



Environmental Law Centre

Managing recreation on public land:

How does Alberta compare?

ADDENDUM

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1. REASON FOR ADDENDUM

This is an addendum to the Environmental Law Centre (ELC) publication “Managing recreational use of public land: how does Alberta compare?” (2015). An addendum is made when relevant information that could change findings or conclusions is discovered after publication.

The original ELC publication unintentionally omitted some Canadian provinces regarded as being ahead on managing off-highway vehicles (OHVs) including snowmobiles. The ELC has also sought to broaden consideration of the context, drivers, challenges and advances concerning trails reform in Alberta. The ELC has further pursued this addendum to mitigate against risks of fostering continued polarization on matters that require broad support for reforms, to provide a robust and broad assessment to policy makers, and to bolster the objectivity of the ELC’s assessment and conclusions.

This addendum is made to rectify these issues by expanding the jurisdictions for comparison to include New Brunswick and Quebec. It also shifts towards more open ended observations, questions and commentary.

The original publication and this addendum should be viewed as an open document as this area of law and policy is evolving, with even more recent developments in further provinces to review including Saskatchewan and Ontario. The ELC is a charity and its capacity to continue this line of work depends on the provision of support. All stages of this work to date have been funded by the Calgary Foundation and donations by Glen and Lois Mumey.

2. EXECUTIVE SUMMARY

The recreational use of public lands raises a number of overlapping issues respecting parks reform, public lands management, OHVs and other motorized activity, trails and tourism. The legislative and policy regimes of the provinces of New Brunswick and Quebec are relevant to all of these issues in Alberta. Each province is similar and different to Alberta in its own way regarding the legal, institutional and physical landscapes. These landscapes are not subject to oil and gas development to the extent of those in Alberta. The similarities and differences between New Brunswick, Quebec and Alberta are highlighted by comparison of approaches on several elements as follows.

Parks and Protected Areas: New Brunswick and Quebec have both undergone parks legislative reforms in the 2000s. This highlights parks reform topics that may be relevant to Alberta include: tourism purposes for parks, the consolidation of designations, ministerial decisions on OHVs, long stay camping, and the delegation of management functions. New Brunswick and Quebec also make use of more flexible designations for public lands outside of the parks system. New Brunswick is notable for use of regulatory zoning that combines conservation purpose and recreational activities, and enables similar designations over public and voluntarily included private lands.

Crown lands and forests: New Brunswick and Quebec are similar to Alberta in that the major legislation is focused on dispositions, access and industry, while the approach to “multiple use” is a matter of non-legislated policy. Unlike Alberta, legislation in New Brunswick and Quebec provides stronger mandates to manage working forests for recreational values.

Regulatory tools: Like Alberta, public access to public lands is relatively open in New Brunswick and Quebec; however both provinces’ regulations restrict motorized use of environmentally sensitive areas to a greater degree. New Brunswick also regulates trespass by motor vehicles on public and private lands under a single statute. Both provinces grant dispositions for trails, camps, and other recreation or tourism purposes. Regulations set the basic terms and fees for leases and licenses of occupation as well as conditions on specific types. Standard forms are provided. New Brunswick provides a good comparison between the process for establishing motorized trails and non-motorized trails, with the process for motorized trails being more legalistic. Beyond trails, both provinces have grappled with the prospects of regularizing unlawful occupations.

OHV legislation in New Brunswick and Quebec is highly comprehensive, combining equipment and operator rules with provisions on the establishment, maintenance, and use of trails across lands and roads under multiple authorities. Both acts apply to snowmobiles as well as wheeled OHVs. The trail models under these two acts are different in legal structure. In New Brunswick, the Minister may enter agreements delegating provincial trail managers for ATV or snowmobile trails. In Quebec, OHV clubs and associations of clubs may be permitted to layout and operate trails in compliance with provincial regulations. In practice, both models assign similar matters including access permits, trail signage and

trail security to clubs and associations of clubs focused on a specific OHV type. Quebec is notable for litigation and legislative amendments concerning municipalities and neighbour issues with OHV trails.

Funding for recreation management in Quebec and New Brunswick include user fees for parks, OHV trail permit fees for the trail managers or operators, levies on OHV registrations held in restricted accounts or trust funds, and broader infrastructure funds available to mixed use and non-motorized trails. New Brunswick provides a comparison between multiple types of advisory committees and decision making models for distribution of funds. For example, the Minister is the final decision maker on restricted management funds whereas user committees may decide trail grants from broader revenues according to guidelines.

Enforcement in New Brunswick and Quebec follows the trend of providing a wide range of officers with comparably broad powers to enforce the same legislation. Both provinces have specialized OHV enforcement forces. Legislation in both provinces provides for the recruitment of assistant personnel for OHV trail security.

Liability regimes in New Brunswick and Quebec are very robust concerning OHV risks. To begin, strong OHV safety regulations may play a risk management function if aimed at the type of injuries that lead to lawsuits. Both provinces create strong bars to actions related to OHV trails directly in the statutes enabling the trail systems. While the models vary, the Crown, landowners and occupiers are well protected in most situations short of reckless disregard. Statutes or regulations serve to structure the use of risk management tools including insurance and trail dispositions. Regulatory compliance on the part of trail managers, operators and OHV users has been a further factor in determining liability in the courts.

The main effects of the addendum are to:

- recognize analogous precedents for trail reform initiatives in Alberta and the possible merits of the same, particularly regarding OHV trails;
- provide examples of mandates to manage public lands for recreational values in the Canadian context;
- expand the details of enforcement models regarding officer powers and assistant personnel;
- affirm the potential to make more use of existing regulatory tools (dispositions, fees, and trails);
- elaborate on the basic types of user payments and management funds; and,
- demonstrate two strong models of liability protection applicable to OHV trails, either of which would require legislative reforms in Alberta.

This addendum also recognizes the complexity created by the potential for overlapping reform issues. Non-legal or practical considerations will impact the transferability and applicability of models from other jurisdictions to Alberta.

3. JURISDICTIONS FOR COMPARISON

New Brunswick is a smaller province in size and population. The traditional inland natural resource industry is forestry, followed by agriculture, mining and most recently petroleum. New Brunswick has a similar legislative regime to Alberta's where separate statutes provide the core mandates for management of parks, protected natural areas, general crown lands and forests, and fish and wildlife. Administration of these various statutes is consolidated in the Department of Natural Resources with the exception of some parks being assigned by regulations to the Department of Tourism.

Quebec is larger than Alberta in size and population. The main land-based industries are forestry, mining, hydroelectric energy and a growing four-season tourism industry. Quebec has a complex territorial system that includes many categories of land under the authority of multiple levels of government.¹ Divergent management objectives and lack of centralized planning have been said to pose a tourism policy challenge as recently as 2009.² Quebec also follows the civil law tradition rather than the common law tradition like the rest of Canada. This means that general principles of "private law" matters such as negligence are set in code rather than being left to the courts. The Quebec judicial system originated from the inquisitorial system rather than the English adversarial system. Several cases discussed below involve the active pursue of facts and context around the establishment of trails.

Both provinces have comprehensive OHV legislation in addition to the main highways and motor vehicle statutes.

Observations:

- Two Canadian examples each similar and different to Alberta in its own way.
- Less oil and gas development (and less resulting linear disturbance) in both examples.

4. PUBLIC LANDS

a) Parks and protected areas

Parks: The parks legislation in New Brunswick and Quebec provides parks with similar purposes of providing for protection and recreation.³ Major resource extraction is restricted and allowable activities are set by regulations. OHVs are restricted to designated trails and areas or as approved by the Minister.

¹ Denise Auger, Outdoor recreation in the province of Quebec: An assessment, (Tourism & Territories, 2009) < Tourter.com >

² Denise Auger, Outdoor recreation in the province of Quebec: An assessment, (Tourism & Territories, 2009) < Tourter.com >

³ *Parks Act*, RSNB 2011, c 202.

New Brunswick and Quebec have both reformed parks legislation since 2000. The New Brunswick amendments provide a tourism purpose for parks and ministerial authority to designate OHV areas and allow extended camping stays.⁴ The Tourism department reports interest in markets for fish, wildlife and ATV and snowmobile trails.⁵ Reforms in Quebec consolidated separate conservation parks and recreation parks into one category with both purposes.⁶

Observations:

Canadian parks reform issues include: tourism purpose, consolidation of designations, ministerial decisions, OHV use and long-stay camping.

Other protected Areas: The New Brunswick *Protected Natural Areas Act* enables regulations creating protected areas on public lands and on private lands with consent.⁷ There are two types of areas. Class I areas prohibit all activities without a permit. Class II areas allow foot travel without a permit, and hunting and fishing with normal licenses. Biking, equestrian, dog sledding and OHVs are restricted to designated “recreational roads” or as provided by regulations. The department policy is to permit access roads and recreation roads, abandon or decommission other road types, use the existing footprint for recreation roads and limit the road network where possible.⁸ It also classifies recreational roads for non-motorized recreation, snowmobiles, ATVs and road vehicles. The general approach to ATVs and snowmobiles is to allow necessary connections through to the managed trail networks outside of the protected area but not development of new trails in the area. Roads are designated by the Minister with Cabinet approval and designated in the regulations. The Quebec Natural *Heritage Conservation Act* has a purpose of establishing a protected areas network.⁹ It prohibits heavy industry and allows other uses to be determined by an application process that must consider damage to the natural setting.

