

## **Municipal Government Board Rules on Development Impacts to the G8 Legacy Wildlife Underpass in the Bow Valley**

**By: Shaun Fluker**

**Case Commented On: *Town of Canmore v M.D. of Bighorn No. 8*, [2017 ABMGB 10](#)**

Say again? The Municipal Government Board created by the *Municipal Government Act*, [RSA 2000, c M-26](#) to adjudicate on municipal affairs such as linear property assessment, annexation, subdivision, and inter-municipal disputes has ruled on a significant wildlife issue in the Bow Valley? And not just any wildlife issue – a dispute concerning the functionality of the G8 Legacy Wildlife Underpass – a key wildlife connectivity feature located just east of Canmore and built with funds provided from the G8 Economic Summit hosted in Kananaskis during June 2002. How can this be? Well really, it should not be. There is a longstanding and seemingly bitter municipal dispute ongoing between the MD of Bighorn and Canmore over urban development in the Bow Valley, and the Board has just ruled in favour of proposed development by the MD of Bighorn for the hamlet of Dead Man’s Flats. However, the dispute between the MD of Bighorn and Canmore over development is just smoke and mirrors for what is really at stake here - the integrity of the G8 Legacy Wildlife Underpass as a highly used connectivity feature that allows wildlife to avoid crossing the highway while moving through the human-congested Bow Valley. With all due respect to the members of the Municipal Government Board who heard this matter and deliberated on the issues, I think the Board accepted pie-in-the-sky solutions to a serious and escalating land use problem in the Bow Valley. In my humble opinion the Board ought to have declined jurisdiction to hear this dispute. For reasons set out below, I suggest the Lieutenant Governor in Council should refer this to the Natural Resources Conservation Board pursuant to section 4(f) of the *Natural Resources Conservation Act*, [RSA 2000, c N-3](#).

### **The Bow Valley and the G8 Legacy Wildlife Underpass**

Without a doubt, the Bow Valley has been loved into ecological decline. Archaeologists have shown us the valley was travelled and occupied by indigenous peoples for millennia prior to the arrival of CP rail in the late 19<sup>th</sup> century (See Sid Marty, *A Grand and Fabulous Nation: The First Century of Canada’s Parks* (NC Press Limited, 1984) at c 1, 2)). However, the locomotive changed everything in the lower stretches of the Bow Valley east of Lake Louise. First it led to the designation of Banff National Park in 1887 and then shortly thereafter the creation of the Banff townsite and the castle-like Banff Springs Hotel as an international tourism destination to enjoy the medicinal hot springs located on Sulphur Mountain. In addition to recreational pursuits at the time such as golden-age mountaineering, resources were also plentiful. The railway opened the valley for coal mining, forestry, and hunting.

The railway brought the settler into the Bow Valley, but the automobile brought the masses. As we celebrate Canada’s 150<sup>th</sup> birthday with free annual park entry passes for vehicles, it is an interesting aside to note that in 1904 the Canadian government banned the use of cars in Banff to control visitor numbers (Marty, *supra* at 91). The vehicle prohibition did not last long however,

and soon thereafter construction began on the first highway through the valley. Human numbers in the Bow Valley have never looked back. Over the decades of the last century, tourism and recreation exploded with urban development in the townsites of Lake Louise, Banff, and Canmore, construction of accommodation facilities outside of these townsites, golf courses, ski hills, hiking and biking trails, trailheads, and campgrounds. The town of Canmore had only 2000 residents when the last coal mining operation shut its doors in 1979, and the 2014 [census](#) recorded just over 13,000 residents. This number no doubt pales in comparison to the actual population numbers in Canmore if vacation homes and tourists are included.

The point here is that the Bow Valley is very congested and busy. If my words aren't convincing but I have nonetheless sparked your curiosity, I suggest you to take a stroll up Mt Lady Macdonald next to Canmore or ride the Sulphur Mountain gondola in Banff and have a look down into the valley. The perspective from these high viewpoints makes you wonder how wildlife persist at all in the Banff – Canmore corridor. The human footprint stretches from one side of the valley to the other at the Banff and Canmore townsites, pushing wildlife up the steeper slopes and into rocky terrain. Factor in campgrounds, hiking trails, mining scars, and linear disturbances such as the Bow River, the TransCanada Highway, and the railway, and you begin to realize why we need to designate wildlife movement corridors and preserve what remains of undisturbed habitat if we want large symbolic wildlife species such as bears, wolves, cougars, elk, deer, and moose to remain in the Bow Valley.

