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Keeping Up With the Feds:
The Provincial Response to Canada's *Species at Risk Act*

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Keeping Up With the Feds: The Provincial Response to Canada's *Species at Risk Act*

By

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Abstract

This thesis examines how the threat of federal intrusion into provincial jurisdiction over natural resource management which accompanied the development and passage of Canada's *Species at Risk Act* (SARA) has impacted provincial legislation and policies aimed at protecting endangered species. SARA's safety net provisions constitute the mechanism by which Ottawa may act unilaterally to provide effective protection for species at risk and their habitats where a provincial or territorial government fails to do so. The federal government's historical reluctance to use similar clauses in other environmental legislation suggests that the true value of the safety net is the degree to which threat alone is sufficient to motivate provincial action. A review of the statutory and policy changes undertaken by the provinces reveals the extent to which the development of SARA and its safety net has spurred provincial governments to provide more effective protection for endangered species.

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CHIEF SEATTLE'S Message
(adapted by the Grade 5 class of Mulgrave School, 2006/07)

They want to buy THIS land.
But how can you BUY or SELL the EARTH or SKY?
The idea is so strange.
If we do not own the FRESHNESS of the air,
The SPARKLE of the water,
The POWER of the land,
Then WE ask,
How can you buy or sell…
…every part of this spirited land is sacred to us
Like the air to our lungs
EVERY shimmering pine needle,
EVERY crisp shore
EVERY haunting mist in the dark woods,
EVERY wind-tossed meadow
EVERY humming insect.
ALL these things are the pounding HEART of the EARTH

They are ALL holy in our memory and experience

We are part of the EARTH and it is part of US.
The sticky sap which flows through the trees
Is like the blood that flows through our veins.
The enchanting flowers are our sisters.
The swift deer, the soaring eagle, the mighty bear
these are our brothers.
The rocky crests,
the moist dew in the field,
the cool mountain streams.
We all belong to the same family.

The glistening water that trickles through streams
is not just WATER
IT IS the crimson BLOOD of elders past.
The land is an expression of us
Each glossy reflection in the water
tells of events and memories in our lives.

The rivers are our family, our parents.
Feeding our hunger.
Quenching our thirst.
They help our canoes flow across to other lands,
But not for nothing in return.
We must reciprocate with love and respect.

The air is our spirit and brings us life,
Our first breath is taken from our ancestor's last sigh.
Man follows the wind
Sweetened by the flowers of our land
Our meadow
Our Earth

The Earth
Our Mother
Keeper of the elements,
What befalls her, befalls us

This we know
The earth does not belong to man,
Man belongs to earth.
All things are connected
like the blood that unites us all.
Man did not weave the web of life,
He is merely a strand.
Whatever is done to the web,
Is done to himself.

One thing we know,
Our God, is your God.
The earth is precious to Him,
to harm the earth is to heap contempt on its creator.
Your destiny is our mystery.
What will happen
When the buffalo are slaughtered?
When the wild horses are tamed?
When the great eagle no longer soars?
What will happen
When the meadows are covered with concrete giants?
When views of ripe hills are blotted with talking wires?
When the crystal waters turn black?
What will happen when the beauty of the land is gone?
Where will the forest be?
Gone.
Where will the raven be?
Gone.
Where will nature's spirit be?
Gone.

When we have moved on,
And time has passed,
What will be left of our spirit?
Its memory a cloud moving across the prairie…
What will remain?
Will shores and forests be no more?
What of our people will be remembered?
We love this earth as a newborn loves its mother's heartbeat.
We beg you to love this land as we have loved it
And care for it as we have cared for it.
Hold in your mind the memory of the land as it is today,
And preserve that memory for all children.
Love this land as God loves us all.
As we are part of the land,
You too are part of the land.
This earth is precious to us.
It should also precious to you.

One thing that is for certain,
There is only one earth;
Those who share it can never truly be apart.
We are all brothers and sisters after all

CHAPTER 1 Introduction and Thesis Outline

Introduction

Resting under an endless prairie sky along the Saskatchewan Montana border, are over 500 square kilometers of relatively undisturbed mixed grasslands. They are located in Grasslands National Park and are home to a wide variety of rare plant and animal species. On any given day, it is possible to see a robin-sized Sage Thrasher nesting in a small shrub, or a grey and buff mountain plover calling to its mate. Mormon Metalmark and Monarch butterflies feed along the Frenchman River. Peregrine Falcons soar above the prairie landscape, and black tailed prairie dogs bark out warnings of the danger overhead.

As of January, 2005 all of these species have been identified and listed under the recently passed federal *Species at Risk Act*[1] ("SARA") as requiring some level of protection, and while within the confines of the national park they receive it. The Act provides legal protection for wildlife species which risk extinction, as well as the habitats in which they live, provided they are on federal land; outside federal land species have only the possibility of protection, should Cabinet choose to apply SARA's "safety net". Under SARA, federal land includes national parks, military bases, Indian reserves, airports and other federally owned areas, and makes up approximately 5% of Canada's land mass, excluding the territories. However, since none of these species have been designated under the provincial *Species at Risk Regulation*[2] should they leave the safety of the park, they will receive only limited protection under Saskatchewan's *Wildlife Act*[3] and the federal *Migratory Birds Convention Act,*[4] (the "MBCA"), where applicable. The question which naturally arises and which this paper will attempt to address is whether the development of federal endangered species legislation in the form of SARA, and specifically the safety net provisions within it, have contributed to increased protection of species at risk provincially.

The situation just outside the perimeter of Grasslands National Park is not an isolated example of species at risk being subject to limited or no protection. In fact, similar examples persist across Canada. Perhaps the most egregious case of an endangered species failing to receive adequate

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[1] S.C. 2002, c.29.
[2] R.R.S. c. W-13.11, Reg. 1.
[3] S.S. 1998, c. W-13.12.
[4] S. C. 1994, c.22.

protection at the provincial level is the Spotted Owl in British Columbia, where its numbers have been reduced to only 6 breeding pairs.[5]

Endangered species make up only a tiny fraction of the abundance of wildlife for which Canada is custodian. Over 70,000 wild species,[6] existing on roughly 20% of the planet's remaining wilderness, reside within our borders. Nationally, we are responsible for 24% of the earth's wetlands, 20% of its freshwater and 10% of its forests.[7] Recognizing the importance of its role in protecting and conserving wildlife species at risk for the global community, Canada was the first developed nation to sign the International Convention on Biological Diversity (the "Rio Convention") in 1992. Under the Rio Convention, the federal government is obligated to protect threatened species and habitats through the adoption of legislation or other regulatory provisions.[8]

Canada took steps towards meeting this obligation in October, 1996 when, shortly before Ottawa unveiled its endangered species bill, the federal, provincial and territorial ministers responsible for wildlife agreed the National Accord for the Protection of Species at Risk (the "Accord").[9] Although not binding legislation, the purpose of the Accord is to prevent species from becoming extinct as a consequence of human activity. The Accord also requires all levels of government to establish complementary legislation and programs directed at providing effective protection of species at risk throughout Canada.

