THE *SPECIES AT RISK ACT*: AN OVERVIEW

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PART I – INTRODUCTION

The federal government has proposed to enact Bill C-5, the *Species at Risk Act* ("SARA").[2] The current legislative initiative follows two previous (and unsuccessful) attempts by the Government of Canada to enact federal endangered species legislation in the late 1990s. At the present time, the SARA has not been enacted, although Environment Minister has recently announced that the passage of the SARA is "a chief priority" of the federal government.[3]

If enacted, the SARA will complement existing federal, provincial and territorial laws and programs that are intended to protect wildlife species and their habitats. In particular, the SARA has a threefold purpose: (i) to prevent wildlife species at risk from becoming extinct or extirpated from the wild in Canada, (ii) to provide for the recovery of wildlife species at risk in Canada; and (iii) to provide for the management of "species of concern" in order to prevent them from becoming endangered or threatened. The term "wildlife species" has been defined broadly so as to include mammals, birds, plants, fish, reptiles, amphibians, molluscs, and insects.

[1] Counsel, Canadian Environmental Law Association.
[2] Introduced for First Reading, February 2, 2001; Debated at Second Reading, February 19, 21, 27, 28 and March 16, 2001; Second Reading and referral to the Standing Committee on Environment and Sustainable Development, March 20, 2001.
[3] Environment Canada, "News Release: Bill C-5 will Protect Canada's Endangered Species" (September 10, 2001).

To achieve its stated purposes, the SARA includes a number of different provisions, such as:

- establishing an independent, expert process for assessing and reporting upon the status of wildlife species in Canada;
- prohibiting the killing, harming or taking of species at risk and/or destruction of their residences;
- providing authority to prohibit the destruction of critical habitat in Canada;
- providing emergency powers to list species or protect habitats that are in imminent danger;
- establishing funding mechanisms and other incentives for conservation and stewardship activities;
- requiring the development of recovery plans, action plans, and management plans for species at risk; and
- providing authority for compensation in relation to losses arising from the protection of designated critical habitats.[4]

In light of these and other provisions, federal Environment Minister David Anderson has claimed that the SARA "will guarantee that all species in Canada, wherever they live, are protected."[5] However, many public interest groups, scientists and other stakeholders disagree with the

[4] Generally, see Environment Canada, *The Species at Risk Act (SARA): A Guide*, and "Backgrounder: The Proposed Species at Risk Act", both of which are posted at <http://www.ec.gc.ca>.
[5] *Supra*, f.n. 3.

Minister's claim, and they have strongly criticized the current version of SARA, particularly in relation to the narrow scope and highly discretionary nature of the foregoing provisions.[6]

If enacted, the SARA will be jointly administered by three federal Ministers: the Minister of Fisheries and Oceans will be responsible for aquatic species; the Minister of Heritage will be responsible for species in national parks, national historic sites and other protected heritage areas; and the Minister of the Environment will be responsible for all other species as well as for the overall administration of the SARA.

PART II – BACKGROUND: THE RATIONALE FOR REFORM

(a) Why Protect Species At Risk?

It is well-recognized that conserving biological diversity in general, and protecting wildlife species in particular, is important for many different reasons:[7]

> **Ecosystem Benefits**: Flora and fauna play important roles in maintaining healthy ecological functions and processes;

[6] See, for example, K. Keenan, *Submissions of the Canadian Environmental Law Association to the Standing Committee on Environment and Sustainable Development regarding Bill C-5 (Species at Risk Act)* (CELA, July 2001); Canadian Institute for Environmental Law and Policy, *Recommendations on Bill C-5 (Species at Risk Act) to the House of Commons Standing Committee and the Environment and Sustainable Development* (CIELAP, May 2001); Sierra Legal Defence Fund, *Summary Brief on Bill C-5: The Proposed Species at Risk Act* (SLDF, n.d.); and Quebec Environmental Law Centre, *The Species at Risk Act (Bill C-5)* (May 2001).

[7] Generally, see S. Elgie, "Protected Spaces and Endangered Species", in Hughes et al. (eds.), *Environmental Law and Policy (2nd ed.)*, (Emond Montgomery, 1998), Chapter 12.