Observations:

Flexible regulatory zoning outside of the parks system can enable:

- Conservation purposes and compatible recreation.
- The inclusion of public and private lands in the same system.
- Roads-to-trail conversions and road decommissioning.

The closest tools in Alberta might be conservation directives or sub-regional plans provided with regulatory weight under the *Alberta Land Stewardship Act*.

⁴ New Brunswick Tourism, Heritage and Culture, Annual Report 2014-2015

<http://www2.gnb.ca/content/dam/gnb/Departments/thc-tpc/pdf/Publications/20142015AnnualReportDTHC.pdf>

⁵ New Brunswick Tourism, Heritage and Culture, Annual Report 2014-2015

<http://www2.gnb.ca/content/dam/gnb/Departments/thc-tpc/pdf/Publications/20142015AnnualReportDTHC.pdf>

⁶ Denise Auger, Outdoor recreation in the province of Quebec: An assessment, (Tourism & Territories, 2009) < Tourter.com >

⁷ *Protected Natural Areas Act*, SNB 2003; *Establishment of Protected Natural Areas Regulation*, NB Reg 2003-08.

⁸ Designation and Management of Access Roads and Recreational Roads in Class II Protected Natural Areas, Policy # PPB 006-2006. (New Brunswick Department of Natural Resources)

⁹ *Natural Heritage Conservation Act*, CQLR c C-61.01.

b) Crown lands and forests

New Brunswick: The majority of crown lands in New Brunswick are upland forests, 98% of which are under forestry dispositions.¹⁰ 70% of forestry dispositions produce forest products and the remaining 30% are managed through the disposition holders for values including recreation and ecosystem objectives.

A non-legislated policy ministry called the Crown Land Management Principles states that public lands are generally managed for concurrent multiple uses, however some landscapes may warrant sequential use where they have value for multiple uses that are not simultaneously compatible. Other areas may warrant single use ranging from resource extraction to total protection. Uses more suitable for private lands are discouraged on public lands.

The key legislation -- the *Crown Lands and Forests Act* – differs from Alberta’s *Public Lands Act* and *Forests Act* in several ways that are relevant to recreation.¹¹ It:

- provides that the Minister’s responsibilities include: “access, travel, fish and wildlife habitat and forest recreation on crown lands;
- provides the Minister with control over a category of “forest roads”, which are a separate from highways under the *Highways Act* or from “logging roads”; and,
- allows the Minister to require holders of forest management agreements to include recreation in forest management plans.

Public access to public forest land is fairly unrestricted. Forest roads are open to public vehicle travel unless closed by the Minister and not all forestry dispositions allow the disposition holder to exclude other users.

Quebec: As in Alberta, the main public lands statute provides little expressed recreation mandate.¹² Like Alberta, forestry is managed under a separate statute that mostly concerns the industry however has expressed purposes of sustainable forest development, requiring forests to contribute to biodiversity and allowing forest permits for recreational development.¹³ Public agricultural lands are managed under a separate statute assigned to the Minister of Agriculture.¹⁴

¹⁰ Crown Land Management Principles, policy # CLM-013-2004 (New Brunswick Department of Natural Resources)

¹¹ *Crown Lands and Forests Act*, SNB 1980, c C-38.1

¹² *Lands in the Domain of the State, An Act Respecting the*, CQLR c T-8.1

¹³ *Sustainable Forest Development Act*, CQLR c A-18.1

¹⁴ *Agricultural Lands in the Domain of the State, An Act Respecting*, CQLR c T-7.1

Observations:

- Like Alberta, “multiple use” is defined by policies not legislation.
- Like Alberta, there is a distinction between public forest and agricultural land.
- Unlike Alberta’s current system, forestry and forest recreation are under the same legislation.
- In Alberta, public land access for oil and gas is currently under the Alberta Energy Regulator.
- The Alberta model places a greater onus on regional planning under Cabinet authority as a means to coordinate decisions on multiple uses.

c) Delegated authorities for parks and wildlife

New Brunswick and Quebec legislation concerning parks, wildlife and protected areas often contains provisions allowing the Minister to enter agreements with other persons for purposes related to the legislation. In Quebec there is much actual assignment of management functions for various territories to para-public and non-government organizations.¹⁵ One such arrangement is the delegation of parks administration to a statutory corporation.¹⁶ The corporation has broad powers and other persons prohibited from delivering services without the Minister’s consent. This model has been criticized for environmental organizations on the basis that a commercial approach by the corporation diverges from the original purpose of parks.¹⁷ Another example from Quebec is the existence of multiple different arrangements for wildlife management areas involving outfitters, trappers, non-profit organizations and Aboriginal peoples.¹⁸ Some outfitter arrangements provide more exclusive rights than others.

Questions:

What mechanisms would help ensure that non-government managers pursue public objectives and that government is accountable for the outcomes?

Delegated authorities, management agreements and operator permits for OHV trails are discussed separately below.

¹⁵ Denise Auger, Outdoor recreation in the province of Quebec: An assessment, (Tourism & Territories, 2009) < Tourter.com >

¹⁶ *Société des Établissements de Plein air du Québec, An Act Respecting the*, CQLR c S-13.01; *Parks Act*, CQLR c P-9

¹⁷ Denise Auger, Outdoor recreation in the province of Quebec: An assessment, (Tourism & Territories, 2009) < Tourter.com >

¹⁸ Denise Auger, Outdoor recreation in the province of Quebec: An assessment, (Tourism & Territories, 2009) < Tourter.com >

5. REGULATORY TOOLS

a) Motorized access and trespass

In New Brunswick, access to public and private lands is subject to the *Trespass Act*.¹⁹ This Act grants motorized access to public lands except for: fish and wildlife areas, protected natural areas, watercourses, marshes, lakeshores, areas protected from environmental damages by regulations and forest areas posted as closed. Motorized travel is allowed over ice, snow-covered frozen ground and through watercourses at customary crossing points. The Crown Land Management Principles include protection from environmental degradation and provide a recreational user Code of Conduct that calls recreational use a “conditional privilege”. This code paraphrases regulations that require setbacks from water for motorized camping and limit rustic camping to remote areas with no campgrounds.

In Quebec, prohibitions on motorized recreation in water, wet areas and fragile environments are provided in environmental legislation administered by the Environment Minister.²⁰

Questions:

Should baseline rules for motorized access focus on protecting sensitive areas of land while allowing customary water crossings (as above), or make land open and water bodies closed unless otherwise designated (as in Alberta)?

Would setbacks from water and area zoning assist with managing random camping? How would this option compare to developing low-amenity sites?

The New Brunswick *Trespass Act* creates regulatory offenses for trespassing by motor vehicles on public forest land, private land and on “lands that are used for livestock, cultivations or plantations”. Persons seeking to prohibit trespassing or to require consent for entry must post signage meeting an appearance set by regulations.²¹ Persons with hunting and trapping licenses that enter onto private land or cultivated land that has not been signposted properly are not liable for trespassing provided that they vacate on request. If there is a regulatory conviction, then persons aggrieved by the trespassing can take legal action for compensation.

Questions:

Should Alberta have a similar regulatory offense for trespassing on private land or agricultural lease land?

¹⁹ *Trespass Act*, SNB 2012, c 117.

²⁰ *Environment Quality Act*, CQLR c Q-2; *Motor vehicle traffic in certain fragile environments, Regulation respecting*, CQLR c Q-2, r 9

²¹ *Prohibition of Motor Vehicles Regulation*, NB Reg 90-55

b) Dispositions for trails and other recreational purposes

Dispositions including leases and licenses of occupation for trails and other recreational purposes are common in New Brunswick and Quebec. New Brunswick Department of Resources fact sheets outline the process for leasing camp lots, and for establishing ATV and snowmobile trails.²² The Department annual report indicates 429 leases and 65 licenses of occupation, however does not note the specific use type.²³ The Quebec lands rental and rights regime reports having granted over 40,000 leases for various vacation, recreation, tourism, vacation and commercial purposes as well as over 3,000 rights and authorizations related to trail development.²⁴

As in Alberta, the public land statutes in these two provinces do not expressly provide for recreational dispositions. Unlike Alberta, the regulations do speak to recreational dispositions. New Brunswick regulations set the basic terms, conditions and rights for all disposition types including recreation. The main distinction is between non-exclusive licenses of occupation and more exclusive leases. Some leases are limited, for example a snowmobile trail provides exclusive use only for a limited part of the year.²⁵ There is a standard form for license of occupation for managing roads and trails on crown land.²⁶ It allows the holder to erect guidance signage and warning signage without further specific authorizations. The New Brunswick Crown Land Management Principles state that most dispositions are “applicant driven” in that the department is responding to requests for land use. The ELC was unable to research the Quebec disposition system in comparable detail at this time.