After nearly a decade of debate, revision and three failed attempts at legislation, the federal government finally fulfilled its obligations under the Rio Convention and the Accord when it passed SARA on December 12, 2002. The Act's purpose is to prevent Canadian indigenous species, subspecies and distinct populations of wildlife from becoming extirpated or extinct, to provide for the recovery of endangered or threatened species, and to encourage the management of other species to prevent them from becoming at risk.[10] SARA also recognizes that responsibility for the conservation of wildlife in Canada is shared among the governments and that it is important for them to work cooperatively to protect and recover species at risk.

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[5] Gwen Barlee, Devon Page & Andrew Miller, *In Defense of Canada's Spotted Owl*, (Vancouver: Sierra Legal Defense Fund & Western Canada Wilderness Committee, 2005) at 5.
[6] Canadian Endangered Species Council of Canada (CESCC), *Wild Species 2000: The General Status of Species in Canada*, (Ottawa: Minister of Public Works and Government Services Canada, 2001) at 4.
[7] Environment Canada, *Canadian Biodiversity Strategy – Canada's Response to the Convention on Biological Diversity* (Ottawa: Minister of Supply and Services Canada, 1995) at 15.
[8] *Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 818 (1992), s. 8(k).
[9] Environment Canada,<http://www.ec.gc.ca/press/wild_b_e.htm>
[10] *Supra*, note 1, s.6.

The nature and extent of the responsibility of the federal and provincial governments to provide effective protection for endangered species was one of the central issues around which the debate preceding the passage of SARA focused. Since environmental matters are not expressly assigned under the *Canadian Constitution Act, 1867* (the "Constitution") to either provincial or federal levels of government, the boundary between legislative jurisdiction has been a matter of considerable overlap and uncertainty.[11] In fact, many provinces viewed federal efforts to legislate over endangered species and their habitats to be an intrusion into provincial jurisdiction over natural resource management and ultimately, economic development. Consequently, there was substantial provincial opposition to the initial federal legislative attempts at protecting endangered species. Moreover, during the period beginning in 1994 and continuing up to the present day, several of the provinces introduced or improved their endangered species legislation in an attempt to colonize their jurisdiction over the management of wildlife and their habitats.

Due in part to these political and constitutional issues, the federal government deliberately chose to restrict the general application of SARA to designated species found only on federal lands, aquatic species and migratory birds, protected under the MBCA. Since federal land comprises such a small fraction of the totality of Canada outside of the northern territories, it is clear that the bulk of the responsibility for providing effective protection of species at risk has been placed squarely on the shoulders of the provincial and territorial governments. Balancing provincial and territorial interests against the need to establish a national standard of protection for listed species, the federal government extended its legislative reach and developed, within SARA's framework, what is generally referred to as the safety net mechanism.[12] Through the safety net provisions, the federal government created an opt-in formula that would enable it to act unilaterally to establish a nation-wide standard of protection for species at risk where a provincial or territorial government fails to provide effective protection of that species and its critical habitat. The safety net is designed "to ensure that no species at risk in Canada would be allowed to fall through the cracks".[13]

[11] *Friends of the Oldman River Society v. Canada (Minister of Transport* [1992] 1 S.C.R. 3 at 64, La Forest J. [Oldman].
[12] Kate Smallwood, *A Guide to Canada's Species at Risk Act*, (Vancouver: Sierra Legal Defence Fund, 2003) at 36 [Smallwood].
[13] *House of Commons Debates,* No. 203 (June 11, 2002) at 1035 (Hon. David Anderson, Minister of Environment).

More than three years following SARA's coming into force, the safety net has not been officially utilized by the federal government despite repeated requests by environmental groups to do so.[14] Historically, similar, albeit less discretionary, safety net like provisions in environmental legislation, such as those contained in the *Canadian Environmental Protection Act, 1999* [15] (CEPA), the *Clean Air Act*[16], the *Canadian Environmental Assessment Act*[17], (CEAA) and the *Canada Water Act*[18], have never been used by the federal government.[19] Although it is premature to judge the efficacy of the safety net as a policy instrument prior to its actual use, this thesis will examine whether the development and passage of federal endangered species legislation, and the safety net contained within it, have carried enough of a threat of federal intervention into provincial jurisdiction to spur provincial action to protect species at risk. This paper will also consider, whether, in the face of the federal reticence to use the safety net provisions of SARA, and given the historical lack of use of similar unilateral instruments by the federal government, the safety net is likely to be effective as a means of achieving its intended purpose of providing a seamless web of protection for listed wildlife species throughout Canada.

The adoption of the federal safety net as a policy instrument was presented by government officials as an endorsement of a cooperative approach to protecting endangered species. The cooperative underpinnings of the legislation are embodied within SARA's preamble and specifically state that "the responsibility for the conservation of wildlife in Canada is shared among the governments ... and that it is important for there to be cooperation between the governments to maintain and strengthen national standards of environmental conservation".[20] Prior to using the safety net provisions, the federal government has indicated time and again that it will work with the provinces

[14] The most recent example at the time of writing involves a petition filed by a coalition of environmental groups including the Alberta Wilderness Association, Federation of Alberta Naturalists, Canadian Parks and Wilderness Society, Sierra Club of Canada and Nature Canada, represented by Sierra Legal Defence Fund on August 8, 2006 requesting Canada's Minister of the Environment, Rona Ambrose to utilize the safety net provision contained in section 34(3) of SARA to protect the tiny cryptanthe and small-flowered sand verbena. According to the petition, the two endangered plants do not currently receive effective protection under the existing provisions of any of the relevant Alberta legislation including most notably the Alberta *Wildlife Act*, R.S.A. 2000, c. W-10 [Alberta Wildlife Act]. Failing federal intervention and application of the safety net, the petitioners will commence a judicial review application before the courts.
[15] S.C. 1999, c.33, s.10.
[16] S.C. 1970-71-72, c.47, s.20.
[17] S.C. 1992, c.37, ss.46-47.
[18] R.S.C. 1985, c.C-11, S.C. 1969-70 c.52, sections 6, 13.
[19] Stewart Elgie, *Evidence before the Standing Committee on Environment and Sustainable Development,* June 7, 2001.
[20] *Supra* note 1.

and territories to safeguard endangered species.[21] Clearly, the safety net is meant to be used only as a measure of last resort and it is arguable that its true worth as a policy instrument lies in its ability to motivate those provinces which have been unable, or unwilling, to live up to their commitments under the National Accord.[22] To that end, while the safety net has been characterized as a cooperative policy instrument, at its heart remains the possibility of coercive and unilateral action by the federal government to legislate over the management of wildlife and their habitat wherever they may live.