Recreational, Economic and Aesthetic Benefits: Wildlife-based activity, such as bird-watching or eco-tourism, is a billion dollar industry in Canada that provides numerous social, cultural and aesthetic values;

Food and Medicine: Many of Canada's foods, medicines, and other material needs are provided by, or derived from, flora and fauna;

Ethics: Many persons believe that the human species does not have the moral right to cause the extinction of another species.

Notwithstanding these various benefits, there has been an alarming decline in biological diversity (including wildlife species and their habitat) across Canada and around the world. At the global level, the continuing loss of biological diversity has been well-documented and does not need to be reviewed in detail in this paper. It has been estimated that two to three species become extinct every hour, which roughly translates into the staggering loss of 27,000 species per year around the world. At this rate, approximately 25% of the Earth's species may disappear over the next 30 years.

While extinction can occur naturally, the vast majority of modern extinctions are caused by various human activities. These activities include:

- habitat destruction and degradation (eg. loss of wetlands, grasslands, old growth forests);
- incompatible land use and development (eg. urban sprawl, road construction);
- resource exploitation (eg. overhunting or overfishing);
- climate change (eg., excessive carbon emissions); and

- toxic pollution (eg. bioaccumulation of persistent contaminants).

Individually and collectively, these activities threaten the long-term sustainability of wildlife species, particularly those already at risk. However, the single greatest human threat to species at risk is habitat loss.

Like other countries around the world, Canada has not been immune to habitat loss or other factors that threaten or endanger wildlife species. For example, it has been estimated that Canada is home to at 70,000 wildlife species, many of which exist only in Canada. However, despite the vastness of Canada and the richness of its wildlife diversity, Canada has already experienced the extinction or extirpation of numerous wildlife species. Similarly, hundreds of other wildlife species remain endangered, threatened, or are of special concern within Canada.

These alarming statistics are reflected in recent population status reports prepared by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). As of May 2001, COSEWIC reported 380 species at risk in Canada, as follows:[8]

Category	No. of Species
Extinct[9]	12
Extirpated[10]	16
Endangered[11]	115
Threatened[12]	82

[8] COSEWIC, *Canadian Species at Risk (May 2001)*, page 2.
[9] A species that no longer exists.
[10] A species no longer existing in the wild in Canada, but occurring elsewhere.
[11] A species facing imminent extinction or extirpation.

Special Concern[13]		155
	Total	380

It should be further noted that COSEWIC has identified 23 additional "data deficient" species for which insufficient information exists to support a population status designation.[14]

In light of the ever-increasing number of species found by COSEWIC to be at risk, it comes as little surprise that there is widespread public support for federal endangered species legislation in Canada. For example, a survey undertaken in January 2001 revealed that 94% of Canadians support the passage of a federal law to protect endangered species. Similarly, a survey conducted in September 2000 found that 76% of Canadians believe that legislation is urgently required to prevent further species extinctions in Canada.[15]

(b) Canada's Legal and Policy Framework for Protecting Species at Risk

Federal Initiatives

In light of the growing number of species at risk in Canada, the federal government has been developed various laws and policies intended to protect wildlife species and habitats. Over the years, for example, Canada has enacted various statutes – such as the *Fisheries Act*, *Migratory Birds Convention Act*, *National Parks Act*, *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, and *Canada Wildlife Act* – that offer some degree of protection for certain species and their habitat.

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[12] A species likely to become endangered if limiting factors are not reversed.
[13] A species of special concern because of characteristics that make it particularly sensitive to human activities or natural events.
[14] *Supra*, f.n. 8.

Similiarly, Canada played a key role at the 1992 Rio Earth Summit in drafting and adopting the Convention on Biological Diversity, which Canada subsequently ratified. Among other things, Article 8(k) of the Convention requires Canada (and other signatories) to "as far as possible and as appropriate, develop or maintain necessary legislation… for the protection of threatened species and populations."

