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The New Species at Risk Act and Resource Development

*by John Donihee**

Introduction and Background

On April 11th, 2000 the federal Minister of the Environment introduced his government's new *Species at Risk Act*[1] (SARA) to Parliament for first reading. The new Bill has been awaited with both eagerness and trepidation by environmental non-government organizations and Canada's resource industries alike. Canada's last foray into this area, the *Canada Endangered Species Protection Act*[2] (CESPA) died on the order paper when the 1997 federal election was called.[3] From 1997 until the reintroduction of the legislation, an extensive consultation program was undertaken by federal officials and the Minister in an attempt to resolve the controversies which resulted from CESPA's provisions and to develop, if possible, a consensus on the form and content of the new legislation.

Canada's new legislation is the centrepiece of a three part strategy aimed at addressing the needs of species at risk. The other two components are an Accord for the Protection of Species at Risk[4] agreed to by federal and provincial ministers responsible for wildlife in 1999 and a stewardship program which will encourage both conservation and voluntary measures for the protection of habitat and species.[5]

Canada's commitment, at least to the idea of protection for species at risk, is not new. The *Canada Wildlife Act*[6] when first enacted included a section which read:

> **9.** The Minister may, in cooperation with one or more provincial governments having an interest therein, take such measures as he deems necessary for the protection of any species of non-domestic animal in danger of extinction.

In 1976, speaking at a conference on Canada's Threatened Species and Habitats, the Honourable Jean Marchand, then Minister of the Environment, said with respect to endangered species.... "the government and my Department have already assumed certain responsibilities and have no intention of evading those that they will be called upon to assume in the near future."[7]

In the late 1980's, culminating in 1990, Canada and the provincial governments developed a Wildlife Policy for Canada [8] to which all jurisdictions have now subscribed. This policy includes provisions addressing the need to protect species and ecosystems at risk and a commitment to action by the subscribing jurisdictions to implement the policy.

Canada was the first industrial nation to ratify the *Convention on Biological Diversity*[9] which included a commitment to legislation for the protection of threatened or endangered species. The federal and provincial governments responded to *Canadian Biodiversity Strategy*[10] which

Résumé

Le 11 avril 2000, le projet de loi C-33, la nouvelle *Loi sur les espèces en péril*, a été déposé en première lecture au Parlement. Une version antérieure de la législation sur les espèces en péril, le projet de loi C-65, avait suscité des réactions orageuses et était mort au Feuilleton lors de l'élection fédérale de 1997. Les représentants des industries de développement des ressources naturelles, à savoir les industries pétrolière, minière, forestière et des pêches ont fait part de leurs inquiétudes au Comité permanent de l'environnement et du développement durable vers la fin 1996 et en 1997. Cet article examine le projet de loi C-33 et fait un tour d'horizon des préoccupations de ces secteurs industriels. Les dispositions de la nouvelle loi sont décrites pour déterminer la façon dont les inquiétudes des industries de développement des ressources ont été apaisées. Dans l'ensemble, le gouvernement fédéral semble avoir été sensible aux préoccupations des secteurs industriels.

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includes provisions addressing the commitments made in the Convention by developing the restoration or rehabilitation of both species and ecosystems. In 1996 the federal, provincial and territorial governments negotiated a national Accord for the Protection of Species at Risk. Introduction for first reading of Bill C-65, in October 1996, followed closely on these events.

Part 2 of this article will provide a brief overview of Bill C-65. Part 3 will review the responses to CESPA by the oil and gas, mining, forestry and other resource development industries. Part 4 reviews the provisions of Bill C-33. Part 5 then examines the new Bill in light of the concerns expressed by resource development industries about Bill C-65. My conclusions are found in part 6.

An Overview of Bill C-65, the *Canada Endangered Species Protection Act*

The purpose of CESPA, expressed in section 5, was to prevent wildlife species from being extirpated or becoming extinct and to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity. A "wildlife species" was defined as a species, subspecies or geographically distinct population of animal, plant or other organism that is wild by nature and native to Canada or which has extended its range into Canada without human intervention and has been present at least 50 years. "Species at risk" was defined as an extirpated, endangered, threatened or vulnerable species. The terms, "critical habitat" and "residence" were defined in the Bill but the term habitat was not.

Bill C-65 would have applied to listed migratory birds, marine mammals, fish and other aquatic species, species that ranged across international borders and all species on federal lands. It would have applied on federal lands including the territories and the ocean out to the 200 mile limit.