Thesis Outline

The threat of federal interference in provincial jurisdiction was present in some form throughout the development of federal endangered species legislation, and became crystallized with the adoption of the safety net provisions in SARA. This paper will examine the nature of this threat and its impact upon provincial action to protect species at risk over the period beginning in 1994, when Canada began to take its first steps towards meeting its obligations under the Rio Convention, to the present day. Specifically, the paper will discuss three factors which have influenced and motivated the provincial governments to improve their law and policies aimed at protecting species at risk. These factors are the initiation and development of the federal endangered legislation in the form of SARA during the years 1994 to 2002, the signing of the National Accord in 1996 and the ongoing provincial obligations to establish complementary legislation to protect species at risk, and finally, the passage and implementation of SARA and its safety net from 2002 to the present day. In particular, the paper evaluates the degree to which these three factors have spurred on the statutory and policy changes undertaken by the provinces during the period in question. In a space of less than ten years since the first announcement of the federal intent to legislate, all of the provinces and territories either now have, or are presently developing improved endangered species legislation. It is unlikely that this nation wide legislative movement would have been accomplished as quickly solely on the back of the National Accord and the demands of the electorate.

It is my thesis that the threat of federal involvement in matters of provincial jurisdiction, which was embodied initially by the development of federal legislation, and ultimately by SARA and its safety net, increased the urgency of the provinces to make legislative and policy improvements in

[21] *House of Commons Debates,* No. 91, (October 3, 2001) at 1535 (Hon. David Anderson, Minister of Environment

[22] Stewart Elgie, *Evidence before the Standing Committee on Environment and Sustainable Development,* March 27, 2001 at 1050.

protecting species at risk in order to protect their jurisdictional interests over wildlife and their habitat. However, to the extent that the federal government does not exercise this threat, its ability as a policy instrument to achieve the objective of providing effective protection for species at risk may be compromised, and consequently, the pursuit of an alternative intergovernmental policy may be necessary.

In particular the paper examines the extent to which these three factors have motivated the provincial governments to:

(i) raise the overall standard of endangered species protection in terms of listing, protection, habitat protection and recovery planning; and

(ii) meet the standard of "effective protection" required by SARA's safety nets.

It is possible to assess the quality of the protection available for provincial and territorial species at risk in terms of the adequacy of statutory listing requirements, protection from direct harm for species and their residences, habitat identification and protection, and finally, recovery planning. It will be shown that the changes undertaken by the provinces during the time periods in question have clearly improved the quality of endangered species protection. The increased listing, wider protections against direct harm for all wildlife species, greater habitat protection and the development of more recovery plans, which have been undertaken by the provinces over the last ten years, have all contributed to a higher standard of protection for species at risk across Canada. Moreover, it is argued that these changes are at least partially attributable to the development, passage and implementation of SARA.

However, the question as to whether or not the threat of federal incursion into provincial jurisdiction has been sufficient to motivate the provinces to meet the standard of "effective protection" set by the safety nets remains. The paper will consider the difficulties presently associated with the meaning of "effective protection" and will draw upon the Act itself, legislative history and the relevant literature to determine the criteria against which the provincial laws and policies can be assessed.

I hope to show that while SARA and the threat of federal intervention in provincial jurisdiction embodied within its safety net have gone some distance towards achieving improved legislative protection for species at risk, as time passes and the federal government demonstrates a less than optimal implementation of its statutory timelines and a reluctance to utilize the safety net, the strength of the threat of interference in provincial jurisdiction will likely diminish. Indeed, many provincial government officials revealed in confidential interviews that they do not believe that the safety net will ever be used by the federal government. Finally, it will be argued that increased federal oversight of the extent to which all SARA-listed species are legally or otherwise protected at the provincial level and the development of a policy framework to establish criteria for the application of the safety net[23] would provide greater certainty for the use and strength of the proverbial iron fist in the velvet glove which the safety net purports to be and that this would increase the extent to which provinces provide the "effective protection" which SARA calls for.

The main objective of chapter two is to provide background information on the legal and historical development of SARA, including a brief synopsis of the constitutional issues which lie at the heart of much Canadian environmental legislation and policy. I will discuss in some detail the impact of the National Accord and the legislative history of SARA, including the two previous attempts at federal endangered species legislation in the form of Bill C-65 and Bill C-33. This history will provide insight into the mandate of the Act and the nature of the safety net: how the safety net was drafted to protect species at risk, to whom it was directed and why it was adopted as a policy instrument. I will also discuss the differing nature of coercive and cooperative policy instruments and why a mixture of both may be optimal in the environmental context. The final section in this chapter will focus around what constitutes "effective protection" and what criteria need to be established to measure it. The case of the spotted owl in BC's old growth forests will provide a striking example of how the federal government has chosen not to use its unilateral powers under SARA to stop the probable extinction of a severely endangered species which is not effectively protected by the province.

Chapter three involves an examination of a number of federal environmental laws, including the *Canada Water Act,* the *Clean Air Act,* the *Transportation of Dangerous Goods Act, (1982),* the *Canadian Environmental Protection Act* and the *Canadian Environmental Assessment Act.* Each of these statutes contains a provision or provisions which stipulates the circumstances under which a provincial government may be subject to, or opt out of, the application of the federal legislation. All of these provisions have similar characteristics to the SARA safety nets. This review will demonstrate that the safety net like provisions, while generally unutilized, in fact, have had a positive effect on environmental protection by virtue of their ability to motivate provincial governments into the desired legislative action. Moreover, an examination of the development of the various federal

[23] *Ibid.*

environmental statutes and the provincial response to the threat of federal unilateral action offers insight into the provincial response to SARA and the potential impact of its safety nets.

Chapter four will constitute an in depth examination of the extent to which the provinces have strengthened their law and policy on protecting species at risk as a result of the development of federal legislation, the passage of SARA and the adoption of the safety nets, including a review of the existing parity between federal and provincial legislation over such areas as listing, protection against direct harm, habitat identification and protection, and recovery planning. More importantly, this chapter will attempt to identify whether the changes undertaken by the provinces are attributable to the development and passage of SARA and the possible threat of federal interference in provincial jurisdiction as it is currently manifested in the safety net provisions. Although it is not possible to prove the existence of a singular causal relationship between provincial action and the threat of federal interference, chapter 4 will demonstrate that there is a strong correlation between the timing of provincial action with federal initiatives for endangered species. Moreover, the assessment about the level of protection presently afforded species throughout Canada will reveal that while the overall standard of protection for provincial endangered species has improved over the past ten years, protection equivalent to that afforded under SARA has not been achieved across all jurisdictions. The question which remains to be addressed is whether the threat value of this is interference has diminished over time due to policy uncertainty over the timing and circumstances of the use of the safety net provisions and what further steps may be needed to provide effective protection for species at risk regardless of where they exist in Canada. Finally, I will draw conclusions from the foregoing analysis and attempt to answer the question of whether the mere threat of federal interference in provincial jurisdiction through the safety net mechanism contained in SARA is likely to achieve effective protection for species at risk in the future.