In 1993, the House of Commons Standing Committee on Environment considered Canada's obligations under the Convention, and concluded that the absence of federal endangered species legislation was a "legislative gap" that had to be addressed by Parliament. The Standing Committee further recommended that "the Government of Canada, working with the provinces and territories… take immediate steps to develop an integrated legislative approach to the protection of endangered species, habitat, ecosystems and biodiversity in Canada."[16]

In 1996, the Government of Canada, together with provincial and territorial wildlife ministers, developed and endorsed the National Accord for the Protection of Species at Risk in Canada. The goal of the National Accord is "to prevent species in Canada from becoming extinct as a consequence of human activity." Among other things, the National Accord commits all Canadian jurisdictions to establishing complementary legislation and programs that effectively protect species at risk across the country.

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[15] Environment Canada, "Species at Risk: Frequently Asked Questions": http://www.speciesatrisk.gc.ca/species/sar/faqs.htm.

[16] Standing Committee on Environment, *A Global Partnership: Canada and the Conventions of the United Nations Conference on Environment and Development* (April 1993), page 30.

To address its obligations under the Biodiversity Convention and the National Accord, the Government of Canada introduced Bill C-65 in 1996. This proposed legislation – which resembled the SARA in many key respects – died on the order paper in 1997 without being enacted. Thereafter, the federal government revised and reintroduced the proposed law as Bill C-33, but this legislation, too, died on the order paper in 2000 without being enacted.

In 2001, the federal Throne Speech again committed the Government of Canada to the introduction of federal endangered species legislation, and the SARA was subsequently introduced for First Reading in February 2001. Similarly, in the 2000 federal budget, the Government of Canada committed $90 million over three years (stabilizing at $45 million in 2002) for implementing the national strategy to protect species at risk. However, it remains unclear at this time when (or whether) the SARA will actually be passed into law and proclaimed into force.

The federal government's legislative inertia regarding endangered species stands in stark contrast to the experience in the United States, which has had strong federal endangered species legislation in place since 1973. While the U.S. *Endangered Species Act* has been characterized by some commentators as excessively adversial and legalistic in nature,[17] the American experience clearly demonstrates that it is possible to have strong legislation that protects endangered species and habitat, and that still permits land use or resource development where appropriate.

Provincial Initiatives

[17] *Supra*, f.n. 3.

At the present time, several Canadian provinces and territories do not have any specific endangered species laws in place to protect species at risk or their habitats. In the jurisdictions that do have endangered species laws (eg. New Brunswick, Prince Edward Island, Quebec, Ontario, Manitoba), the respective legislative regimes are neither comprehensive nor consistent.

Ontario's *Endangered Species Act*, for example, was first passed in the early 1970s and contains a number of flaws and loopholes that are typical of provincial endangered species legislation, such as:

- the listing process is slow, bureaucratic, and highly discretionary, which has resulted in only a small number of flora and fauna being designated as "threatened with extinction" (including two that have already been extirpated from Ontario);[18]
- recovery plans are not mandatory for the relatively few species that have been officially declared to be "threatened with extinction";
- the legislation does not require any comprehensive assessments of projects or undertakings that may impact species at risk or their habitat; and
- the enforcement of the Act's prohibitions has been sporadic and ineffective over the past four decades.

In 1996, a private member's bill (Bill 62) was introduced in the Ontario Legislature to amend and modernize the *Endangered Species Act*, but this bill was not enacted. Accordingly, the most

[18] Regulation 328, R.R.O. 1990, as amended. It is noteworthy that a significant number of Ontario species found to be at risk by COSEWIC have yet to be designated under Ontario's *Endangered Species Act*.

recent Annual Report from the Environmental Commissioner of Ontario correctly concludes that:

> Our analysis has shown that species at risk are inadequately protected in Ontario because of a confusing blend of generally outmoded and ineffective laws and policies…
>
> Our analysis suggests that the existing regulatory and policy framework for the protection of species at risk is in need of an overhaul. The issues of the criteria and timeliness of endangered species designation and the lack of protection for vulnerable and threatened species should be addressed. The ECO notes that at present, insufficient staff resources have been dedicated to this program.[19]

Although Ontario signed the National Accord (see above), it remains to be seen whether the province's *Endangered Species Act* will be substantially revised to better reflect the principles and commitments contained within the National Accord.