Observations:

- New disposition types are possible under existing legislation in Alberta.
- Dispositions would appear in the Crown land registry and provide notice to other land users.
- A trail disposition would create a legal record of a linear feature.
- Environmental review and public participation do not typically occur on public lands dispositions.

Questions:

What guidance from regional plans, regulations, departmental policy or new legislation would be most relevant to use of new dispositions?

²² Land Use and Ownership of Crown Lands, http://www2.gnb.ca/content/gnb/en/departments/natural_resources/ForestsCrownLands.html

²³ Department of Natural Resources Annual Report 2013-2014. <http://www2.gnb.ca/content/dam/gnb/Departments/nr-rn/pdf/en/Publications/AnnualReport2013-2014.pdf>

²⁴ Quebec Energy and Natural Resources, Land rental and other rights <https://www.mern.gouv.qc.ca/english/territory/land/index.jsp>

²⁵ *Lands Administration Regulation*, NB Reg 2009-62.

²⁶ *Off-Road Vehicle Act*, SNB 1985, c O-1.5; *Off-highway Vehicles, An Act Respecting*, CQLR c V-1.2.

c) General trails process

New Brunswick provides a good comparison of the processes for establishing trails under the authority of the Department of Natural Resources and beyond. Overview documents include Trail Management Principles, Motorized Trails Fact Sheet and "Sentier NB Trail" Fact Sheet.²⁷

There are three main types of trails. ATV and snowmobile trails require authorizations that can only be applied for by the delegated trail managers for these two types of trails. These applications are pre-screened by a provincial trail planning committee. The legislation enabling ATV and snowmobile trails is discussed in detail below.

The third trail type is a network of multi-use recreation trails using provincially owned abandoned railway lines as well as municipal and private land. Site selection factors include potential for tourism and non-motorized use. Portions owned by the province do not require dispositions for non-motorized use in the ELC's understanding. The province determines the use and maintenance is provided through an agreement with the New Brunswick Trails Council. The Trails Council is a non-government organization focused on non-motorized use. It is not a delegated authority like the ATV and snowmobile trail managers.

Observations:

In this model, motorized trails are established by applicant-driven regulatory process and managed under agreements, whereas non-motorized trails on public lands are established by government and maintained with contract help.

Questions:

In what ways do motorized and non-motorized trails warrant similar or different process?

d) Unauthorized occupations

Quebec and New Brunswick have documented issues with unlawful occupations. The response in both cases can involve regularizing occupations. The New Brunswick Crown Land Management Principles concede that government has limited capacity to respond to unauthorized occupations. This policy notes that while some occupations are causing damage, others would have been authorized on request. Quebec has a regularization regulation that enables the Minister to sell public land to occupants at set rates.²⁸

²⁷ Sentier NB Trail Fact Sheet, Motorized Trails Fact Sheet and Trail Management Principles, http://www2.gnb.ca/content/gnb/en/departments/natural_resources/ForestsCrownLands/content/TrailsRiversParks.html

²⁸ Regulation respecting the regularization of certain kinds of occupation of lands in the domain of the State, CQLR c T-8.1, r 6

Observations:

“Regularization” in this context means making something legal after the fact.

Questions:

Could regularization be an effective and appropriate response to any unlawful activities in Alberta?

6. OFF HIGHWAY VEHICLES

The New Brunswick *Off Road Vehicle Act (ORV Act)* and the Quebec *Off Highway Vehicle Act (OHV Act)* are highly developed, comprehensive and similar in several ways. Both acts:

- apply to vehicles designed or adapted for use off road use including snowmobiles;
- provide strong rules on vehicles, equipment and operators; and,
- include provisions on the establishment, management and use of trails across lands and roads under multiple authorities.

The assignment of matters to regulations varies between models. Quebec has regulations on OHVs generally, snowmobiles and ATVs as well as trail signage regulations.²⁹ The New Brunswick regulations concern registration fees, young drivers, and liability protection for the trail manager.³⁰

The New Brunswick *ORV Act* is largely assigned to Public Safety except for the trail provisions which are assigned to Tourism concerning snowmobiles and Natural Resources concerning ATVs. The Quebec *OHV Act* is largely under the Minister of Transportation including the trail provisions. The trails provisions in the Quebec and New Brunswick Acts are legislatively quite different from each other; however in practice both engage associations of member clubs in the provision of trail systems.

a) Access, highway use and setbacks from dwellings

Access: The New Brunswick *ORV Act* and Quebec *OHV Act* defer most details of general land access to other legislation. For example, the Quebec *OHV Act* makes public lands generally open to OHVs subject to a list of land, wildlife and environmental legislation, the existence of other lease and occupation rights, regulations under the *ORV Act*, the rules of OHV club trails and municipal bylaws.

²⁹ *All-terrain vehicles, Regulation respecting*, CQLR c V-1.2, r 6; *Off-highway vehicles, Regulation respecting*, CQLR c V-1.2, r 5; *Snowmobiles, Regulation Respecting*, CQLR c V-1.2, r 1.

³⁰ *Fees Regulation*, NB Reg 85-202; *Prescribed Persons or Bodies Regulation*, NB Reg 2010-15; *Young Driver Regulation*, NB Reg 2009-51

Highway use of OHVs is generally prohibited in both provinces. However, there are allowances for trail and access situations. The New Brunswick *ORV Act* prohibits ORVs within 7.5 metres of highways unless permitted by regulations or municipal bylaws, and exceptions for managed trails and direct crossings. The Quebec *OHV Act* provides exceptions for designated crossings and travel up to 1km where: it is not feasible to operate off highway, use is authorized by signs and signals, and is to allow OHVs to reach an authorized trail, services or rest areas. Rules for operation on highway are provided by regulations. In Quebec OHVs may operate on “private roads open to public vehicular traffic” without further approval. However, the private road owner or road authority may restrict OHV use by posting signs or signals that meet the standards in the provincial regulations.

Setbacks: New Brunswick and Quebec provide for setbacks of OHV trails from certain developments. In New Brunswick the distance is 25 metres without consent of the person entitled to provide consent. In Quebec the baseline setback is 30 meters from dwellings, health care facilities and any “area reserved for cultural, educational, and recreational or sports activities”. This setback requirement does not apply if:

- the landowner consents;
- the use is on a public highway or a “private road open to the public”;
- an abandoned railway converted to trails under metropolitan land use and development plans;
- in places determined by regulations; or,
- the setback is altered by municipal bylaws.

The baseline setback has been amended to 100 m for new trails and reroutes after 2011.

b) Trail establishment

The New Brunswick *ORV Act* and Quebec *OHV Act* provide two similar yet different models for establishing OHV trails through a “ground up” or applicant-driven process.

New Brunswick: The *ORV Act* provides separate, parallel provisions on ATV and snowmobile trails. The requirements for establishing trails in either case are for:

- provincial parks: a license under the *Parks Act*;
- public lands: a lease or license of occupation under the *Crown Lands and Forests Act*;
- highways: a permit under the *Highway Act*;
- municipal land: consent of the municipality;
- private land: consent of the person with authority to give consent, either the landowner or tenant with sufficient lease rights. Consents from landowners may be verbal if supported by affidavit evidence.

Consents and leases must provide for rights and obligations regarding withdrawal.

Permitting under the *Highways Act* is more complex as permits require the identification of managed trails under the *ORV Act*.³¹ The Ministry of Transportation states that permits for highway use are intended only for short distances to connect to provincial trails and that it is working with the trail managers to identify links. The New Brunswick ATV Federation Strategic Plan (2015) cites need for legislative changes to the *Motor Vehicles Act* and *ORV Act* to allow ATVs on highways for linkages to trails and services.

Quebec: The *OHV Act* allows OHV clubs or associations of clubs to acquire permits to “layout and operate” a trail:

- on public lands with authorization of Minister or responsible authority;
- on private lands with permission of private landowners; and,
- at intersections with highways subject to authorization of highway maintenance authority.

Operation on public road requires Ministerial authorization on the Ministers’ conditions. There is a parallel permit process for roads under a provincial Highway Corporation.³²

Observations:

- Permitting authorities may screen applications using their own process and criteria.
- Regulatory designation of trails may still be required in locations where OHV use would not otherwise be allowed, for example in a protected area.
- Alberta could use a clear permitting process with environmental criteria for public land trails.

Judicial consideration: There has been at least one case that considers the trail provisions of the *ORV Act*. In *New Brunswick Federation of Snowmobile Clubs v. New Brunswick All-Terrain Vehicle Federation*, the court denied an application for an injunction sought by the snowmobile federation to prohibit ATV use on a highway portion of a provincial trail during snowmobile season. The snowmobile federation sought to enforce an agreement between the two federations that provided for seasonal use and which predated the permit provisions of the *ORV Act*. The court noted that the *ORV Act* had come into force and that it required highway permits. The ATV federation had a permit but the snowmobile federation did not. The ATV federation also had all-season liability insurance.