> "... *the approach we have taken is entirely consistent with the Canadian Constitution and the Canadian way ... Bill C-5 is consistent with the cooperative approach of the Accord. Through the Accord, governments have committed to coordination, complementary action and inclusion so that wildlife in Canada will be protected regardless of where it exists.*"[24]
> David Anderson, Minister of the Environment,
> June 11, 2002

Constitutional Jurisdiction for the Protection of Species at Risk

Environmental matters touch on many different aspects of contemporary Canadian society and as such, do not fall within the exclusive legislative jurisdiction of either the federal or provincial governments as enumerated under Part VI of the Constitution.[25] Consequently, there has been extensive debate over the federal authority to pass laws governing the environment. The provinces have traditionally viewed environmental matters, and more specifically, wildlife issues as falling more directly within their jurisdiction. As such, "assertions of federal environmental jurisdiction, including authority to protect species at risk, represent a ...fundamental threat, not just to provincial environmental protection efforts, but to provincial authority to direct economic development within their borders, particularly through exploitation of their Crown lands".[26]

Although the debate over constitutional jurisdiction of environmental matters is well beyond the scope of this paper, it is important to note the essential elements of the discussion as a means of understanding the development of federal endangered species legislation and the provincial response to it.[27] The provinces claim constitutional authority over environmental issues through several

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[24] *House of Commons Debates*, No. 203 (June 11, 2002) at 1035.
[25] *Oldman, supra* note 11 at 63.
[26] William Amos *et al*, "In Search of a Minimum Winning Coalition: The Politics of Species-at-Risk Legislation in Canada" in Karen Beazley & Robert Boardman, eds., *Politics of the Wild,* (Don Mills, Ontario: Oxford University Press, 2001) at154 [Amos]. See also Grace Skogstad & Paul Kopas, "Environmental Policy in a Federal System" in Robert Boardman ed., *Canadian Environmental Policy: Ecosystems, Politics and Process*, (Don Mills, Ontario: Oxford University Press, 1992) 43 at 53[Skogstad & Kopas].
[27] For a general discussion of the constitution as it relates to environmental law see: Peter W. Hogg, *Constitutional Law in Canada*, (Scarborough, Ontario: Carswell, 2007); Robert T. Franson and Alastair R.

different heads of power including the right to pass legislation over municipal affairs, local works and undertakings, the management of public land, matters of a local or private nature, property and civil rights and perhaps most importantly, over the development, conservation and management of non-renewable natural resources within their boundaries.[28] Although section 109 of the Constitution confers considerable proprietary rights on the provinces as the owners of natural resources, they do not have express jurisdiction over water, fish or wildlife, which under common law cannot be owned in their natural state.[29] However, as the "qualified owner" of all wildlife on its property, each province has wide authority to make laws concerning the management and conservation of wildlife.[30]

Provincial jurisdiction over environmental matters and natural resources is not, however, without restriction.[31] For example, in the context of endangered species legislation, the extra-provincial constraint placed on provincial legislative power under section 92 of the Constitution has a significant impact on provincial authority over trans-boundary species. Thus, when considering jurisdictional authority over environmental management, it is also necessary to examine federal proprietary rights and legislative powers granted under the Constitution.[32] Section 91(1A) provides the federal government with proprietary rights over federally owned land, water and resources which are comparable to those of the provinces. Federal jurisdiction can thus be most easily established over environmental matters which concern land and water owned by the federal government such as those located in national parks, the northern territories, and land owned by Crown corporations. However, this basis for jurisdiction is highly limited in application due to the restricted amount of federal land within Canada outside the territories (where there are few species at risk).

Lucas (eds.),*Canadian Environmental Law,* (Toronto: Butterworths, 1991); and Jamie Benedickson, *Environmental Law*, (Concord, Ontario: Irwin Law, 1997).

[28] For a discussion of the role of the provinces in environmental legislation see Marcia Valiante, "Legal Foundations of Canadian Environmental Policy: Underlining Our Values in a Shifting Landscape" in Debora L. VanNijnatten & Robert Boardman eds., *Canadian Environmental Policy,* 2d ed., (Don Mills, Ontario: Oxford University Press, 2002) at 7 [Valiante], and Kathryn Harrison, *Passing the Buck*: *Federalism and Canadian Environmental Policy,* (Vancouver: UBC Press, 1996) at 32-35 [Harrison].

[29] Harrison, *ibid.* at 33.

[30]Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54 at 65 [Gibson].

[31] For a general discussion of the limitations placed on provincial jurisdiction over environmental matters see Harrison, *supra* note 28 at 34-35.

[32] For a general discussion of federal and provincial authority under the *Constitution Act* to legislate in environmental matters see: Alastair R. Lucas & Cheryl Shavitt, "Constitutional Powers" in Roger Cotton and Alistair R. Lucas eds., *Canadian Environmental Law*, (2d ed.), looseleaf (Toronto: Butterworths, 2000) [Lucas & Shavitt]; F.L. Morton, "The Constitutional Division of Powers with Respect to the Environment" in Kenneth M. Holland, F.L. Morton & Brian Galligan eds., *Federalism and the Environment: Environmental Policy Making in Australia, Canada and the U.S.,* (Westport: Greenwood Press, 1996) at 37 [Morton].

Depending upon the issue in question, federal jurisdiction may also be asserted through one of its listed legislative powers, including fisheries, navigation and shipping, trade and commerce, agriculture, Indians and land reserved for Indians.[33] Much of the debate regarding the scope of federal jurisdiction has focused on those heads of power which could potentially provide the basis for more comprehensive federal environmental legislation, most notably its authority over criminal law[34] and its residual power to pass laws for the 'Peace, Order and good Government of Canada'.