The listing process was the heart of CESPA. The Committee on the Status of Endangered Species in Canada (COSEWIC) was established[11] as a group of experts who would assist in developing the list of species at risk on the basis of the best available information about the biological status of the species. The functions of COSEWIC were set out in subsection 13(3) and included the designation of species at risk and classifying them as either extinct, extirpated, endangered, threatened or vulnerable (s.18). A one year time frame was established within which COSEWIC had to make a decision on the designation of a species which was the subject of a report prepared by or received by the committee. Emergency designations were permitted (s.22).

The regulation which listed the COSEWIC species designations was made by Cabinet (s.30). Species designated by a province could also be added to the regulation (ss.30(3)) if the minister of a province requested the listing and agreed to participate in recovery planning. Another avenue for provincial involvement in the listing process was through the Canadian Endangered Species Conservation Council (CESCC) established under section 12 of CESPA. This Council was to be responsible for providing general direction to COSEWIC.

Once a species was listed, it was necessary for the Minister to prepare a recovery plan, in cooperation with other ministers and governments (s.38). For endangered species, the plan had to be completed within one year, for other species at risk, two years. Based on the advice of COSEWIC, the responsible minister had to determine whether the recovery of the wildlife species was technically and biologically feasible (ss.38(4)). If recovery was feasible, the plan had to address the critical habitat of the species and other threats and include a description of the measures needed to reduce the threats to the survival of the species. If recovery was not technically or biologically feasible, the actions taken to protect the species were limited (ss.38(7)). CESPA did not include any provision making the implementation of recovery plans mandatory.

Public involvement and information about the process was provided for by allowing applications by individuals to have a species designated, reclassified or to have a species' designation revoked (s.19). Such applications could also be made on an emergency basis. COSEWIC had to give reasons for its decisions on such applications and they were to be placed on a public registry.

Significant enforcement powers were included in CESPA. Prohibitions against the killing, harming, harassing, capture or taking and against the trading, possession, collecting, buying or selling of individuals of endangered species were included. A further prohibition against damage or destruction to the residence of a listed endangered or threatened species was included (s.32). Emergency orders to protect a species at risk were possible when COSEWIC made an emergency designation or if a recovery plan was failing. These emergency orders could include provisions to protect the residences of the species and protecting the critical habitat of the species. If all reasonable alternatives to an activity were considered and all feasible measures were taken to protect the habitat of the species, a permit could be issued authorizing a person to engage in activities affecting listed species or their habitats.

Enforcement officers could be appointed under CESPA and they had inspection, search and seizure powers. Fines of up to $100,000.00 for a corporation and $50,000.00 for an individual could be levied for the killing of listed endangered or threatened species or for the destruction of their residences, if prosecuted by way of summary conviction. If the Crown proceeded by way of indictment, the fines could be up to $500,000.00 and $250,000.00 respectively. Doubling of a fine was possible for second or subsequent offences. These were strict liability offences and section 80 provided for a

due diligence defence. Section 84 provided for a variety of court orders contingent upon conviction. Section 85 provided for the suspension of sentence thus making probation a possibility and section 87 provided for diversion of a prosecution by way of alternative measures. For proceedings by way of summary conviction, a limitation period of two years was established.

Among the more controversial provisions in CESPA were those permitting investigations (s.56) and endangered species protection actions (s.60). An investigation's purpose was to determine whether an alleged offence had been committed. The minister did not have to proceed if it was determined that the request was frivolous or vexatious. Once the investigation was complete, the minister could refer the evidence to the Attorney General for consideration. If the minister's decision not to investigate or the minister's response, after the completion of an investigation were unreasonable, section 60 permitted the citizen who had applied for the investigation to bring an "endangered species protection action" against a person alleged to have done anything directed toward the commission of an offence. This was a civil action with a limitation period of two years where liability would be determined on the balance of probabilities.

The Resource Development Industry's Response to Bill C-65

The positions of the oil and gas, mining, forest and fishing industries with respect to CESPA were determined by reference to their presentations filed with Parliament's Standing Committee on the Environment (the "Standing Committee") during its consideration of Bill C-65. There was considerable common ground among industry groups appearing before the Standing Committee. None of the submissions made by resource development industries opposed endangered species legislation, in fact all of the submissions supported the legislation. The representatives of each of these industrial sectors made suggestions for the improvement of the Bill. Industry positions are summarized and reviewed sector by sector below.