The test for an injunction is important to the discussion. Injunctions require: (1) a serious issue to be tried, (2) irreparable harm in the absence of an injunction, and (3) that the balance of convenience favor the injunction. The court held that:

- lack of a permit meant a lack of property rights and therefore no serious issue to be tried;

³¹ *Highways Act*, RSNB 1973, c.H-5.; *Highway Usage Regulation*, NB REG 2010-55.

³² *NB Highway Corporation Act*, SNB 1995, c. N-5.11.

- permits that confer non-exclusive use suggest that there is no irreparable harm from other uses; and,
- the balance of convenience favored the defendant due to it having complied with the legislation and invested in insurance.

The courts also noted that public interest arguments for injunctions should be treated with caution as the province had regulatory authority over snowmobiles and ATVs. The court was silent on whether the federations were the trail managers at the time.

Observations:

- Use of trails was determined through private contracts, property rights and economic interests

Questions:

- How should harm be repaired in mixed use situations?
- Would trail manager status impact the public interest arguments around allowable uses?

c) Trail managers and operators

New Brunswick: The *ORV Act* provides for appointment of a snowmobile trail manager appointed by the Minister of Tourism and an ATV trail manager appointed by the Minister of Natural Resources.

Agreements between the Minister and the trail manager may provide for matters including:

- trail permit requirements;
- user fees and distribution of the funds (discussed below);
- trail maintenance and infrastructure;
- signage requirements;
- liability protections and insurance (discussed below);
- record keeping, accounting and auditing requirements;
- the authority to give access to other types of ORV associations and their members in crossing and access situations; and,
- authorization of sub-delegation of trail manager functions.

The *ORV Act* also provides direct authority to the trail managers to post signs that comply with the agreements. Trails signed by the trail manager become “managed trails” for the purpose of the Act. Trail management agreements can be cancelled and if there is no trail manager then functions reverts to the minister.

Observations:

- The Minister has discretion to delegate authority on subject matters set by legislation.
- Entering agreements also confers limited direct management powers under the legislation.

A trail manager is not an “agent of the Crown. The trail manager is a public body for the purpose of access to information law.

Observations:

- The Crown may avoid judicial oversight for actions and decisions of the trail manager.
- The trail manager has no public reporting requirements.

The current trail managers are the New Brunswick Federation of Snowmobile Clubs and the New Brunswick ATV Federation which is also comprised of member clubs. Examples of materials produced by one or the other of the two trail managers include:

- manuals and guides on trail signage, classifications and specifications;
- affidavit forms for use in acquiring trail consents;
- trail maps and grooming status of snow trails;
- policies and procedures regarding trail development funds, regional funds and financial reporting by member clubs;
- safety courses and instruction; and,
- updates on changes to regulations.

Observations:

- The functions of the trail manager are not inherently governmental and would not necessarily be done by government in the absence of a trail manager.

Quebec: In Quebec the permit to layout and operate a trail is conditional on the operators meeting duties, requirements and standards prescribed by the OHV Act and regulations. Examples include:

- maintaining the trails;
- installing and maintaining signage, signals and markings to standards provided by regulations;
- assuming responsibility for safety and compliance with the OHV Act and regulations;
- providing trail security personnel that meet qualifications provided by regulations;
- posting access restrictions, conditions and fee requirements in places where users may pay access fees; and
- carrying liability insurance in accordance with the *OHV Act*.

The *OHV Act* also provides some limited legal paramountcy for trail operation by providing that peace officers, trail security officers and trail workers are not restricted by municipal bylaws.

Trail signage and signals are a key function of the trail operator. Regulations determine the types of signs, format and appearance of signs, and the obligations of clubs respecting the installation and maintenance of signs.³³ These regulations are prescriptive, detailed and graphic in nature. The basic categories of signs are regulatory signs, warning signs and information signs. The regulations impose the stronger obligations on clubs regarding the posting of regulatory signs and warning signs. Clubs have more discretion in the use of information signs provided that the signs comply with the regulations. Manufacturing and installation standards are provided by Ministry of Transportation publications referenced in the regulation. Signage standards apply to trails on private trails open to the public.

Clubs must comply with the regulations and the Minister may order removal of non-compliant signs at the clubs' expense. Persons other than the club or someone with the club's permission are prohibited from erecting signage and are responsible for the costs of removing it.

Regulations also require the erection of traffic "signals" in road situations and the "marking" of trails by stakes in non-wooded areas. The regulations are detailed on the appearance of signals and markings.

The Ministry of Transportation website directs users to the provincial federation of snowmobile clubs and federation of quad clubs regarding the trail network and states that the clubs perform the trail operations functions provided by the legislation. General OHV rules are posted on government websites.

³³ *Off-highway vehicle trail signs, Regulation respecting*, CQLR c V-1.2, r 4.1

Observations

The main functions of the Minister, the departments and the trail managers and operators are similar between models.

- The Minister is responsible for trail designations in parks and protected areas where OHV use would not otherwise be allowed. In New Brunswick the Minister is also responsible for entering management agreements and approving user fees.
- The departments are responsible for screening trail applications and for general regulatory requirements.
- The trail managers or operators are responsible for obtaining consents, trail maintenance, access permits and security.

Observations:

- In the New Brunswick model the trail manager need not be an OHV organization and in the Quebec model the trail operators can only be specific types of OHV organizations. In practice both models involve federations or associations whose members are clubs focused on a particular activity.

Questions:

To what extent should legislation follow the structure of user organizations?

To what extent should legislation structure user organizations?

d) Trail use

New Brunswick: The *ORV Act* makes trail use permits mandatory to use managed ATV and snowmobile trails. There are exceptions for landowners and their families, vehicles used for trail management and for crossing and access situations. Highway use permits are additional requirements and may be obtained from the trail managers with authorization from the Department of Transportation. Permits are available from the government or the user organizations delegated as trail managers. All users of managed trails must obey signage installed by the trail manager.

Quebec: The *OHV Act* provides the trail operator with rights to restrict OHV use by posting signs and signals and by collecting fees. It also creates a generalized restriction of OHVs trails to OHVs. There are exceptions for maintenance vehicles, trail crossings, trails on roads open to public vehicle traffic, and where OHV passengers must walk on hills. The OHV Act allows club bylaws to impose conditions that apply beyond the baseline rules in the Act.

There are additional rules and regulations for snowmobile trails.³⁴ Trails over frozen water bodies may only be used for the period of the year determined by the operator, who must provide adequate information to snowmobilers likely to use the trail. Winter motorized and non-motorized use is generally separated by law. Skiers, snowshoers, pedestrians and road vehicles can only be on snowmobile trails at direct crossings. Snowmobiles are generally prohibited on trails reserved for skiing and snowshoeing except for accidents and emergencies.

Questions:

What models would work in situations involving high numbers of unaffiliated (i.e. non club) users, preference for off- trail use, or for non-motorized use?

e) Municipal authority

New Brunswick and Quebec provides municipalities with more authority to restrict OHV use and to participate in establishing OHV trails as compared to Alberta. Questions of municipal authority must be considered in general terms as all municipal powers must come from provincial legislation. The Quebec system is different from Alberta as it assigns separate powers to local municipalities and regional county municipalities.

General examples of powers to restrict OHV use include: restriction on municipal lands, setting speed limits by using signage that complies with signage regulations, and making bylaws on hours when OHV use is permitted.

General examples of powers to establish OHV trails include: permitting of OHVs on roads or right of ways, leasing arrangements as either the tenant or the landlord, expropriation of land for parks and public utilities, and altering the legislated setbacks of OHVs from dwellings and public facilities.

In Quebec there have been litigation and legislative amendments concerning objections to OHV trails. Several cases concern municipal involvement in rails-to-trails projects or efforts to connect to trail systems.

Most cases concern snowmobile use. The courts have given attention to the political, policy, and social context. The trails may be supported by a combination of local commercial interests, provincial tourism rationales, rural transportation, and access to services or customary use. Generally, the main objectors are landowners and residents seeking quiet enjoyment of property and non-motorized recreation. In

³⁴ *Snowmobiles, Regulation Respecting*, CQLR c V-1.2, r 1

some cases, OHV use exists in the area already and the objections follow from land use change. Examples include the purchase of rural properties, forest lot development, permanent use of summer villages and retreat to the countryside. Some of the legal issues include municipal authority, discussed here. Other issues concern neighbourhood disturbance, discussed below.

Trail authority: One regional municipality was found to lack authority to establish a regional rails-to-rails corridor after the court characterized this as a transportation route and found that this municipality only had power to establish parks.³⁵ The legislation was later amended to provide regional municipalities with authority to establish regional recreation trails. In a subsequent case the court held that a local municipality lacked authority to establish an OHV trail on the basis that the municipality had only been delegated authority to establish public roads, bicycle and pedestrian trails.³⁶ Again, the specific powers of municipalities will differ by province.