In 1997, the Supreme Court of Canada considered the application of the criminal law power in the context of the environment in *R. v. Hydro-Quebec*.[35] The court was unanimous in finding that environmental protection, in and of itself, fell within the ambit of the federal criminal law power. Justice La Forest, writing for the majority, stated that "stewardship of the environment is a fundamental value of our society and ... Parliament may use its criminal law power to underline that value. The criminal law must be able to keep pace with and protect our emerging values." [36]Although the protection of the environment, and CEPA's toxic substances control regime, was upheld as a valid exercise of the federal government's criminal law power, the court was divided about whether the provisions in question[37] constitute a criminal prohibition against particular conduct or merely a regulatory scheme which could potentially be subject to wide levels of discretion and which could ultimately interfere in provincial jurisdiction under section 92 of the Constitution. Traditionally, the courts have distinguished an exercise of the criminal law power by the federal government from administrative or regulatory schemes by the requirement that it follow a prohibition and penalty structure.[38] While the federal criminal authority is not restricted solely to the strict creation of an offence and the provision of a penal sanction punishment, "the more a law moves from prohibition to regulation, the more difficult it is to justify under federal criminal law jurisdiction."[39] This restriction limits the federal power to address environmental matters, including species at risk, to those circumstances which are tied to a penal objective. Thus, while the decision

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[33] For example both the *Arctic Waters Pollution Prevention Act*, R.S. 1985, c. A-12 and the former *Northern Inland Waters Act,* c. N-25, (repealed 1992, c.40, s.52) were founded upon federal proprietary rights. Federal environmental statutes grounded in specific legislative powers include the *Fisheries Act*, R.S. 1985, c. F-14, the *Navigable Waters Protection Act*, R.S. 1985, N-22, and the *Migratory Birds Convention* Act, 1994 c. 22. See also Harrison, *supra* note 28 at 36-39, Valiante, *supra* note 28 at 4, and Morton, *supra* note 32 at 42.
[34] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(27), reprinted in R.S.C. 1985, App. II, No. 5.
[35] [1997] 3 S.C.R. 213 [*Hydro-Quebec*].
[36] *Ibid* at 296.
[37] *Canadian Environmental Protection Act,* R.S.C. 1985, c. 16 (4^{th} Supp.) ss. 34 and 35.
[38] P.W. Hogg, *Constitutional Law of Canada,* 4^{th} ed. (Scarborough Ontario: Carswell, 1996), c. 18.10 [Hogg].
[39] Edward A. Fitzgerald, "The Constitutionality of Toxic Substances Regulation under the Canadian Environmental Protection Act", (1996) 30 U.B.C. Law Review 55 at 93-94.

in *R.v. Hydro Quebec* effectively expands the construction of the criminal law power, more comprehensive environmental legislation may "require more subtle policy approaches than the logic of prohibition and punishment".[40]

Writing for the majority in *R. v. Hydro Quebec*, La Forest J. was clear that the exercise of criminal law power by the federal government, however, does not preclude provincial regulation of the environment and that there is indeed room for concurrent legislation[41]. It has been suggested that it is precisely because of this ability to afford concurrent jurisdiction with the provinces in the environmental field that the Court relied on the criminal law power and specifically chose not to consider whether the impugned provisions fell within the federal government's residual POGG power, which operates conversely and to the exclusion of the provinces.[42]

The nature and extent of the federal government's ability to use the POGG power to legislate in the environmental field has been both controversial and wide ranging in opinion. Of the two doctrines which have been used to interpret the limits of the POGG power, it is the meaning and scope of the "national concern" test which provides the greatest difficulty.[43] In 1988, the Supreme Court in *R. v. Crown Zellerbach*[44] considered the national concern doctrine as a basis for the constitutional validity of the federal control of marine pollution under the *Ocean Dumping Control Act*.[45] Le Dain J. held that a matter may only be considered to be of national concern where it has "attained a singleness, distinctiveness and indivisibility that clearly distinguish it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".[46] Moreover, an assessment of national concern must include a reference to the extra-provincial effects of the failure of a province to regulate the problem effectively.[47] Where such a failure occurs, federal legislation would be justified to the extent of the

[40] Sven Deimann, *R. v. Hydro-Quebec: Federal Environmental Regulation as Criminal Law*, (1998) 43 McGill L.J. 923 at 945 [Deimann] . See also Harrison, *supra* note 28 at 42 for a discussion regarding the limitation of the federal criminal law power in the context of environmental protection.
[41] *Hydro Quebec*, *supra*, note 35 at 312-314.
[42] Deimann, *supra* note 40 at 933. See also Lucas & Shavitt, *supra* note 32 for a discussion of the *R. v. HydroQuebec* decision.
[43] The emergency doctrine essentially provides the federal government with exceptional powers and temporary jurisdiction over all subject matters in order to deal appropriately and expeditiously with an emergency. It will not be discussed herein as it is unlikely that environmental legislation generally aimed at protecting endangered species would ever be considered a matter of national emergency. (See Hogg, *supra* note 38 for a general discussion of the "emergency powers" doctrine.)
[44] [1988] 1 SCR 401 [*Zellerbach*].
[45] S.C. 1974-75-76, c. 55.
[46] *Supra,* note 44 at 432.
[47] *Ibid.* at 432-434. This has become generally known as the "provincial inability test".

gap in provincial powers. The Court stated that "the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residences of the other provinces".[48] The Court upheld the impugned provision of the Act, finding that marine pollution, which included the dumping of pollutants into provincial waters, was in fact a matter of national concern under the POGG power. This case serves to uphold federal jurisdiction over pollution, and arguably other environmental matter, that is both international and inter-provincial in scale, as well as, provide important clarification on the application and scope of the POGG power in the environmental field.

These powers give the federal government broad, though not unlimited, authority to pass comprehensive environmental protection legislation. However, it has generally adopted a restrictive reading of its own jurisdiction and has been reluctant to fully occupy the field.[49] Indeed, in some cases it has been the courts which have expanded the federal role in environmental matters despite the federal government's unwillingness to exert its own legislative authority and jurisdiction.[50] In both the *Rafferty*-Almeda and the *Oldman* Dam cases, the federal government was forced to conduct environmental assessments of projects that it would rather have deferred to the provinces.[51] It is arguable that the full limits of federal jurisdiction in the environmental arena remain as yet untested, but as Ottawa has no legal duty to legislate to the full extent of its constitutional authority, they may never be fully challenged.

In drafting SARA, the federal government deliberately chose to be as "deferential to provincial powers as possible"[52] and in so doing circumscribed the scope of the legislation beyond what some considered constitutionally necessary.[53] During its review of Bill C-5, the Standing Senate Committee on Energy, the Environment and Natural Resources noted that "the whole attitude of the federal government in recent years is one of extreme fear or timidity in the face of provincial

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[48] *Ibid* at 431.
[49] David R. Boyd, *Unnatural Law*, (Vancouver: UBC Press, 2003) at 223[Boyd].
[50] See *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309 (T.D.), aff'd (1989), 99 N.R. 72 [*Rafferty Almeda*] and *Oldman supra* note 11.
[51] Harrison, *supra* note 28 at 48-51.
[52] Mary Dawson, *Evidence before the Standing Committee on Environment and Sustainable Development*, June 6, 2001 at 1615. Online: http://cmte.parl.gc.ca/Content/HOC/Committee/371/envi/evidence/ev1040898/enviev30-e.htm [Dawson]
[53] Dale Gibson, *Evidence before the Standing Committee on Environment and Sustainable Development*, April 26, 2001 at 0915. Online: www.parl.gc.ca/InfocomDoc/37/1/ENVI/Meetings/Evidence/enviev 15-e.htm [Gibson Evidence]. See also Richard D. Lindgren, *The Species at Risk Act: An Overview*, (Toronto: Canadian Environmental Law Association), 2001 at 12-13 [Lindgren 2001] and Boyd *supra* note 49 at 223.