This brief trip through history in the Bow Valley now takes us into the early 1990s. The population of Canmore is about 6000 but the town remains in its modest coal mining form. The nearby hamlets of Dead Man's Flats and Lac Des Arcs have but a handful of residents. The afterglow of the 1988 Calgary Olympics is strong and developers have their eye on some prime mountain real estate in the Canmore area. In 1991 Canmore annexed approximately 5400 hectares of land from the MD of Bighorn – consisting of the forested lands directly west of the TransCanada Highway and stretching from Dead Man's Flats to Canmore. This area, situated under the shadow of Mount Lougheed, Wind Mountain and Three Sisters Mountain, became the location for a major project proposal by Three Sisters Golf Resorts in 1991 to construct a mix of commercial, residential and recreation services. The Alberta government decided to require an environmental impact assessment (at the time there was no legislated EIA process in Alberta) and subjected the project to a review by the then-newly created [Natural Resources Conservation Board](#) (NRCB).

The [NRCB Decision 91-03](#) on the Three Sisters proposal issued in November 1992 is essential background reading for the current dispute between the MD of Bighorn and Canmore. The location of the Three Sisters lands is set out on pages 1-2 and 1-3 of NRCB Decision 91-03. The NRCB heard from many parties speaking in opposition to and in favour of the Three Sisters proposal, and the NRCB ultimately approved the 20 year development proposal with conditions. Wildlife concerns factored large in the NRCB review, and are addressed in Decision 91-03 at pages 10-33 to 10-52, wherein the NRCB examines evidence placed before it on how the Three Sisters project would affect larger wildlife species such as elk, wolves, cougars, grizzly bears, black bears, deer, and bighorn sheep. The overarching conclusion by the NRCB on wildlife impacts was that the Three Sisters project would have significant adverse impacts on the ability of wildlife species to move through and across the Bow Valley. The NRCB approved the Three Sisters project on terms, conditions and recommendations which included terms with respect to protecting habitat and wildlife corridors (at page 10-51). Most notably, the NRCB recommended further studies into the construction of a wildlife underpass in the vicinity of the project to allow

wildlife to cross the highway and connect undisturbed movement corridors and habitat (at page 10-51).

The dispute over the Three Sisters project and the resulting NRCB Decision 91-03 highlighted the need for meaningful land use planning to protect wildlife in the face of a rapidly expanding human presence in the Bow Valley near Canmore. Countless studies were conducted and numerous reports and guidelines were produced following the NRCB decision, including the 1996 [Banff - Bow Valley Study](#) produced by the federal government and the establishment of the Bow Corridor Ecosystem Advisory Group ([BCEAG](#)). The BCEAG is an advisory committee that makes land use recommendations to government stakeholders in the Bow Valley east of the Banff park gate: the town of Canmore, MD of Bighorn, Alberta government, federal government, and Banff National Park. Most importantly for this comment, the BCEAG has delineated habitat areas and wildlife corridors and established guidelines for human use in these areas.

The 2012 BCEAG wildlife corridor and habitat patch guidelines (the [2012 BCEAG guidelines](#)) are particularly instructive here. The document identifies the current wildlife corridors and habitat patches in the Bow Valley east of Banff park and provides land management agencies with guidelines for assessing development applications that have the potential to impact adjacent wildlife corridors and habitat patches. Like most good wildlife policy work in Alberta though, someone has made sure the guidelines are not legally binding on anyone.

The BCEAG guidelines describe a wildlife habitat patch as either ‘regional’ or ‘local’. Regional wildlife patches are large enough to provide large carnivores with sustenance for short periods of time or may encompass a seasonal range for certain species such as elk. A local wildlife patch is a smaller area that provides short term undisturbed habitat for resting. Habitat patches are connected by wildlife corridors and the guidelines set out parameters for corridors on matters such as adequate width and topography preferences. Figure 1 on page 2 of the [2012 BCEAG guidelines](#) provides a clear delineation of the current habitat patches and wildlife corridors in the Canmore – Dead Man’s Flats region. On this map you can see the G8 Legacy Wildlife Underpass as a key connectivity feature allowing wildlife to pass from the Wind Valley into the lower Bow Valley and the Bow Flats regional habitat patch.