The Canadian Association of Petroleum Producers (CAPP)[12] expressed support for the protection of endangered species and the protection of biological diversity, consistent with Canada's international obligations. CAPP observed that Bill C-65 contributed significantly to the goals of the National Accord for the Protection of Species at Risk but outlined several concerns with respect to the Bill.

The "Americanization of Public Policy" based on the adoption of a command and control approach in CESPA, would embroil the judiciary in matters best resolved by other means. In CAPP's view, Bill C-65 would result in unwarranted litigation based on the section 60 endangered species protection actions. The regulatory framework established by CESPA had not been integrated with already existing planning and approvals processes. There was no provision for compensating persons affected as a result of action taken to protect and preserve endangered species on private land. The CESCC's role in giving advice to COSEWIC with respect to the listing of species at risk needed to be clarified. Recovery planning should include a benefit cost component to ensure that the benefits of protection action justify the costs.

CAPP emphasized the importance of voluntary action in response to positive incentives as a mechanism to protect species at risk and the absence of such instruments in the Bill. The elimination of the section 60 private action was recommended. CAPP pointed out that a civil action alleging an offence involving endangered or threatened species could result in liability based on a lower threshold, the balance of probabilities, at times when a prosecution for the same alleged offence could not succeed because of the criminal burden of proof. Furthermore, a civil action would import none of the constitutional and other protections enjoyed by a defendant in the criminal prosecution. CAPP suggested that allowing the civil actions in these circumstances could be unfair.

CAPP also pointed out that while the benefits derived from the protection of endangered species would be shared by all Canadians, the costs resulting from the listing of a species could fall on individuals and adversely impact on their enjoyment of private property rights. CAPP recommended that any loss in value of private property arising from measures taken to protect or recover species at risk should result in a compensation payment from government. Another of CAPP's concerns related to the role of COSEWIC in making designations of species at risk. CAPP recommended that CESPA clearly indicate that COSEWIC could only make recommendations and that the decision on listing a species be made by the federal cabinet.

The Mining Association of Canada and the Prospectors and Developers Association of Canada (collectively MAC below)[13] recommended an integrated approach to protecting species at risk in order to ensure effectiveness and efficiency, "more carrot, less stick", suggesting that in Canada, hard to come by funds should go to species protection, not litigation. MAC expressed concern that the Bill did not respect the constitutional authorities of the provinces and urged the federal government to strive to achieve the cooperation of the provinces and the corporate sector in protecting species at risk. Since recovery plans were the heart of the legislative thrust in the Bill, MAC recommended that sound science be applied to recovery plans and habitat protection and that development activities be considered in light of different levels of impact. MAC's submission recommended that "habitat" be defined in the Bill, that the geographical scope of agreements, prohibitions and orders be clarified and that a time frame be included in emergency orders. MAC also

recommended that endangered species protection actions be dropped.

The Canadian Pulp and Paper Association[14] and the Council of Forest Industries[15] (collectively CPPA below) appeared on behalf of the forest industry and outlined their concern that the Bill would not promote partnerships and that it did not focus on the protection of habitat which would be essential to the preservation of biodiversity. They too opposed citizen actions under section 60 and indicated concern with the apparent emphasis on command, control and enforcement in CESPA. Concern was raised in the CPPA submission about federal intrusion into provincial constitutional jurisdiction. They also recommended a socio-economic impact analysis be conducted before initiating any recovery plans and that land owners and industry impacted by recovery plans be compensated.

The Fisheries Council of Canada[16] (FCC) recommended that stakeholders be allowed to develop responsible responses to endangered species issues in the fisheries and not be locked into intractable, heavy handed legislative requirements. The FCC also wanted the criteria for assessing the status of endangered species to be developed by COSEWIC but recommended to CESCC for their approval and that the listing of species be the responsibility of the Governor in Council. The FCC felt that government should have the opportunity to consider the ramifications of listing a species. The FCC wanted to limit the responsibility for referring any aquatic species for listing to the Minister of Fisheries and Oceans. FCC recommended the insertion of a clause in subsection 60(1) to prevent frivolous or vexatious civil actions. The FCC concluded by recommending that CESPA include appropriate checks and balances and that it provide a framework to engender cooperation among constituents.