The court has prohibited a municipality from authorizing a snowmobile trail on a road where this was done to connect to a club trail that was itself unauthorized under the *OHV Act*.³⁷ The municipality had permitted road use to connect snowmobilers to a rail bed that had previously been accessed across private land. The land was sold to a new owner who would not continue this consent for the local club. The railway company then advised the municipality and the club to avoid the railway after a period of grace, resulting in there being no connection to an authorized trail.

Right of ways: One case allowed a municipality to establish a snowmobile trail on a municipal right of way on private land without need for specific legislative authority. It held that this was not a road and therefore would not trigger the narrow range of situations in which road use can be permitted under the *OHV Act*. The right of way in question historically served as a railway to bring people to a summer village.³⁸

Expropriation for a road has been upheld in a situation where it could restrict existing OHV use.³⁹ The objector was a logging company who feared loss of use for its vehicles. The court suggested that the logging vehicles were not OHVs, and if they were then they could claim a work vehicle exemption, obtain a municipal permit, or make use of a short section to reach a designated trail. One of the above road cases was also an expropriation case.⁴⁰ The court held that the municipality had power to expropriate land for sports and recreation centres, which the trail was not.

³⁵ *Club de motoneige de Saint-Raymond inc. c. Portneuf (Municipalité régionale de comté de)*, 1999 CanLII 10979 (QC CS)

³⁶ *Gignac c. St-Zénon (Municipalité de)*, 2006 QCCS 5111 (CanLII)

³⁷ *Boulerice c. St-Prosper (Municipalité de)*, 2010 QCCS 5343 (CanLII)

³⁸ *Lac-Sergent (Ville de) c. Lapointe*, 2012 QCCA 1935 (CanLII)

³⁹ *Lac-Beauport (Municipalité) c Ferme agro-forestière M Tremblay inc*, 2011 CanLII 64012 (QC TAQ)

⁴⁰ ***Gignac c. St-Zénon (Municipalité de)*, 2006 QCCS 5111 (CanLII)**

Observations

Determining municipal authority can be challenging for the courts.

Questions:

How should legal and political risks be assigned where interests are shared between the province, municipalities and trail organizations?

f) Neighbourhood disturbance and dispute process

As noted above, Quebec has experienced litigation and legislative amendments around issues of neighbourhood disturbance related to OHV trails. Some examples of reforms include: immunities from legal actions, establishing a mediation process, financial assistance to clubs, fines for operating OHVs on private land without consent, enlarging setbacks from dwellings, and anticipated bans on engine types in the future. This section covers only some of the developments. The ELC must emphasize that the law is very Quebec-specific so should be considered in a very general way.

In Alberta and other common law jurisdictions there is a tort of “nuisance” for unreasonable interference with the use and enjoyment of property. In Quebec, the Quebec Civil Code provides that: “neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.”⁴¹ Exceptional annoyances allow actions for injunctions and damage payments. Quebec law also provides environmental rights that have been argued in the same cases. The environmental right offers freedom from contamination including noise.

In the early 2000s there was a notable class action lawsuit brought by landowners in which the court granted an injunction and financial damages against a municipality in relation to snowmobile use along a provincially-enabled rails-to-trails project.⁴² There was a chain of legal events beginning with the province acquiring an abandoned rail line from the railway operator for the purpose of a recreation tourism project.

The province then leased the rail bed to the municipality. A term of the lease was that the province recognized the importance of snowmobiling in a specific area and that it would cooperate with the municipality on ensuring the continuance of a snowmobile route. The municipality then sublet that section of the rail line to two snowmobile clubs.

⁴¹ Civil Code of Quebec, CQLR c C-1991, s.976.

⁴² *Coalition pour la protection de l'environnement du parc Linéaire « Petit train du nord » c. Comté des Laurentides (Municipalité régionale)*, 2004 CanLII 45407 (QC CS); See numerous related decisions: <http://www.canlii.org/en/qc/index.html#search/jld=qc&id=petit%20train&origJld=qc>

The court upheld the general right to recourse despite all of the leasing, permitting and municipal bylaw elements of the trail project being in compliance with legislation. It further held that the regulatory standards in the *OHV Act* such as speed limits and setbacks from residences did not establish the local norms for the purpose of determining the claims. In other words, a defense of “statutory authority” did not succeed.

Notably, the court held that the snowmobile clubs holding the subleases did not occupy the trail in a way that would make them neighbours and force the acceptance of normal inconveniences. Subsequent amendments to the *OHV Act* currently bar legal actions for neighbourhood disturbance or other damage relating to noise, orders or contaminants if activities are authorized by the *OHV Act*. Actions against OHV operators are still allowed if the cause of the damage is a contravention of the Act or the result of intentional or gross fault. These provisions have start dates, end dates and review dates specific to the provincial context. One notable feature for comparison purposes is that there are dates after which the immunity only applies to interregional trails established by Ministerial Order. Such Ministerial orders in turn require consulting with municipal authorities. The Minister was required to report to government in December 2015 on the advisability of keeping these rules; however, as of this time, we do not know the outcome.

The legislative amendments have been considered in at least one case; however, the case was not determined on the issue of nuisance as the municipality was found to have lacked authority to permit the trail in question.⁴³ However, the court stated that restrictions on rights of recourse should be read cautiously. The ELC found no equivalent litigation in New Brunswick.

Observations:

Statutory rights of recourse have been constrained where OHV trails are authorized and compliant. Similar statutory rights do not exist in Alberta to begin with.

Political risks are likely higher in systems which are governed by municipal management and regulation when compared to a provincial regulatory system. Accountability to the electorate may be increased in this way.

Complaints, mediation and arbitration: The Quebec *OHV Act* allows the Minister to establish a complaints mediation and arbitration process dealing with complaints regarding neighbourhood disturbances, noise, odors or contaminants in situations where no legal action is available under the Act. The Minister may designate a person to administer this system and set directives on mediators, rules, fees and meetings. The Act sets the mediator’s roles and powers. Mediators may make orders to remedy neighbourhood disturbances or stop damage but may not order payment of financial compensation. The ELC does not about the workings or outcomes of the mediation system in practice.

⁴³ *Boulerice c. St-Prospér (Municipalité de)*, 2010 QCCS 5343 (CanLII).

7. FUNDING FOR RECREATION MANAGEMENT

The funding models in Quebec and New Brunswick largely affirm the findings from other jurisdictions as summarized in the main report:

- User fees presume benefits to users and may be kept and used by service providers subject to legislation and agreements.
- Regulatory charges like levies on vehicle registrations may held by the government in trust funds or restricted accounts Funds are for management purposes set by legislation that may go beyond direct benefits to users.
- Fuel tax and other general revenues may be directed to trails, with or without legislation, for rationales including transportation infrastructure.
- Directing fines to enforcement agencies or creating penalties that repair damage requires legislation, and while justifiable, the impact of these practices is uncertain.
- User payments are commonplace, more than one type of payment can be used to support the same lands or trails systems.
- Payments for mere access or foot travel on public lands would be uncommon outside of parks in the Canadian context.

a) Disposition fees

New Brunswick has a crown policy of seeking “fair financial return” for use of Crown land which also allows consideration of public benefits provided by the use. Disposition fees or rental costs for recreational activities are set in regulations. For example, recreational trail leases and licenses of occupation run by the kilometre. Campsite leases are at fixed rates depending on the type of location and time of year. The ELC did not research Quebec fees in similar detail.

Observations:

- Disposition fees are more likely to be considered a public land rent or an administrative cost recovery tool than a “user fee”.

b) OHV Trail fees

The New Brunswick *ORV Act* specifically states that trail fees are not public money. The Minister has authority to approve the fees, exemptions from payment, and the purpose for which fees may be used.

Fees are collected, held and used pursuant to the terms of the agreement between the Minister and the trail managers. OHV trail fees in Quebec may be set by OHV club bylaws pursuant to the *OHV Act*.

Observations:

- Public land area permits or user fees are possible under existing legislation, subject to Ministerial approval.
- Legislative reforms would be required for province-wide trail passes or the collection of fees by non-government authorities.

Questions:

Should 4x4 trucks, road vehicles, motorized camping and non-motorized uses be covered in a user payment system? Where, when and how?

c) Restricted funds and advisory committees

New Brunswick provides a good comparison for committee models as it has at least three funds: a wildlife trust fund, an OHV Trail Management Trust Fund and a general Trails Infrastructure Fund.

The Wildlife Trust Fund is worth noting for its approach. Wildlife fees, fines and penalties are held by the government in a separate account.⁴⁴ The Minister is the trustee and makes payments from the fund for purposes set by regulations. Regulations provide for an advisory council of seventeen members representing conservation interests to make recommendations on payments.

Questions:

How should the appropriate number and nature of interests on a committee be determined?