As you drive along the TransCanada highway just after entering the mountains, you pass the hamlet of Lac Des Arcs and the Exshaw cement plant to your right, then you pass a lake, and as you continue towards Canmore you pass a road sign for exit 98 indicating the approaching turnoff from the highway into the hamlet of Dead Man’s Flats. As you pass Pigeon Mountain on your left, the expansive Wind Valley and the north face of Mt Lougheed appear to the south, and at this very moment you will be driving over the G8 Legacy Wildlife Underpass. Research conducted by the [Miistakis Institute](#) concluded the underpass has significantly reduced wildlife mortality on the TransCanada Highway at this spot, and this is largely because the location of this underpass was selected based on extensive wildlife research demonstrating the spot is frequently used by wildlife moving from the Kananaskis Valley into the Bow Valley. The underpass has since been recognized as a mitigation success for wildlife mortality due to vehicle collisions. See Lee T, Clevenger, AP and RJ Ament. 2012. [Highway wildlife mitigation opportunities for the TransCanada Highway in the Bow Valley](#).

The Three Sisters project was not the only proposed development in this region of the Bow Valley to attract controversy in the early 1990s. Although not considered as part of the 1991 NRCB Three Sisters Decision 91-03, what was known as the Limestone Valley golf and

recreational resort in the hamlet of Dead Man's Flats was the subject of a judicial review application by the Bow Valley Naturalists in 1995. The Court of Queen's Bench ordered an environmental impact assessment would be required for the Limestone Valley resort under the then-newly enacted *Environmental Protection and Enhancement Act*, SA 1992 c E-13.3 (See *Bow Valley Naturalists Society v Alberta (Minister of Environmental Protection)*, [1996] 2 WWR 749, 35 Alta LR (3d) 285 (CanLII)). The area is now the location of a new residential development (see [Rivers Bend Developments](#) - and one of the photos on this webpage clearly illustrates the location of the G8 Legacy Wildlife Underpass relative to the hamlet of Dead Man's Flats – the underpass is located next to forested land just east of the area circled in red for the residential subdivision River's Bend) and some light industrial zoning. Site development on these lands began in 2013.

### **Development in Dead Man's Flats and the Municipal Government Board Decision**

All of this is no doubt just a glimpse into grander plans to redevelop the hamlet of Dead Man's Flats from an industrial highway turnoff into a smaller scale of what is now Canmore. The new area structure plan passed by the MD of Bighorn which is the subject of the dispute before the Municipal Government Board is a part of this larger redevelopment vision. And the Alberta government is no stranger to this. Land exchange discussions have taken place between the MD of Bighorn and the Alberta government for years, whereby the undeveloped lands around Dead Man's Flats would be set aside for habitat protection in exchange for allowing the MD to develop lands elsewhere. However, thus far these negotiations have failed to produce an agreement (see [here](#)). Given that everyone on the record seems to agree the undeveloped lands in this region of the Bow Valley need to be conserved, it would be interesting to know why these discussions between the MD of Bighorn and provincial government have not borne fruit.

The action which led to the Municipal Government Board decision in *Town of Canmore v M.D. of Bighorn No. 8*, [2017 ABMGB 10](#) was the enactment by the MD of Bighorn of a new area structure plan (ASP) for development in Dead Man's Flats. The east portion of the new ASP covers the land which abuts the north side of the G8 Legacy Wildlife Underpass. Figures 1 and 2 on pages 9 and 10 in *Canmore v Bighorn* show the location of lands subject to this new ASP. Canmore opposes the new ASP on the ground that the new development in this location would be detrimental to its interests, and accordingly this brought the two municipalities before the Municipal Government Board in a hearing conducted in June 2016 pursuant to section 690(1) of the *Municipal Government Act* which provides:

- (1) If a municipality is of the opinion that a statutory plan or amendment or a land use bylaw or amendment adopted by an adjacent municipality has or may have a detrimental effect on it and if it has given written notice of its concerns to the adjacent municipality prior to second reading of the bylaw, it may, if it is attempting or has attempted to use mediation to resolve the matter, appeal the matter to the Municipal Government Board by
  - (a) filing a notice of appeal and statutory declaration described in subsection (2) with the Board, and
  - (b) giving a copy of the notice of appeal and statutory declaration described in subsection (2) to the adjacent municipality

within 30 days after the passing of the bylaw to adopt or amend a statutory plan or land use bylaw.