The New *Species at Risk Act, Bill C-33*

Bill C-33 repeats the purposes of CESPA, "to prevent the extirpation or extinction of wildlife species and to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity". A new element is, however, added to C-33's purpose, to manage "species of special concern". These are species at risk which are not extirpated, endangered or threatened, but which are particularly vulnerable to human activity or natural events.

The SARA definition of "wildlife" is essentially unchanged except that it now explicitly excludes bacteria and viruses. A definition of "habitat" is included. In respect of aquatic species, this includes spawning grounds, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes. In respect of other wildlife species, it includes the area or type of site where an individual or wildlife species naturally occurs or formerly occurred and has the potential to be reintroduced.

The application of SARA is limited, unless the Governor in Council takes action. Sections 32 and 33 which prohibit the killing, harming, capture or taking of a listed species and the damaging or destruction of the residences of listed species respectively, only apply in provinces to species other than migratory birds and aquatic species on areas that are not federal lands if the Governor in Council makes an order to that effect. Such an order can only be made after consultation with the province and if the minister is of the opinion that the laws of the province do not protect the species. In the territories, sections 32 and 33 apply in respect of listed species only to the extent that an order of the Governor in Council specifies. Section 36 provides for the application of sections 32 and 33 to enforce protection of species listed by a province or territory on federal lands to the extent ordered by the Governor in Council.

SARA provides for the establishment of a Canadian Endangered Species Conservation Council (CESCC) with duties very similar to those of the CESCC proposed by CESPA. The Council is, however, no longer to be jointly chaired by a federal and a provincial wildlife minister. Instead, it is made responsible for the coordination of the activities of various governments in the protection of species at risk. Provision is made for the establishment of advisory committees to assist the Council.

Under the heading of stewardship, C-33 provides for agreements among the federal government and any government in Canada, organization or person, to monitor, develop public education programs, develop and implement recovery strategies, action and management plans, protect the habitat and critical habitat of species at risk. Section 12 of SARA also provides for the use of such agreements to prevent a species from becoming a species at risk. Consultation between the federal minister and other ministers and with the CESCC is required before entering into any such agreement. Section 13 authorizes federal contributions toward programs established under such agreements.

SARA's listing process will also depend on COSEWIC which is established by section 14 and will be responsible for assessing and reassessing the status of species at risk, ranking the urgency of assessing a particular species, developing criteria for assessing the status of wildlife species and providing advice to the minister and the CESCC. COSEWIC is to carry out its duties on the basis of best available knowledge. The Committee must base its assessments on status reports. These reports can be prepared by COSEWIC or submitted along with a request for the assessment or reassessment of a species' status. COSEWIC has one year after the receipt of a report to make its assessment and provide its reasons. The assessment and reasons will be included on a public registry.

COSEWIC no longer designates species at risk. The list of species at risk is established by regulation and the decision to add or remove a species at risk from the regulations is clearly in the hands of the minister (s.27). As in CESPA, emergency listing provisions are included.

The prohibitions against killing, capturing or taking and against the destruction of the residences of species at risk found in sections 32 and 33 of SARA are virtually unchanged from those found in CESPA. In the provinces, the application of these provisions is limited to aquatic species and migratory birds unless the species are found on federal lands. An order can be made by the Governor in Council to apply these prohibitions in the provinces where the law in the province does not, in the minister's opinion protect the species. The order cannot be made unless the appropriate provincial minister is consulted. In the territories, the prohibitions apply only to the extent that the Governor in Council specifies in an order. Consultation with the appropriate territorial minister is required before the order can be made. Section 36 will, subject to an order by the Governor in Council, apply the prohibitions found in sections 32 and 33 on federal lands in the provinces to species listed under provincial but not federal legislation.

If a species is listed as endangered or threatened, a recovery strategy must be prepared by the minister (s.37). Strategies are optional for extirpated species. Recovery strategies are, to the extent possible, to be developed cooperatively. In preparing the strategy, the minister must determine if recovery is technically and biologically feasible. For those species where recovery is not deemed possible, the strategy required is limited to a description of the species, its needs and critical habitats and the reasons why recovery is not possible. Proposals for a recovery strategy must be filed in the public registry within one year of listing for endangered species and two years for threatened species. After a period for comment and revision, the strategy is finalized.