powers".[54] This apparent timidity in the context of endangered species, is however unwarranted in the opinion of Dale Gibson. He has suggested that the totality of "federal powers are so sweeping, ... 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".[55] More specifically, Gibson argues that by relying on the "national dimension" aspect of the POGG power, the federal government could "exercise jurisdiction over all aspects of endangered species protection both direct and necessarily incidental, regardless of the nature of the species or its location".[56] Although his views have been shared by other scholars[57], the federal government considered the POGG power too risky and opted instead to use the criminal law power as the constitutional basis for SARA.[58]

While the criminal law power affords the federal government a strong source of jurisdiction to legislate over endangered species, the Act must embody a general prohibition and penalty scheme directed towards the protection of the environment to fall within the constitutional parameters of this power. To the degree that the application of the prohibitions contained within SARA depend upon the discretion of the federal cabinet, the constitutionality of the legislation may be impugned.[59] That is, where otherwise criminal prohibitions are conditional upon administrative discretion, the scheme may be viewed as more regulatory in nature and consequently an invalid exercise of criminal law power. There is no question that the operation of the safety net, and hence the criminal law prohibitions, on provincial land requires an exercise of administrative discretion. Describing the constitutional basis for the Act, legal counsel for the department of justice stated that "the legislation does have the capacity for the federal government in relation to the offenses to act if there is a feeling that the provincial legislation doesn't adequately cover the problem".[60]

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[54] Senator Mira Spivak, *Proceedings of the Standing Senate Committee on Energy, the Environment and Natural Resources,* November 26, 2002.
[55] Professor Dale Gibson, *Endangered Species and the Parliament of Canada: A Constitutional Question* (Toronto: Sierra Legal Defence Fund, 1994) at 25.
[56] *Ibid.*
[57] Stewart Elgie and Magdalena Muir, *Evidence before the Standing Committee on Environment and Sustainable Development*, April 26, 2001 at 0930. See also Richard D. Lindgren, *The Species at Risk Act: An Overview*, Report No. 408, Canadian Environmental Law Association, (Toronto: Canadian Environmental Law Association, 2001) at 13.
[58] Gibson Evidence, *supra* note 53 at 1550 and 1645. See also Minister David Anderson, *Evidence before the Standing Committee on Environment and Sustainable Development*, October 3, 2001at 1550 [Anderson 2001].
[59] Gibson Evidence, *ibid.* at 0920. See also the dissenting opinions of Lamer C.J. and Iacobucci J. in *Hydro Quebec, supra* note 35 at 254.
[60] Dawson, *supra* note 52 at 1620.

Under SARA, the decision to invoke the federal safety net is ultimately subject to the approval of cabinet. Moreover, the Act does not contain any statutory criteria as to how cabinet may decide to use the safety net or how to assess the efficacy of provincial legislation. These are but two of many examples of the discretionary power exercised under SARA.[61] Whether SARA adopts a regulatory framework or is founded upon appropriate criminal law prohibitions remains a matter of academic debate.[62] The CEPA includes discretionary elements similar to those in SARA and the Supreme Court in the *Hydro* Quebec decision was split 5:4 over whether its powers were more prohibitory or regulatory in nature. It is not necessary here to determine whether or not SARA would survive a constitutional challenge. However, what is not in doubt is that the federal government's attempt to be as deferential to the provinces effectively restricted the scope of Canada's endangered species legislation to federal land and the protection of federally listed species. It has been suggested that the decision to limit the application of the Act in this manner had in fact little to do with jurisdictional wrangling but was instead based upon political considerations.[63]

The provinces have exerted significant political pressure on the federal government in the development of national environmental policies. The threat of Quebec independence, the western stronghold over resource wealth and development, and the resistance to national spending and inter-provincial transfer payments have all affected the federal government's willingness to create nation wide standards over environmental matters.[64] Finally, the position adopted by the provinces that they are better able to perceive and solve regional environmental problems has also contributed to the lack of federal commitment to centralized control.[65]

Kathryn Harrison has characterized federal provincial relations over environmental matters during the last several decades as cycling between higher and lower levels of cooperation and conflict depending primarily upon the degree to which environmental matters are within the public

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[61] For a more comprehensive discussion of the discretionary nature of SARA and its constitutionality see John Cartwright, "Does our Government Really Want to Protect Endangered Species", *Policy Options*, June 2001 at 39.
[62] *Supra*, note 35. Magdalena Muir, *Evidence before the Standing Committee on Environment and Sustainable Development,* April 26, 2001 at 0930. Valiante, *supra* note 28, has argued that "an appropriately crafted endangered species statute" which relies on the federal criminal law power would likely survive a constitutional challenge but does not address the issue whether or not SARA is so crafted.
[63] Lindgren 2001, *supra* note 57 at 13.
[64] Robert Paehlke, "Spatial Proportionality: Right-sizing Environmental Decision-Making" in Edward A Parson, ed., *Governing the Environment: Persistent Challenges, Uncertain Innovations* (Toronto: University of Toronto Press, 2001) at 74 [Paehlke]. See also Boyd *supra* note 49 at 260-262; Harrison, *supra*, note 28 at 170; and Grace Skogstad & Kopas, *supra* note 26 at 43.
[65] Paehlke, *ibid.* at 86.

consciousness.[66] Thus as the 1980's progressed and environmental issues came to the forefront of the electoral agenda, intergovernmental tensions began to mount. This tension was exacerbated by the passage of CEPA and the political controversy which arose from two separate court decisions requiring greater federal involvement in environmental assessment matters; matters that had previously been considered areas of provincial jurisdiction.[67] During the 1990's, as public attention began to wane, both levels of government worked towards restoring political relations, harmonizing legislation and rationalizing services in the environmental field. A 1998 study produced by Pollara found that only 6% of Canadians viewed the environment as an important national issue and that the protection of endangered species did not even rank within the top ten environmental concerns.[68] In accordance with Harrison's findings, cooperation rather than conflict and federal deference to provincial concerns characterized decision making in the latter part of the decade. It is within this legal and political background that the development of SARA must therefore be viewed.