Canmore argued that development pursuant to the new ASP will have a negative impact on the functionality of the G8 Legacy Wildlife Underpass and this loss of functionality will adversely impact Canmore by (1) impairing its ability to plan for its own land use development since the ASP is not consistent with the 2012 BCEAG guidelines for protecting wildlife habitat and movement corridors, or (2) increasing the financial costs incurred by Canmore to manage human-wildlife interaction since the reduced functionality of the G8 Legacy Wildlife Underpass will result in more wildlife traffic in Canmore as wildlife seek alternative means of moving through the Bow Valley.

The Municipal Government Board addressed Canmore's appeal in two steps. First, was there evidence to establish that development pursuant to the new ASP will have a negative impact on the functionality of the G8 Legacy Wildlife Underpass? Second, if the functionality is impacted, will this be detrimental to Canmore's interests? The essence of the Board's decision is that Canmore failed to pass the second step, it was unable to convince the Board the impacts on the G8 underpass would be detrimental to its interests. I'm not particularly interested in this aspect of the Board's decision because I think it is ridiculous to decide the fate of the G8 Legacy Wildlife Underpass based on Canmore's operational and planning interests. The source of this nonsense is the appeal provision in section 690(1) which requires an appellant to make a case for detriment to its interests. Readers interested in the Board's reasoning on why Canmore fails to establish detriment under section 690(1) can find it at paras 55 to 130.

What interests me here is the first question, which is largely if not exclusively one of fact and evidence: Will the ASP reduce the functionality of the G8 Legacy Wildlife Underpass? This is an issue with importance that transcends the interests of Canmore or the MD of Bighorn. And it is this issue which I believe deserves far more scrutiny than it received here. Canmore provided the Board with evidence from two experts who spoke on the impacts to the underpass. Their evidence is described by the Board at paras 26 to 38 of its decision. Both experts concluded that the development associated with the ASP will reduce the functionality of the G8 underpass as a wildlife crossing, and the Board accepted this conclusion stating "... the MGB concludes on a balance of probabilities that development associated with the ASP will reduce the level of functionality of the G8 Underpass at least to some degree and for some species in comparison to no development." (at para 49)

The MD of Bighorn responded with evidence from one expert who asserted impacts on the G8 Underpass can be mitigated with appropriate land-use restrictions in the area, fencing to separate wildlife from humans, signage, and more public education. Another example of the policy approach to resource and commercial development in Alberta when evidence of environmental impacts is problematic, but is tempered with pie-in-the-sky manage and mitigate solutions. The Board concludes from this evidence that it isn't possible to predict to what extent human disturbance from the ASP will impact the functionality of the G8 underpass (at para 50) and that wildlife will adapt to disturbances in unpredictable ways thus again we can't say for sure how much impact the new development will have on the G8 underpass (at para 51). But somehow on the same evidence the Board could say conclusively that wildlife fencing will reduce human-wildlife conflicts and have a positive influence on the functionality of the G8 underpass. (at para 52) The Board's conclusion is an example of what the late Jon Gordon called an upward counterfactual narrative: linking current facts with a positive future scenario that is presented as fact but has yet to be realized (see Jon Gordon, *Unsustainable Oil: Facts, Counterfactuals and Fictions* (University of Alberta Press, 2015).

There are certainly problems with the intelligibility of the Board’s reasoning on the question of whether the functionality of the G8 underpass will be impacted, and Canmore has until the end of March to decide whether to seek permission to appeal this decision at the Court of Appeal. But the larger issue here is whether the Municipal Government Board should be deciding this question at all. With all due respect to the members of this Board, it seems like the wrong forum to decide the fate of a key wildlife connectivity feature in the Bow Valley. And the fact that this Board - which was not intended by the Legislature to have expertise on wildlife issues– has made this decision based on evidence from just three wildlife experts also seems very problematic. In my view the functionality of the G8 Legacy Wildlife Underpass is a matter of the public interest and we should give this issue a robust and meaningful application of the precautionary principle. I also think this seems like a worthy point of controversy upon which to invite the NRCB to conduct a review on what has transpired in this region over the past 25 years and revisit its Three Sisters decision.

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