The ORV Trail Management Trust Fund is established by the *ORV Act*. It includes portions of the registration fee for ATVs and snowmobiles, and any gifts or voluntary contributions that fit the purposes of the fund. Registrations from types of ORVs other than ATVs and snowmobiles are not paid into the fund. The trust fund is administered by the Minister of Natural Resources as trustee. The *ORV Act* provides that the Minister may make payments out of the fund for: trail development and maintenance, equipment, trail infrastructure, signage, safety and environmental impact education, enforcement of the *ORV Act* and reimbursement of expenses of the Advisory Board. Gifts must be used according to their

⁴⁴ *Wildlife Trust Fund and Wildlife Council Regulation*, NB Reg 2002-6.

terms. The advisory board is appointed by the Minister to make recommendations on payments out of the fund. It must include five voting members including two from the ATV trail manager, two from the snowmobile trail manager and one from the public at large. There must also be six non-voting members including representatives from the departments of Public Safety, Natural Resources, Tourism, Transportation and Environment and Local Government, as well as one representative from the RCMP. Three voting members is a quorum. The chair and vice chair are appointed by the board from among the non-voting members. Members do not receive pay but can claim expenses. The board may also establish its own rules of procedure.

The Department of Natural Resources annual report for 2014-2015 indicates a fund of \$1,475,200. The New Brunswick ATV Federation Strategic Plan (2015) proposes need for changes to the *ORV Act* to include registrations from dirt bikes and side by sides in the trust fund.

Observations:

The funding and trails provisions are narrower than the breadth of OHVs to which the legislation otherwise applies.

The Trail Infrastructure Fund is administered by the Department of Tourism. Applications for funding are accepted from the New Brunswick Federation of Snowmobile Clubs, the New Brunswick ATV Federation, and the New Brunswick Trails Council and further trail organizations with projects that could qualify for the provincial trail system. The New Brunswick Trails Council is the provincial-level organization dedicated to advocacy for non-motorized trails and to the building and maintenance of non-motorized trails. It is not a delegated authority like the ATV and snowmobile trail managers. However, it has been awarded contracts to maintain some provincial trails. The Fund Guidelines list eligible projects related to new infrastructure or repair of existing infrastructure along the provincial trails system as well as the process for funding applications and review.

Quebec imposes a levy on OHV registrations described by the *OHV Act* as the “contribution”. Regulations may set the contributions by vehicle type. The Act provides that the contribution may be used for financial assistance programs for OHV clubs in developing and maintaining infrastructure, for protecting wildlife and habitats, and for other purposes. The contribution is collected and funneled through a broader Land Transportation Fund enabled by multiple highway and motor vehicle statutes. This broad fund also collects revenue from other sources including fuel tax, gifts, inter-jurisdictional transfer payments and highway permits. There is a legislated formula that redirects OHV contributions to activities set out in the *OHV Act*.

Questions:

As in the main report, there are numerous variations on where money comes from, who it goes to and what it is used for. What are the pros and cons to broad vs. narrow funding models?

8. ENFORCEMENT

Quebec and New Brunswick legislation enables enforcement structures including:

- a broad array of full officers provided with comparable broad powers;
- assistants for parks, fish and wildlife enforcement; and
- trail security or patrollers for OHV trails provided by the trail operators or managers.

a) Officers

In New Brunswick all of the various parks, public lands, wildlife and OHV legislation provides enforcement powers to several officer types including RCMP, police, park wardens, conservation officers and ORV enforcement officers. There are differences in the regimes for parks, fish and wildlife as compared to that for ORVs.

ORV enforcement officers are appointed under the *ORV Act*. Officers have power to stop vehicles, require document production and seize vehicles. If prosecutions follow, then the courts have power to take vehicles as security.

An ORV enforcement branch is housed under the Minister of Public Security. For 2014-2015 the ORV enforcement branch reports to have covered 76,001 km of trails, responded to 5,507 service calls, checked 18,340 ORVs, issued 1,774 citations and laid 878 charges.⁴⁵ The Department of Natural Resources further reports the *ORV Act* as its second most frequently enforced statutes after Fish and Wildlife Act.⁴⁶

Observations:

Special enforcement branches or dedicated forces do not require special legislation.

⁴⁵ New Brunswick Public Safety, Annual Report 2014-2015.

⁴⁶ New Brunswick Department of Natural Resources, Annual Report 2014-2015.

In Quebec, the *Police Act* assigns enforcement of the *OHV Act*, trail patrolling and forest search and rescue, and recreational boating safety to municipalities in the small population category.⁴⁷ Wildlife officers under the *Wildlife Act* also have a duty to enforce certain provisions of the *OHV Act* and provisions of parks, public lands and environmental legislation. Regulations may set which provisions may be enforced by which officers. Peace officers under the *OHV Act* have power to travel where OHVs operate, to enter into the premises of OHV clubs, conduct searches and seizures and make arrests.

b) Assistant personnel

New Brunswick and Quebec enable assistant personnel for a range of parks, public lands, wildlife, and trails functions. The following examples are drawn from where the legislation is most prescriptive.

Parks and wildlife legislation in New Brunswick provides for an array of assistants. Parks can have security guards. Fish and wildlife enforcement can include assistant personnel drawn from government agencies, nominated by non-government conservation organizations, or other persons deemed suitable by the Minister. The Minister may determine what provisions are enforceable by assistant personnel.

OHV trail security officers in Quebec are recruited by OHV clubs or associations of clubs. Conditions for appointment include: being of full age, not been found guilty of vehicle-related offenses for 5 years and taking an oath to perform duties and keep information confidential where required. Security officers recruited directly by clubs are required to have 2 years' experience, to have taken a training program offered by the association of OHV clubs that recruited them, to hold a driver's license and hold a certificate issued by the OHV association that recruited them. Trail security officers have a narrower range of powers to stop vehicles and require document production. Their duties are restricted to trails operated by the club that recruited them or the trails of other clubs in the same association.

Observations:

All models separate different types of assistants, with OHV security being most specialized.

c) Offenses and penalties

The OHV legislation in Quebec and New Brunswick set a wide range of offenses and fines.

⁴⁷ *Police Act*, CQLR c P-13.1.

In New Brunswick, mandatory fines in motor vehicles (road vehicle) cases where the accused does not appear in court have been found to breach the rights of the accused; however this infringement was justifiable where the penalty is only a fine and a license suspension until payment is made.⁴⁸

The Quebec model of regulated club trails includes several offenses that apply to OHV clubs. These include offenses for not acquiring consents to operate trails, not maintaining signage, and not meeting the insurance requirements. There are also offenses for non-compliant lighting on maintenance vehicles. The directors, officers, representatives and employees of clubs that authorize or participate in offenses face potential liability even if they are not prosecuted and convicted directly.

9. RISK AND LIABILITY

This section is focused on motorized use and OHVs specifically, as compared to the main report which looked at universal principles of risk and liability in the recreational context.

a) OHV safety

OHV safety regulations have been added to this section to demonstrate how they can assist with risk management. The regulatory aspect of the legislation concerning vehicles, equipment, safety training and operator rules in the Quebec and New Brunswick legislation are very developed. Both provinces' OHV legislation also includes general prohibitions of the type otherwise found in public lands legislation.

Equipment requirements New Brunswick and Quebec include helmets for all riders, goggles if helmets lack visors and closed footwear for ATVs. Quebec also requires seatbelts if provided on vehicles. Quebec snowmobile regulations cover aspects of winter motorized safety including clothing that will not catch on machines or trees, first aid kits, shelter equipment, maintenance standards and general precautionary measures. Quebec also regulates towing and carrying passengers in trailers and sleighs and modifications for extra seats.

Safety training, age limits and the compatibility between young users and vehicle types are the subject of regulations in both provinces.⁴⁹ Quebec is notable for requiring minors and persons operating vehicles modified for extra passengers to carry a “certificate of competence and knowledge”.

Operator rules in Quebec are notable for including passenger carriage, prohibitions on mounting and dismounting ATVs in motion and for providing speed limits for ATVs and snowmobiles. Speed limits can be altered by club trail operators. However, rules concerning speed, proximity to dwellings and nighttime operations apply even if there is no signage.

⁴⁸ *R c. Richard*, 1993 CanLII 6828.

⁴⁹ *Young Driver Regulation*, NB Reg 2009-51.

Quebec also has multiple Ministerial orders for Pilot projects geared at gathering safety information. Recent examples [some spent or repealed] include side-by-side vehicles on ATV club trails, track systems on 4-wheel ATVs for winter driving, add on seats for snowmobiles, non-skid devices (metal studs) on OHVs on public highways under the Highway Safety Code.⁵⁰

Observations:

Some of the above safety rules address the exact same matters that led to injury lawsuits in the cases below.

Environment, property and noise: Both provinces have general prohibitions on damaging activities and on machine alterations. In New Brunswick there are prohibitions on: operating ORVs in a careless, reckless or negligent manner or in a manner likely to cause injury or property or environmental damage; and a prohibition on vehicles with muffler by-pass devices or those that cause “excessive or unusual” noise.