The minister responsible must then prepare an action plan based on the strategy. Again, these action plans are to be prepared cooperatively if possible and subsection 48(3) specifically requires consultation with directly affected persons and land owners who would be affected by the recovery strategy. The action plans must include an identification of a species' critical habitat, the measures to be taken to protect it, a statement of the measures to be taken to implement the recovery strategy, including a time frame and an evaluation of the socio-economic costs of the action plan and of the benefits to be derived from its implementation. A completed action plan will be filed on the public registry. The action plan must be completed within the time specified in the recovery strategy.

SARA provides for the development of codes of practice for the protection of critical habitats. Section 58 prohibits the destruction of those critical habitats found on federal lands which are specified by order of the Governor in Council. Both the preparation of such an order and the development of regulations under section 59 to protect critical habitats on federal lands are subject to extensive consultation requirements. Subject to the requirement for an order under either section 60 or 61, the critical habitats of species listed in provincial or territorial legislation and found on federal lands or federally listed species whose critical habitats are not on federal lands can also be protected.

Section 62 provides for the acquisition of lands for the purpose of protecting the critical habitat of threatened or endangered species. Section 64 provides for compensation to be paid "for losses suffered as a result of any extraordinary impact of the application of section 58, 60 and 61 or an emergency order.....that is necessary for the survival or recovery of a wildlife species" (my emphasis). Provision is made for regulations to outline the procedures for making compensation claims, for determining the eligibility of claimants, damages and the amount of compensation to be paid.

A permit for an activity affecting a listed species or its critical habitat may be secured from the minister on terms very similar to those provided for in C-65. The minister must be notified if any project subject to environmental impact assessment will affect a listed wildlife species or its critical habitat. SARA also includes provisions for emergency orders to protect listed species.

The provisions dealing with the appointment of enforcement officers and their authorities, search, seizure and enforcement are largely unchanged but are more carefully detailed than those found in CESPA. Under sections 93 and 94, a person over 18 years of age may still apply for an investigation of an alleged offence under the Act. These provisions are virtually unchanged from those in C-65. The minister need not investigate complaints which are determined to be either frivolous or vexatious. The controversial endangered species protection action has been removed from the statute.

The offence and punishment provisions in SARA still provide for both summary conviction and indictable offences. These are strict liability offences and a due diligence defence is available. In Bill C-33, the maximum fines for corporations have been raised. Under CESPA, a corporation could be fined a maximum of $100,000.00 for a summary conviction offence and $500,000.00 for conviction on an indictable offence respectively. In SARA these potential fines are raised to $300,000.00 and $1,000,000.00 respectively. Section 102 now outlines a series of sentencing considerations which must be taken into account by a court upon conviction. They include the harm or risk of harm caused by the offence; whether the offence was intentional, reckless or inadvertent; negligence or incompetence in the commission of the offence; benefits

resulting from the offence; the compliance history of the offender; and all available sanctions which are reasonable in the circumstances. Otherwise, the offence and punishment provisions and alternative measures provisions found in C-33 are much the same as those in C-65.

Annual reports must be made to Parliament on the administration of SARA and reports on the status of wildlife species must be prepared every five years. A five year review of the legislation must be undertaken by a committee of the House of Commons or the Senate.

SARA and Resource Development Industry Concerns

Review of Bill C-33 in light of the concerns expressed by representatives of resource development industries indicates that many of the changes recommended during the review of Bill C-65 have been incorporated into the new Bill.

The strong, universal rejection of the proposal for endangered species protection actions under section 60 of CESPA and the concerns expressed about a potential proliferation of litigation affecting resource development activities were successful and this provision was eliminated in the new Bill. The strong command and control flavour of CESPA has been muted by the inclusion of provisions to encourage stewardship and by repeated requirements for consultation before action to protect species at risk can be taken. It must nevertheless be noted that the penalty provisions with respect to corporate offenders have been strengthened and that all of the fundamental elements of the enforcement, search and seizure, penalty and alternative measure provisions found in C-65 remain intact. While consultation and stewardship may be the first choice for dealing with species at risk concerns, strong enforcement and punishment remain an option under SARA.

The investigation provision which accompanied the endangered species protection action under CESPA has been retained. It should be noted, however, that the minister can refuse to proceed with an investigation on the grounds that it is frivolous or vexatious. A similar investigation provision has been in place under section 108 of the *Canadian Environmental Protection Act*[17] since 1988. These investigations have not proven problematic, or even popular.