(c) Constitutional Basis for the SARA

Some commentators continue the question the constitutional basis for the SARA, primarily on the grounds that legislative jurisdiction over wildlife species, like other natural resources, rests primarily with the provinces pursuant to the *Constitution Act*.

However, one leading constitutional expert has opined that there is a strong basis for federal endangered species legislation:

> There is a persuasive argument to be made that the Parliament of Canada has sufficient competence under the "national dimension" facet of its "P.O.G.G. [peace, order and good government] power" (including the "treaty power", however interpreted) to exercise jurisdiction over all aspects of endangered species protection, both direct and necessarily incidental, regardless of the nature of the species or its location. Even if that argument should fail, it is indisputable that federal authorities have such jurisdiction over:

[19] Environmental Commissioner of Ontario, *Changing Perspectives: Annual Report 1999/2000* (ECO, 2000), pages 48 and 51

- all fish and other aquatic life-forms (s.91(12));
- all species inhabiting (for at least part of their life-cycles) property that is federally owned or federally controlled, whether beyond the geographic bounds of the provinces or on federal enclaves within the provinces (s.91(1A);s.91(24); P.O.G.G.);
- all species that move across provincial or national boundaries, or whose survival depends on trans-boundary measures (P.O.G.G.);
- all protections embodied in criminal law (s.91(27);[20]
- statistical studies of endangered species and related matters (s.91(6)); and
- at least some threats caused by agricultural activities (s.95).

> The totality of these federal powers are so sweeping, in my opinion, as to leave few, if any, gaps in the ability of the Government of Canada to act for the protection of all endangered species in Canada.[21]

Similarly, it has been suggested that while there is constitutional authority for provincial endangered species legislation (and a corresponding need for interjurisdictional cooperation), it is ultimately open to the federal government to play the lead role in endangered species protection:

> The provinces are capable of providing much protection for endangered species within their own territories under their own authority (although major aspects of the subject cannot be dealt with by the provinces alone, and all provincial action is subject to federal paramountcy). Virtually any kind of federal-provincial collaboration that might be considered desirable is constitutionally feasible through delegation, cost sharing, and other cooperative measures. The constitutional powers of the federal Parliament are so sweeping in this area that federal authorities would have no difficulty performing a paramount role in any such cooperative schemes if they chose to do so.[22]

Given the strong constitutional basis for federal endangered species legislation, it is unclear why the initial application of the SARA is largely limited to fish, migratory birds, and species found

[20] See *R.. v. Hydro-Quebec*, [1997] 3 S.C.R. 213, where the Supreme Court of Canada held that environmental protection was a public purpose that could be properly addressed by the federal government through the criminal law power.
[21] Prof. Dale Gibson, *Endangered Species and the Parliament of Canada: A Constitutional Question* (SLDF, 1994), page 25.
[22] *Ibid.*, page 26.

upon federal lands.[23] It is equally unclear why the SARA does not provide mandatory protection of transboundary species and their habitat, particularly since the provinces cannot act effectively on their own to fully address the extraprovincial and international aspects of transboundary species at risk. Because there are no compelling constitutional grounds to limit the nature and scope of the SARA, it is reasonable to conclude that the narrow application of the SARA was primarily motivated by political considerations rather than constitutional constraints.

PART III – OVERVIEW OF THE *SPECIES AT RISK ACT*

As described above, the SARA has not yet been enacted into law. Because it is possible (if not probable) that certain provisions of the SARA may be amended prior to its ultimate passage by Parliament, it is preferable at this time to focus upon the major components of the Act, rather than undertake a detailed, clause-by-clause analysis of the Act's provisions.

As currently drafted, the essential elements of the SARA may be summarized under four broad categories:

- species assessment and the listing process;
- protection of species and residences;
- recovery and management planning; and
- public involvement and citizen action.

[23] See, for example, section 34 of the SARA, which provides that the Act's prohibitions against killing species or destroying residences do not apply to species on provincial lands unless they are aquatic species or migratory birds. However, the federal Environment Minister has discretion to order that the SARA applies to "non-federal" species or lands if the Minister is of the opinion that "the laws of the province do not protect the species": see subsections 34(2) and (3).