In Quebec there are prohibitions on: speed or actions that could endanger life or safety of persons or cause damage to property while using OHVs; and, on modifications to noise or emissions or reduced stability or breaking or increased acceleration.

Questions:

How effective are general prohibitions as compared to specific rules when it comes to shaping user behaviour and enabling enforcement?

b) Liability protections

The liability regimes in New Brunswick and Quebec provide strong statutory protections against legal actions for injuries related to motorized use in general and managed OHV trails in particular.

Observations:

The bars to action in New Brunswick and Quebec are directly in the statute.
In Alberta, such legislation would have to replace or prevail over the *Occupiers Liability Act*.

New Brunswick is notable for having abolished occupiers’ liability with the intention that liability be determined under other rules. The key legislation is the *Trespass Act* that applies to motor vehicles

⁵⁰ Pilot project concerning add-on seats for single-seat snowmobiles, Ministerial Order concerning the, CQLR c V-1.2, r 2; Pilot project concerning track systems for 4-wheel all-terrain vehicles, Ministerial Order concerning the, CQLR c V-1.2, r 3; Pilot project concerning side-by-side vehicles, Ministerial Order concerning the, CQLR c V-1.2, r 4.

including OHVs on public and private lands, and the *ORV Act* respecting managed trails. Regulatory compliance has been a factor in determining liability as well.

Crown lands: The Crown Land Management Principles clearly identify the risks associated with use of forests roads and lands that are distant from services and subject to industrial activities. It states that the Crown intends to show due diligence regarding public safety and to ensure that persons responsible for roads and trails maintain them to standard. However, it also demands that users assume the risks and that protection for the Crown be a requirement for leases and licenses of occupation. These principles lack legal weight but are reflected in legislation and departmental practice.

The *Trespass Act* applies to public and private lands, and owners and occupiers. It removes the duty of care towards trespassers in motor vehicles including OHVs unless there was deliberate creation of dangers with the intention of doing harm, or reckless disregard to the presence of persons or property. As above, this Act also creates offenses for trespassing on premises including land used for recreational purposes.

The *ORV Act* bars legal actions for injuries related to use of the managed ATV and snowmobile trails. This protection is provided to listed persons including: landowners, occupiers, municipalities, the provincial Crown, ministers, or persons prescribed by regulations. Regulations prescribe the ATV and snowmobile trail managers as persons to whom the protection applies.⁵¹ The protection is not available where dangers are created with a deliberate attempt to harm, wilful and reckless disregard for the presence of persons or property, or negligent use of snowmobiles and ATVs.

Observations:

Trail managers can receive protections at the discretion of government.

Multiple cases have been decided based on the existence or absence of reckless disregard. In *Arseneault v. Savoie*, the snowmobile trail manager was granted an “unanswerable defense” by the *ORV Act* as there was no case of reckless disregard.⁵² The accident occurred between two snowmobilers in a group ride on the managed trails. One rider stopped, the other rider hit him from behind, and was found entirely liable due to driving too fast for the visibility conditions. In *Richards v. Beton Brunswick Ltd.*, an industry landowner was held liable for injuries incurred on a managed snowmobile trail due to having shown reckless disregard.⁵³ A snowmobiler hit an undulation caused by the landowner’s equipment crossing the trail. The court found that the company knew that this would be a hazard and that the employees did not follow a company policy to prevent this hazard. The court defined “reckless disregard” as where persons knew or should have known about the risks and did not care if injury resulted. In doing so it considered cases under the Ontario *Occupiers’ Liability Act*, *Off-Road Vehicle Act* and *Motorized Snow Vehicle Act*.

⁵¹ *Prescribed Persons or Bodies Regulation*, NB Reg 2010-15.

⁵² *Arseneault v. Savoie*, 2015 CanLII 13114 (NB QB)

⁵³ *Richards v. Beton Brunswick Ltd.*, 2013 NBQB 102.

Observations:

Defining reckless disregard can be an issue for the courts regardless of the legislation.

The *ORV Act* also grants the Crown, ministers and government employees protection from all torts arising from the good faith actions of the trail managers or their sub delegates. This would provide government with protection from the actions of trails managers that amount to negligence, nuisance or trespass.

Dispositions: Crown land regulations require disposition holders to indemnify the crown.⁵⁴ Dispositions are required for managed trails.

Insurance: The trail managers are required to carry liability insurance conforming to the agreement with the Minister under the *ORV Act*. The agreements may establish: the form of insurance that the trail manager must carry; requirements for the Minister to approve the insurer; the manner of disposition of insurance proceeds; and, any other matter related to insurance.

Regulatory compliance: If injuries are unrelated to use of the managed trails then none of the above protections apply. However, compliance with the regulatory provisions of the *ORV Act* has been a factor in determining liability in multiple cases that concern unauthorized use of ORVs on highways.⁵⁵ While the non-compliant party was found at fault in all cases, the courts still considered whether the other parties met their own duties of care.

Quebec: The general rules of civil liability in Quebec are set by the *Civil Code*.⁵⁶ These rules set a general duty not to cause injury and they prevent the limitation of liability in situations of gross fault. Gross fault resembles the common law concept of recklessness or gross negligence. The rules also provide that the posting of notices may be used to disclose dangers but not to exclude liability. Finally, voluntary assumption of risk does not entail renunciation of remedies against an “author of the injury”.

The *OHV Act* provides protections against civil actions related to trails within these confines:

1. On private lands, there are no legal actions against owners or lessees that authorize OHV clubs to layout or operate trails for any damages related to operation of OHV use on the trails. This protection for landowners in the absence of gross fault has been upheld by the courts.⁵⁷

⁵⁴ *Lands Administration Regulation*, NB Reg 2009-62.

⁵⁵ *Lepage v. Quimper*, 2004 NBQB 29 (CanLII); *Larocque c. Duguay*, 2009 NBBR 171 (CanLII).

⁵⁶ Civil Code of Québec, CQLR c C-1991, Chapter III (Civil Liability).

⁵⁷ *Marchand c. Club de motoneige du comte de Champlain inc.* 2009 QCCQ 15109 (CanLII).

2. On public lands “off” a club trail, there is a bar to civil actions resulting from defects with trail layout, signage or maintenance. This provision does not designate specific persons that are protected. It bluntly bars actions for injuries related to inoperative trails on public lands.
3. On club trails, the operator has positive duties to layout, sign, and maintain trails and to assure safety and regulatory compliance. The *OHV Act* requires trail operators to carry civil liability insurance of at least \$2,000,000 a year as well as requiring all individual OHV owners to carry \$500,000 in civil liability insurance that covers personal injury and property damage. Clubs may require members purchasing trail permits to sign waivers assuming risk and require demonstration of insurance coverage. The courts have cited prior regulations that made voluntary assumption of risk a condition of use however the ELC did not find these provisions in the current regulations. The *OHV Act* also bars actions against peace officers or trail security officers if officers were acting in good faith.

Observations:

The Crown is protected if club trails cease to operate.

A trail situation entails more risk management practices even under protective legislation

Regulatory compliance: In Quebec, clubs that use the waiver and insurance system, meet their positive duties and comply with the regulatory standards for trail operation have successfully availed themselves of the legislative protections in multiple cases. In *Marchand c. Club de motoneige du comté de Champlain inc.* the court found that a snowmobiler had voluntarily assumed a risk by signing a club waiver and that the club had met its management responsibilities under the *OHV Act*.⁵⁸ The snowmobiler was injured by an elevation change in a trail that was likely caused by a snow blower operated by a landowner beside the trail. Apart from the protections afforded to the club and landowner, the court found that the snowmobiler did not meet his own duty to operate prudently and follow speed limits. Likewise, in *Levesque c. Association de motoneigistes Boule de Neige Inc.* the court dismissed a claim on the basis that the snowmobile regulations and the club’s waiver required users to assume the risks.⁵⁹ The snowmobiler was injured by falling into a culvert. The parties contested the sufficiency of trail markings; however, the court relied largely on voluntary assumption of risk.

Clubs that fail to meet the regulatory standards of the *OHV Act* are more exposed to liability even if there is no gross fault. In *Tremblay c. Club motoneige Piteman* the court split liability 50/50 between a snowmobile club and a snowmobiler injured in a collision with the trail grooming machine.⁶⁰ It found that the club did not take all of the precautions required by regulations as the location of trail signage

⁵⁸ *Marchand c. Club de motoneige du comté de Champlain inc.*, 2009 QCCQ 15109 (CanLII).

⁵⁹ *Lévesque c. Association des motoneigistes Boule de Neige Inc.*, 2005 CanLII 17353 (QC CQ).

⁶⁰ *Tremblay c. Club motoneige Piteman*, 2005 CanLII 48406 (QC CS).

and markings did not meet the standards. It also relied on general principles of foreseeable risk in the use of grooming equipment in the daytime. The court suggested that the groomer's signal lights would be less visible and that users are known to disrespect speed limits. It did not accept the club's practice of using radios in helmets as a way to alert riders to the groomer as it was possible that not all riders would have such radios.