Another general concern shared by presenters on behalf of resource development industries related to the roles of COSEWIC and the minister with respect to the designation of species at risk. This concern too has been addressed in the new Bill. COSEWIC's role is now limited to the assessment and classification of species at risk. The decision to list species at risk will be made by the Governor in Council based on the minister's recommendation. We can assume that cabinet will examine the effect of such a decision comprehensively.

Like C-65, SARA provides for an assessment of the feasibility of a recovery strategy and for limitations on the level of commitment required if a species' recovery is unlikely. Bill C-33, however, also includes a requirement to evaluate the "socio-economic costs of the action plan and the benefits to be derived from its implementation" (para 49(1)(d)) a measure recommended in several of the resource developers' submissions. The requirement for the conduct of this evaluation may provide some comfort to resource industries concerned with ensuring that the action plans upon which recovery strategies are based will be both pragmatic and affordable.

In the interlude between the expiry of CESPA and the introduction of C-33, the issue of the impact of species at risk legislation of private property rights was thoroughly canvassed[18], primarily by comparison with experience under similar legislation in the United States This concern had also been raised by resource development industries in their appearances before the Standing Committee looking at Bill C-65. Recommendations were made for a system through which land owners could claim compensation if property rights were adversely affected by the listing of a species located on their land. Compensation was not mentioned in C-65.

In SARA, section 64 makes limited provision for land owner compensation arising because of the "extraordinary impacts" of the prohibitions which prevent the destruction of the critical habitats of species at risk. The term "extraordinary impacts" is not defined. Subsection 64(2) authorizes regulations which will determine eligibility, procedures for claiming and the amount of compensation to be paid a claimant.[19] Until these regulations are developed, it is not possible to predict how this system will work. What can be said, however, is that unless regulations are developed, the operation of the system will be completely discretionary and that the use of the word "extraordinary" does not augur for overly generous application of the compensation provision. The section 64 compensation system may fall short of industry and land owner expectations. Careful attention to the content of the new regulations is warranted.

Another theme in the presentations of resource industries was the need for coordinated and cooperative federal provincial action to protect species at risk. This call for more cooperation has been reflected in Bill C-33. The Bill includes numerous provisions which require consultation before federal action can be taken, primarily among governments, but also with land claims groups and with land owners. Other provisions authorize a variety of agreements on matters ranging from conservation agreements for species at risk to agreements to authorize activities affecting the critical habitats of listed species. Cooperative efforts are also demanded by several provisions, including cooperation on recovery strategies and recovery plans. SARA clearly provides a framework for a cooperative approach to species at risk which is consistent with federal and provincial commitments made in

the National Accord for the Protection of Species at Risk. Given the difficulties inherent in such consultation processes, those hoping for bold federal action once species at risk legislation was passed may be disappointed.

Several of the industry groups emphasized the importance of stewardship agreements as a mechanism to provide positive incentives for land owners to cooperate in the protection and recovery of species at risk. This theme attracted a great deal of attention, time and effort in the run up to Bill C-33. The preamble to the statute now includes explicit reference to the contribution which stewardship can make to the protection of species at risk and sections 11 to 13 make provision for stewardship agreements for species at risk, for other wildlife and for funding such arrangements. Perhaps the most important reflection of Canada's commitment to this new approach is the three year $90 million dollar program announced concurrent with the tabling of the legislation by the Minister.

One of the concerns raised by the resource industry and environmental organizations about CESPA related to the levels of political discretion built in to the legislation with respect to key elements of the framework for the protection of species at risk. Review of SARA indicates that if anything, the number of discretionary decisions made at the ministerial or cabinet level has increased. This may have been an inevitable result of the decision to build more consultation into the management and protection of species at risk but it also appears that the legislation reflects a determination that the important decisions about species at risk will be made at the political level. The number of discretionary decisions and orders which determine the application of the legislation may make it difficult to envision the full scope of the new system.

Conclusion

Federal species at risk legislation is strongly supported by Canadians.[20] The development of the new SARA legislation has required an intense multi year national consultation effort. In the final analysis, the SARA must achieve a balancing of the interests of stakeholders, industry and governments while ensuring the protection and recovery of species at risk. This is a tall order. It is perhaps understandable that such a balancing act will leave some parties unhappy, at least part of the time.

A review of the concerns raised by selected resource development sectors during the Standing Committee hearings on Bill C-65 and a review of the provisions of Bill C-33 indicates that most of the significant concerns raised by these industries have been addressed in the new legislation.