Legislative History

When the federal government ratified the UN Convention on Biological Diversity in December of 1992, it became obligated "to develop and maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations".[69] Following their election in 1993, the liberal party promised Canadians that they were dedicated to creating a "vision of society that protects the long-term health and diversity of all species on the planet".[70] In an attempt to begin the task of fulfilling these commitments, a federal Task Force on Endangered Species Conservation comprised of representatives from various environmental groups, industry associations and academia was appointed under the direction of then Deputy Prime Minister, Sheila Copps. [71] Following public workshops with numerous provincial, territorial, aboriginal and regional stakeholders and upon the advice of the Task Force, the federal government produced a plain language legislative proposal for the *Canadian Endangered Species Protection Act* in 1995. The

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[66] Harrison, *supra* note 28, and Kathryn Harrison, "Federal Provincial Relations and the Environment: Unilateralism, Collaboration and Rationalization" in *Canadian Environmental Policy: Ecosystems, Politics and Process*, Robert Boardman ed., (Oxford University Press: Toronto, 1992) at 123 [Harrison, 1992].
[67] See *Rafferty Almeda, supra* note 50 and *Oldman supra* note 11.
[68] Pollara, *Canadians Views on Climate Change*, May, 1998. Online: Pollara, <http://www.pollara.ca/Library/Reports/CLIMATE/ClimateChange.html>
[69] *Supra*, note 8.
[70] Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada*, (Ottawa: Liberal Party of Canada, 1993).
[71] Canadian Endangered Species Coalition, *"Federal Endangered Species Legislation - Background"*, Summer 1997, online: <http://www.chebucto.ns.ca/Environment/FNSN/cesc/bck-su97.html>

proposal was developed for the purpose of providing a specific focus for continuing discussions on the forthcoming detailed legislation.[72] That same year, Ottawa also produced the *Canadian Biodiversity Strategy* which further committed the government to developing legislation that would support the conservation of biodiversity in Canada and the sustainable use of biological resources. Under the *Strategy,* jurisdictions were directed towards undertaking a legislative review to identify the necessary and practical steps required to create an improved legislative framework to support the conservation of biological diversity.[73] The *Strategy* also emphasized the need for strong cooperative efforts between all levels of government to create the policy, management and research conditions necessary to advance ecological management.

The Accord for the Protection of Species at Risk

Consistent with the prevailing harmonization initiatives that had characterized intergovernmental relations over the preceding few years, the federal government also committed to developing a "national approach" to endangered species conservation.[74] It sought the cooperation of provincial and territorial governments and wildlife management boards in developing Canada's endangered species legislation through a number of directors' meetings and public consultations. Throughout the decade leading up to this period, the bureaucratic community responsible for wildlife management at both the federal and provincial level had enjoyed collaborative working relationships. With the announcement of proposed legislation, however, the mood began to shift and concern over federal interference in provincial jurisdiction grew.[75] Attempting to provide some overriding structure and "rules" around the application of the federal act, the provinces supported and ultimately pushed for the development of a National Accord for the Protection of Species at Risk.[76]

Thus, on October 2, 1996, during a meeting in Charlottetown, federal and provincial wildlife ministers, reiterating the need for intergovernmental cooperation, agreed in principle to establish

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[72] Canada Wildlife Service, *"The Canadian Endangered Species Protection Act: A Legislative Proposal"*, (Ottawa: Environment Canada, 1995).
[73] Environment Canada, *Canadian Biodiversity Strategy: Canada's Response to the Convention on Biological Diversity* (Ottawa: Minister of Supply and Services Canada, 1995) at 61.
[74] *Ibid.* See also Environment Canada, *Response to the Convention on Biological Diversity* (Ottawa: Minister of Supply and Services Canada, 1995) at 61, and Kathryn Harrison, "Passing the Environmental Buck", in Francois Rocher & Miriam Smith eds., *New Trends in Canadian Federalism"* (2d ed.) (Peterborough, Ontario: Broadview Press, 2003) 313 at 331 [Harrison, 2003].
[75] Telephone Interview with Trevor Swerdfager, former Director General, Canada Wildlife Service, February 22, 2007.
[76] *Ibid.*

complementary legislation and programs which provide for the effective protection of species at risk and their habitats throughout Canada. The Accord specifies several different steps to be taken to protect species at risk including ongoing independent status assessments, legal designations for species as either threatened or endangered, legal protection for designated species, development and implementation of recovery plans having regard to the habitat needs of the particular species at risk, citizen participation, and finally, enforcement.[77] In order to assist in the coordination of these activities, the Canadian Endangered Species Conservation Council (the "CESCC") was established. Membership in the Council was shared by all participating jurisdictions. The CESCC was also intended to serve as a forum for any disputes arising out of the implementation of the Accord. Thus, although the Accord established a skeletal framework around which the legislative muscle was to be built by both levels of government, it did not outline the jurisdictional limits of that legislation. Consequently, federal attempts at defining those limits became mired in debate and controversy.

For example, Lucien Bouchard, the Premier of Quebec, considered the purpose of the Accord as being simply "to enable the federal and provincial governments to agree on which species to protect and nothing more".[78] Moreover, concerns regarding possible "overlap between some future federal act and the legislation which has [sic] been in effect in Quebec since 1989" were echoed by Quebec's provincial minister of the environment.[79] Other provinces were aware of the potential jurisdictional and constitutional difficulties with the anticipated federal endangered species act and viewed the Accord as the impetus necessary to raise the legislative bar at the provincial level. In so doing, it was hoped that the Accord would serve to limit federal interference in provincial jurisdiction over the protection and management of wildlife.[80] It is impossible to know whether or not the Accord alone, would in fact have accomplished this goal due to the similarly motivating and concurrent influence on the provinces of the development of the proposed federal legislation.

Bill C-65: *The Canadian Endangered Species Protection Act*

Although many believed that the federal government would wait to design its proposed legislation in light of the principles and commitments agreed to by the wildlife ministers, it released a draft bill in

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[77] Environment Canada, online <http://www.ec.gc.ca/press/wild_b_e.htm>

[78] *House of Commons Debates*, No.163, April 24, 1997 (Yvan Bernier,Gaspe, Bloc Quebecois) at 10163.

[79] *Ibid.* (Gilbert Fillion, Chicoutimi, Bloc Quebecois) at 10168.

[80] In particular, Alberta, Saskatchewan, New Brunswick and British Columbia advocated for the creation of the Accord as a means of allowing the provinces to fully occupy the field. *Supra* note 75. Also telephone interview with Steve Curtis, former Associate Director General, Canada Wildlife Service, January 5, 2007.

the form of the *Canada's Endangered Species Protection Act* (CESPA)[81] less than a full month after the creation of the Accord. Bill C-65 met with much criticism, prompting Charles Caccia, then Chairman of the Committee on the Environment and Sustainable Development to agree with national editorial commentary which suggested that "the most positive thing about Ottawa's bill is that it exists at all".[82]

CESPA was resoundingly criticized by scientists, environmentalists, industry, and provincial governments alike. Several different objections to the contents of the bill were raised by the affected parties but for these purposes the one issue of particular importance concerned the protection of international transboundary species.