Some trail cases do not involve the clubs at all. For example, the court may simply determine which of two riders on a snowmobile group ride was liable for a user-on-user collision.⁶¹

Regulatory compliance with the *OHV Act* can also be a factor in cases that do not involve trails. In *Godbout c. Bolduc* the court found a private landowner liable to a child relative for head injuries incurred through snowmobile use that he enabled on his own property.⁶² The injury occurred through towing a sleigh with a cable that did not comply with a regulatory requirement for tow-bars. At the same time, the court would not allow mere regulatory compliance to create protection from fault. In particular, just because helmets were not required for sleigh passengers at the time, this did not exculpate the defendant.

Insurance issues: The main report did not explore insurance law and the ELC has no special expertise in this field. However, there is at least one Quebec case worth noting as it concerns trail operators. In *Bonin c. Picard* the court found a snowmobiler 100% liable for injuries to a passenger that he was carrying on a club trail.⁶³ The court then ordered that the victim be indemnified by the Snowmobile Federation, by the company whose insurance product was offered to members by the Federation, and by the defendant's own insurer whose policy was not in place at the time.

The defendant mistakenly believed that his personal policy was in place when it was not. Consequently, he declined the coverage obtained by the Federation and offered by the club when club members purchased their trail pass. The court found that this gap in coverage was the result of misinformation provided by the various distributors of the insurance products. It also found issues concerning compliance with the legislation on distribution of insurance products. Issues included consumer rights of choice, the need for distributors of certain products to be certified, and ministerial exceptions to the general rules. This is a complex case that legal advisors may wish to read.

It is worth noting that Quebec has a provincial automobile insurance regime that does not apply to OHVs.⁶⁴ Courts anywhere may feel that imposing the costs on whoever has insurance is the lesser of evils as compared to leaving innocent victims uncompensated.

⁶¹ *Richard c. Dubois*, 2005 CanLII 46259 (QC CS).

⁶² *Godbout c. Bolduc*, 2007 QCCS 726 (CanLII).

⁶³ *Bonin c. Picard*, 2004 CanLII 9161 (QC CS).

⁶⁴ *J.A. v. Société de l'assurance automobile du Québec*, 2010 QCCA 1328.

Observation:

- A rare decision against a trail organization was unrelated to trail maintenance.
- The Crown or landowner was not exposed.

10. CONCLUDING COMMENTS

New Brunswick and Quebec were included in this addendum due to their relevance to OHV management and trails reform options. However, these provinces are also relevant to assessing the general regimes for managing recreational use of public lands in the Canadian context and doing so maintains the scope of this report. New Brunswick provides the more similar legal and institutional framework to Alberta while Quebec is more similar in size and population. In both provinces forestry is a primary industry and oil and gas development is less than in Alberta.

The legislative history in New Brunswick and Quebec suggest that Alberta may be lagging behind other provinces on multiple overlapping matters including: parks reform, forest management, provincial trails and OHV legislation.

Concerning parks, some notable differences in Quebec and New Brunswick as compared to Alberta include greater tourism focus, fewer designations and more delegation. A second difference that the ELC sees as potentially valuable in Alberta is the prevalence of flexible conservation zoning designations outside of the parks system.

Concerning undesignated crown lands and forests, the basic regimes in Alberta, New Brunswick and Quebec are similar to the extent that the main statutes mostly concern dispositions, access and industry. Policy on “multiple use” is made outside of the legislation.

Unlike Alberta, legislation in New Brunswick and Quebec provides stronger mandates to manage public forests for recreational values. Furthermore, the planning and approval powers for recreation and the major industries are in the same agencies. A higher level of legislative and administrative fragmentation respecting the multiple land use industries in Alberta affirms the need for regional planning under the *Alberta Land Stewardship Act* to be integrated, detailed and legally binding on decision makers.

Regulations in New Brunswick and Quebec might be stronger than those in Alberta in several regards. Regulations are more restrictive on motorized access to environmentally sensitive areas and offer greater protection for persons aggrieved by motorized use. Regulations also enable dispositions for trails, camps, and as a means to regularize existing use. All of these approaches are possible under the *Alberta Public Lands Act* with the assistance of guiding policy and minor regulatory reforms.

Enforcement in New Brunswick and Quebec follows the trend of providing broad powers to numerous officers, creating specialized OHV forces and engaging assistant personnel. Minor reforms in Alberta would assist in meeting this benchmark.

OHV trails legislation in New Brunswick and Quebec are the largest difference from Alberta. These models indicate that reform efforts in Alberta involving the concept of non-government trail authorities holding dispositions have analogous precedents in Canada. The New Brunswick model is for the Minister to appoint a provincial trail manager by agreement while the Quebec model is to permit the operation of trails in compliance with regulations. Nonetheless, both models are similar in the roles of the administrative departments and user organizations. Both models are relatively narrow in terms of the delegated functions and the types of uses they concern. Local clubs and associations of clubs are central to both models in practice.

Where the OHV trail models in New Brunswick and Quebec are most legally different is in what details are determined by statute, regulations or agreements. There is a tension between need for flexibility and adaptability on one hand, and demand for transparency and accountability of government on the other hand. This tension would increase with the breadth of managerial functions and recreational uses involved in a model. It is telling that the multiple criticisms of delegated authorities have been directed at models for parks administration and wildlife management rather than at OHV trails. The concerns are more about inherently governmental functions and divergent managerial objectives than about a specific land use.

The ELC must emphasise the different though overlapping contexts of public lands recreation and trails across lands under multiple authorities. When comparing trails models, there are distinctions in documented drivers and outcomes between agency-led models and delegation models. Public deliberations, reports and evaluations were more common in agency-led models while court cases and strategic plans were more prominent in delegation models. The clearest historic drivers for the New Brunswick and Quebec models are the resolution of conflict so as to enable sustainability of the OHV use. Tourism has been a prominent driver for motorized and non-motorized trails in more recent years. Managing conflict may be an ongoing process as agreements and authority to establish new trails may fuel new grievances. This context is a contrast to agency-led models where the expressed drivers of reform have included the protection of public resources and the environment. This does not discount the potential environmental benefits of trails produced through delegation if done within a robust legislative framework.

One legal issue to resolve concerning the transferability of any trails model to Alberta is the need for trails permitting processes and environmental screening criteria within the various departments. Another issue will be the importance of planning and regulatory designation for trails on public lands, especially regarding non-motorized trails. The ELC is also sensitive to the numerous non-legal factors that will impact the transferability of any models. Examples include the political context, institutional culture, physical landscape, primary industries, the range of recreational uses and the structure of user organizations.

Funding: The New Brunswick and Quebec models affirm that multiple types of user payments plus the use of more general public revenues are commonplace and appropriate. A key distinction to make is between types of user payments. Most commonly, user fees go to service providers for benefits to users, regulatory charges go to restricted management funds for uses including but not limited to physical infrastructure, and general revenue goes to trail projects. The larger issues, including pros and cons, may involve create multi-source, shared pot funding. Regarding options for Alberta, public land user fees or area passes or backroad permits could likely be done with policy guidance, existing regulations and Ministerial decisions. OHV levies, provincial trails passes that extend beyond public lands would require legislative reforms. A further need in Alberta will be for the level of decision-making structure provided in other jurisdictions.

Liability regimes related to OHV use are very strong in New Brunswick and Quebec. The common feature is that statutes directly bar actions against parties that manage or consent to trails while still allowing recourse in egregious situations. Regulations, dispositions, waivers and insurance requirements play supplementary risk management functions. These comparisons also suggest policy choices to be made between requiring upped protections before allowing trails or assuming some risks so as to allow managed trails. Legislative reforms directed at liability issues are a key to enabling proactive management of OHV use in Alberta.

The universal best legislative practices across all jurisdictions reviewed in the main report and this addendum include: clear agency mandates, more formalized involvement of recreational users, stronger enforcement structures, municipal involvement, multiple funding tools and strong liability protections. The largest legislative differences are between the US and Canada. Prevalent features of US regimes include: strong public policy statements, detailed direction to agencies, separation and prioritization of uses, environmental criteria for trails designation and broad motorized management programs. Features more prevalent in Canadian regimes include: industry planning for recreation, recreational dispositions and delegated authorities for an array of parks, wildlife, and motorized trail functions. These comparisons might suggest a distinction between top-down, strong agency models in the US and ground-up, privatized models in Canada. The ELC suggests that this distinction could be overstated or is at least not mutually exclusive with respect to reform options given the uniqueness of Alberta. There is need for stronger departmental mandates as well as more enablement of non-government actors on public lands. Stronger funding and liability regimes as in other jurisdictions would enable more proactive management actions all around. Advances can be made through use of current planning and regulatory tools, however minor reforms would assist and new legislation is ultimately needed. In that regard the ELC's main findings are the same following this addendum.