Each of the foregoing components of SARA is described below.

(a) Species Assessment and the Listing Process

Arguably, the most important decision to be made under the proposed SARA is the threshold determination of which species are actually at risk in Canada. Unless a species is actually designated as being at risk, the prohibitions and protections in the proposed SARA will be inapplicable to that species.

To ensure that species assessment is credible, independent and science-based, the SARA proposes to entrench COSEWIC on a firm legal basis (section 14). Under SARA, COSEWIC will continue to operate at arm's length from governments in an open and transparent manner (sections 22 to 26), and will be composed of qualified wildlife experts drawn from across Canada (section 16).

Among other things, COSEWIC members will assess and classify wildlife species (eg. extinct, extirpated, endangered, threatened, or "special concern"), based upon the best available information from the scientific community, traditional aboriginal knowledge, and the public at large (section 15). COSEWIC's assessments will be published and provided to the federal Environment Minister as well as the "Canadian Endangered Species Conservation Council" to be established under the SARA (section 25).

In light of COSEWIC's exemplary work over the years, there appears to be strong support for SARA's proposal to formalize COSEWIC's mandate and composition in respect of species at risk. However, there is considerable concern among many stakeholders that COSEWIC's assessments are not binding on the Environment Minister or the federal Cabinet in terms of actually listing a species as being at risk for the purposes of the SARA. In other words, even if COSEWIC experts have found that a particular species is endangered, this finding does not necessarily mean that the species will be added to the List of Wildlife Species at Risk under the SARA. In short, the ultimate decision to list – or not list – a species under the SARA will be made by politicians, not wildlife experts (section 27).

As demonstrated in Ontario and several other provinces, leaving critically important listing decisions to political discretion generally means that many species at risk will get left off the list for various political reasons. For example, only 30% of species found to be at risk by COSEWIC have been incorporated into provincial endangered species lists, which are generally overseen and amended by Cabinet members. This dismal provincial track record has prompted many stakeholders to recommend that the initial List of Wildlife Species at Risk under the SARA should simply incorporate the current COSEWIC list in its entirety,[24] rather than require COSEWIC to review all of its existing assessments and allow Cabinet to pick and choose which species actually get listed under the SARA.

It should be noted that the SARA also authorizes the listing of species that are in rapid decline and facing an "imminent threat" to its survival. This kind of "emergency listing" may be sought

[24] This mandatory approach to listing is used under Nova Scotia's *Endangered Species Act*, which stipulates that the provincial list must include all species found in the COSEWIC list.

by the federal Environment Minister on his/her own initiative, or upon application by any member of the public (sections 28 and 29). However, this "emergency listing" power is also subject to the discretion of the federal Environment Minister and Cabinet.

(b) Protection of Species and Residences

Assuming that a species actually gets listed under the SARA, then a number of protective provisions may become applicable to the species, its residences, and possibly its critical habitat, as described below.

Prohibitions

The SARA proposes a broad prohibition against killing, harming, harassing, capturing or taking "an individual of a wildlife species that is listed as an extirpated species, an endangered species, or a threatened species" (section 32). Similarly, the SARA proposes to prohibit the destruction of the "residence" (eg. den, nest, or other dwelling place) of species at risk (section 33).

It should be noted, however, that these broad prohibitions do not apply to species on provincial lands (other than aquatic species and migratory birds), unless the Cabinet makes a discretionary order providing that the prohibitions apply to such species (section 34(1) and (2)). Such an order cannot be made unless the federal Environment Minister "is of the opinion that the laws of the province do not protect the species" (section 34(3)), and until the Minister has consulted with his provincial counterparts about the matter (section 34(4)). Similar restrictions have been proposed in respect of the application of the SARA's prohibitions to territorial lands (section 35).