However, the task is not yet complete. Industry and others concerned about the protection of species at risk must continue to work cooperatively to develop the regulations necessary to fully implement SARA and participate in the stewardship and voluntary action programs being developed to complement the legislation. Effective federal legislation is only one element in the protection of biodiversity in Canada.

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Notes:

1. Bill C-33, 2nd Sess., 36th Parl.,1999-2000. First reading April 11, 2000.

2. Bill C-65, 2nd Sess., 35th Parl., 1996. First reading, October 31, 1996.

3. There had been earlier attempts at federal endangered species legislation. Two private members bills were introduced in 1991 but went nowhere, see Bill C-209 and Bill C-303, 3rd Sess., 34th Parl., 1991. Two government bills introduced in 1994 and 1996 suffered the same fate. See Bill C-275, 1st Sess., 35th Parl.,1994, first reading September 1994 and Bill C-238, 2nd Sess., 35th Parl., 1996, first reading March, 1996.

4. Accord for the Protection of Species at Risk, September 1999, available at www.cws-scf.ec.gc.ca/sara/stategy/accord_e.ht The Accord was agreed to in principle in 1996 and was amended in 1998 to strengthen the role of stewardship in the protection and recovery of species at risk.

5. The Government of Canada has committed $90 million dollars over three years for incentives for people to become involved in specific programs to protect species and help them recover. *Speaking Notes for the Honourable David Anderson, April 11, 2000.* Available at www.ec.gc.ca/minister/speeches/000411_s_e.h

6. S.C. 1973, c. 21 (first enactment) now R.S.C. 1985, c. W-9 as amended.

7. Proceedings of the Symposium on Canada's Threatened Species and Habitats, (Canadian Wildlife Federation: Ottawa, 1977) at page 3.

8. A Wildlife Policy for Canada, (Canadian Wildlife Minister's Council: Ottawa, 1990) 29pp.

9. *Convention on Biological Diversity,* 5 June 1992, Can. T.S. 1993, No. 24.

10. *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity* (Minister of Supply and Services: Ottawa, 1995).

11. This step was a formality. COSEWIC had been operating since 1978 in a cooperative framework which involved federal, provincial and independent experts who examined the status of species and listed species at risk.

12. Submission of the Canadian Association of Petroleum Producers, January 27, 1997.

13. A Brief Submitted by the Mining Association of Canada and the Prospectors and Developers Association of Canada, November 21, 1996.

14. Comments on Bill C-65 The Canada Endangered Species Protection Act: The Need for a Cooperative Approach, November, 1996.

15. Comments on Bill C-65 The Canada Endangered Species Protection Act, January 1997.

16. Presentation to the Standing Committee on Environment and Sustainable Development, November, 1996.

17. R.S.C. 1985 (4th Supp.), c.16. Section108 came in to force June 30, 1988.

18. See for example, Robert J. Smith and M. Danielle Smith, "Endangered Species Protection: Lessons Canada Should Learn from the United States *Endangered Species Act*", Property Rights Journal, Vol.1 No.1, October 1997.

19. Concurrent with the release of the new Bill, Minister Anderson announced the appointment of Dr. Peter Pearse of the University of British Columbia to study and report on compensation issues.

20. See "Canada's Plan for Protecting Species at Risk: An Update", Environment Canada, December 1999, page 4. Available on Environment Canada's web site at <www.ec.gc.ca>.

NEW PUBLICATIONS

The Evolution of Wildlife Law in Canada, *by John Donihee. 2000. 73 pages. Occasional Paper #9. $15.00*

Wildlife law evolves in response to the ecological status of wildlife populations, changing values and societal objectives for wildlife and changes to the domestic and international legal context within which wildlife is managed. Canadian wildlife law has changed significantly since the time of Confederation.

This study briefly explored the constitutional framework for and common law sources of Canadian wildlife law. It then developed a series of criteria which distinguished three distinct eras in our wildlife law. The earliest, the game management era, lasted the longest from the time of Confederation until about the 1960s. The transitional wildlife management era then lasted until about the mid-1980's. The most recent sustainable wildlife management era is about 15 years old.

Provincial, territorial and federal wildlife laws were reviewed, assessed and grouped on the basis of the criteria developed in this study. The results show that the pace of change in our wildlife law is increasing and that the framework of wildlife law in all Canadian jurisdictions is moving toward more sustainable wildlife management.

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