Aside from the limited application of the SARA's prohibitions, many commentators have strongly criticized the fact that section 34 protects only "residences", rather than the habitat, of species at risk. Since habitat loss is the major threat facing 80% of Canada's species at risk, there is widespread consensus that the key to protecting species is protecting their habitats, not just the individual trees or dens in which species may spend part of their time. As drafted, SARA does not confer mandatory protection of habitat for any species at risk, unless Cabinet makes a discretionary decision to designate and protect a particular species' "critical habitat" on a case-by-case basis (sections 58, 59 and 61). Even if Cabinet was inclined to make such an order for a particular species, there are no timelines prescribed by SARA for the identification of critical habitat, and recovery strategies and action plans are only required to identify critical habitat "if possible" (sections 41 and 49). Moreover, aside from the "emergency listing" provision (see above), SARA provides no authority to pass interim orders protecting critical habitat during the lengthy amount of time that may elapse between the listing of a species and the subsequent development and implementation of a recovery strategy and action plan.

The discretionary approach to habitat protection under the SARA stands in sharp contrast to mandatory habitat protections found in American and Mexican endangered species laws, and in most provincial endangered species laws across Canada. Indeed, unless habitat protection becomes mandatory rather than optional under the SARA, it is highly doubtful whether the legislation can achieve its stated purposes of preventing extinction and/or extirpation, and ensuring the recovery of species at risk.

Exceptions, Permits and Agreements

The above-noted prohibitions in the SARA are subject to a number of explicit exceptions related to public health and safety, national security, or activities in accordance with conservation measures for wildlife species under land claims agreements (section 83).

In addition, the SARA contains authority for the issuance of permits, licences or agreements that allow person to engage in activities (eg. scientific research programs) that affect species at risk or their critical habitat, provided that the activity benefits the species, enhances its chances of survival, or otherwise does not jeopardize the recovery of the species (sections 74 to 78).

Project Review

The SARA provides that persons who are required to undertake an environmental assessment pursuant to the *Canadian Environmental Assessment Act* must take into account the potential effects of the project upon listed species or their critical habitats (sections 79 and 137). In particular, such persons are obliged to immediately notify the appropriate federal Ministers if such effects are likely to occur, and are further obliged to implement mitigation and monitoring measures to avoid or lessen such effects upon listed species or their critical habitat.

Compliance and Enforcement

Federal officials have suggested that enforcement of SARA will be undertaken in close cooperation with provincial, territorial and local law enforcement agencies. Nevertheless, the SARA contains authority for inspections, monitoring, investigations, and prosecutions that are

typically found in environmental laws at both the federal and provincial levels (sections 85 to 96).

Contraventions of the SARA carry a variety of penalties (eg. fines, jail terms, profit-stripping, forfeitures, restraining orders, restoration orders, etc.), depending upon the nature of the offence and other factors (sections 97 and 103 to 105). Corporate directors and officers may also be convicted and punished if they directed, authorized, or participated in contraventions under the SARA (section 98). Due diligence has been explicitly recognized as a defence under the SARA (section 100), and a two-year limitation period has been proposed (section 107). Alternative measures may also be used in lieu of prosecution in certain circumstances (sections 108 to 119).

(c) Recovery and Management Planning

Assuming that a wildlife species has been listed as endangered or threatened under the SARA, then recovery plans (sections 37 to 46) and action plans (sections 47 to 56) must be developed for the species in conjunction with provincial and territorial officials, First Nations, landowners, conservation groups, and other stakeholders. Recovery strategies and action plans for extirpated species appear to be optional under the SARA (section 37(3)).

Where required, a recovery strategy must be proposed by the relevant Minister(s) and placed on the public registry within one year if the particular species is listed as endangered, and within two years if the species is listed as threatened (section 42). In preparing a recovery strategy, the Minister(s) must first determine if the recovery of the species is "technically and biologically

feasible", based upon information from COSEWIC and other sources (section 40). If recovery is adjudged to be feasible, then the recovery strategy must identify and assess the threats to the species' survival, and must describe the steps to be taken to address those threats (section 41). In preparing a recovery strategy, the Minister(s) may adopt a "multi-species or an ecosystem approach" (section 41(3)).

Once the recovery strategy is in place, the SARA requires the preparation of one or more action plans (section 47), which is to be placed on the public registry upon completion (section 50). Among other things, the action plan must identify the specific measures to be undertaken in a given area to implement the recovery strategy, and must include an "evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation" (section 49).

As described above, recovery strategies and action plans should also identify the species' critical habitat "if possible". Where the designation and protection of critical habitat imposes "extraordinary impacts" upon landowners or other persons, the SARA authorizes the establishment of a compensation fund for such persons (section 64). Regulations that set out compensation procedures, eligibility criteria, or terms and conditions may be promulgated by Cabinet (section 64(2)).

The SARA also confers authority upon the federal government to enter into stewardship agreements with any other government, organization or person for the purposes of protecting species at risk or their critical habitat (section 11), although some conservation groups question

whether the federal government has committed sufficient funding to facilitate or promote conservation efforts by private landowners. For species not at risk, conservation agreements may be entered into by the federal government and other parties (section 12). Funding agreements are also possible under the SARA (section 13).

For species of "special concern", management plans are to be prepared within three years of listing, again in conjunction with all interested or affected parties (sections 65 to 73). Management plans are to be placed in the public registry upon completion (section 68).

(d) Public Involvement and Citizen Action

Among other things, the SARA's lengthy preamble recognizes that:

> All Canadians have a role to play in the conservation of wildlife in this country, including the prevention of wildlife species from becoming extirpated or extinct…
>
> Community knowledge and interests, including socio-economic interests, should be considered in developing and implementing recovery measures;
>
> The traditional knowledge of the aboriginal peoples of Canada should be considered in the assessment of species at risk and in developing and implementing recovery measures….

Accordingly, the SARA proposes a number of provisions that are intended to facilitate public involvement in matters concerning species at risk and their habitat. These provisions include:

- establishing advisory committees to advise the Minister on the administration of the Act (section 9);

- enabling any person to apply to COSEWIC for an assessment of the status of a wildlife species (sections 22 and 28);
- ensuring public access to COSEWIC reviews and reports (sections 24 to 26);
- requiring public consultation in respect of recovery strategies, action plans, and management plans (sections 39, 42 to 52, 66 to 68);
- enabling any person to formally apply for investigations of suspected contraventions of the Act (sections 93 to 96);
- requiring the establishment of a public registry to facilitate access to documents relating to matters under the Act (sections 120 to 124);
- requiring the preparation of annual reports and the periodic review of the Act (sections 126 and 129); and
- requiring the Minister to periodically establish "roundtables" consisting of persons who are interested in the protection of species at risk, and who may make recommendations related thereto (section 127).

Interestingly, the current version of the SARA no longer contains a "citizen suit" provision that would enable citizens to go to civil courts to seek judicial relief in respect of contraventions of the Act. Such provisions currently exist under the *Canadian Environmental Protection Act, 1999* and in Ontario's *Environmental Bill of Rights*, and, in fact, had been included in a previous incarnation of the SARA (eg. Bill C-65). However, the citizen suit provision has since been dropped from the SARA, which raises important concerns about ensuring legal accountability for non-compliance under the Act.

As a possible alternative to the citizen suit provision, a multi-stakeholder group (known as the "ADR Committee") recommended the creation of an independent, third-party review mechanism to ensure that the Act's provisions were being enforced in a timely and effective manner. Although this suggestion (which was developed during discussions about Bill C-33) appears to have enjoyed consensus support from most stakeholders, the current version of the SARA does not contain any such review mechanisms for dispute resolution.

PART IV – CONCLUSIONS

Assuming that the proposed SARA is actually passed and proclaimed into force, it remains to be seen how the Act's numerous discretionary provisions will be interpreted and applied by federal Ministries and agencies. For example, unless and until the federal government actually promulgates the list of species at risk, extends the Act's prohibitions to "non-federal species", designates critical habitat, establishes the permitting system, and undertakes investigation and enforcement activities under the Act, it cannot be concluded that the SARA will provide effective and enforceable protection for all species at risk across Canada. For this reason, it is somewhat premature at this time for the federal Environment Minister to assure Canadians that the SARA (as drafted) will "guarantee" the protection and recovery of all species at risk in Canada.

September 18, 2001