Although the scope of the protection to species afforded in CESPA was generally restricted to federal lands,[83] under section 33 those endangered or threatened species which migrated or ranged across an international boundary were eligible for protection against direct harm anywhere in Canada. Amendments made to CESPA by the Committee strengthened section 33, making the protection of transboundary species mandatory unless equivalent provincial regulations safeguarded the wildlife. With these changes, the scope of the bill had widened the federal role in protecting endangered species and covered nearly 60% of Canada's species.[84] The more expansive role proposed by the Committee was viewed as insufficient by some and draconian by others.

For the ENGO's, amongst a host of other weaknesses contained in Bill C-65, the net cast did not go nearly wide enough[85] and demonstrated the federal government's continued unwillingness to assert it's constitutional authority over endangered species throughout Canada.[86] So strong was provincial opposition to section 33, that the New Brunswick Minister of the Environment, on behalf of all the

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[81] Bill C-65, *An Act Respecting Canada's Endangered Species Protection*, 2nd Sess., 35th Parl., (1st Reading, October 31,1996).

[82] *Evidence before the Standing Committee on the Environment and Sustainable Development*, November 5, 1996 at 0835 quoting an editorial from the *Globe and Mail*, November 5, 1996 at A16.

[83] At first reading, the Bill contained basic prohibitions against the harming or destruction of listed endangered, and threatened species and their "residences" provided those species were located on federal lands, were aquatic species or migratory birds as protected under the *Migratory Birds Convention Act, 1994, supra* note 4.

[84] *House of Commons Debates,* No. 113 (December 4, 1996) at 7107, (Karen Kraft Sloan, Parliamentary Secretary to the Minister of the Environment). See also Kristen Douglas, *Bill C-65: The Canada Endangered Species Protection Act*, (Library of Parliament: Ottawa, November 12, 1996, revised May 14, 1997) at 44 [Douglas]. It should be noted, however, that section 33, grounded in the federal government's criminal law power to prevent cruelty to animals, only applied to animals and offered no protection for transboundary plant species. (*Ibid.* Douglas at 13).

[85] Most provincial transboundary species were left unprotected.

[86] Amos, *supra* note 26 at 137. The authors provide a thorough review of Bill C-65 and discuss in detail the particulars of CESPA, the major objections raised and ultimately why the bill failed.

provinces, wrote to then Federal Minister of the Environment, Sergio Marchi, indicating their unanimous rejection of the Bill. Their concerns centered on the potential for interference with provincial jurisdiction and the subsequent conflict with the intergovernmental cooperation that had been agreed to in the National Accord.[87] The prospective reach of the federal government under section 33 to manage species, and consequently, provincial resources and economic development simply became too wide for the provinces to tolerate.

The precise reasons behind the failure of Bill C-65 are rooted in a complex mixture of political, institutional and economic relationships that have been discussed at length by Amos and others.[88] What is important here is that the threat of federal interference in provincial jurisdiction was enough to bring about such a united negative political response from the provinces. Without at least the tacit support of the provinces, the federal government's efforts to implement or enforce Bill C-65 would have proved very difficult, even if the proposed legislation had passed. It was also this reaction by the provinces that encouraged the more cooperative, if not more deferential, approach adopted in Bill C-33 and eventually in SARA.

After months of debate over its contents, Bill C-65 eventually died on the order paper in June, 1997 with the dissolution of Parliament. However, the need for national endangered species protection did not leave the federal consciousness. At the Wildlife Ministers Council of Canada meeting in October of that same year, Environment Minister Christine Stewart promised that the federal government would introduce effective endangered species legislation as soon as possible and agreed to work with the provincial ministers to develop a detailed work plan to implement the Accord.[89] The federal government also held two national workshops in 1998 to canvass the views of various stakeholder groups as a means of further implementing a national approach to protecting species at risk.

The need for greater cooperation amongst the various stakeholders also manifested itself in the form of an unlikely union of environmental and industry groups called the Species at Risk Working Group

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[87] *Evidence before the Standing Committee on the Environment and Sustainable Development*, February 13, 1997 at 0842.

[88] *Supra* note 86. See also Mary Illical, *How They Built the Ark: Comparing Federal Endangered Species Legislation in the United States and Canada* (MA Thesis, University of British Columbia, 2005) [unpublished, Illical].

[89] Canadian Intergovernmental Conference Secretariat, News Release, October 1, 1997, Ref 830-591/01, online: <http://www.scics.gc.ca/cinfo/83059101_e.html>

(SARWG).[90] SARWG was formed in April, 1998, and although an independent lobbying group, it had similarities to the earlier federal government appointed Task Force on Endangered Species. That is, SARWG's mandate was to develop solutions for a national endangered species act which satisfied environmentalists and industry alike. Their recommendations for a revised federal act were presented to the Canadian Wildlife Ministers in September 1998 and generally built upon the recommendations of the earlier Task Force (with some differences). Ultimately, some of the SARWG proposals found their way into Bill C-33. Without question SARWG and the legislative initiatives it suggested, represented a cooperative and multi-faceted approach to conserving endangered species that the federal government began to view as being of increasing importance.[91]

It was at this same meeting of wildlife ministers that the concept of a national safety net was first introduced by the federal government. The purpose of the safety net was to create a seamless web of protection for species at risk throughout Canada; however, the precise way in which that outcome would be achieved was left unresolved. Less than a month after the ministers' meeting, Charles Caccia introduced a possible version of a federal safety net in a private members bill. It was hoped that the bill would serve as a model for the government proposed legislation that was expected to follow.[92] Under Bill C-441, the protection afforded species at risk would have applied to both provincial and federal land unless a province had enacted mirror legislation and entered into an equivalency agreement with Ottawa. The safety net proposed in Bill C-441 was not residual in nature but rather was intended to apply in the first instance. The ability of the federal government to opt-out of, as opposed to opt-in to, the protection of endangered species within provincial boundaries made it a stronger policy instrument than what was eventually adopted under SARA. Although the bill was applauded by the environmental and scientific community, the Bill was dropped from the Order paper in May, 1999 following a brief parliamentary debate.[93]

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[90] SARWG was comprised of representatives from the Canadian Wildlife Federation, the Canadian Pulp and Paper Association, the Mining Association of Canada, the Canada Nature Federation, and the Sierra Club of Canada.

[91] Species at Risk Working Group, *Conserving Species at Risk Cooperatively: A Response to the Species at Risk Act,* brief presented to the Standing Committee on Sustainable Development and the Environment, September, 2000 [SARWG]. Online: <http://www.mining.ca/english/publications/SARWG-Eng.pdf>

[92] *House of Commons* Debates, No. 223 (May 6, 1999) at 1735 (Clifford Lincoln).

[93] *Ibid.* at 1825.

Bill C-33: *The Species at Risk Act*

In its 1999 throne speech, the federal government announced that it would introduce legislation and stewardship programs to ensure that species at risk and their critical natural habitat are protected, and that it would work together with provinces and territories to accomplish this goal. By December, newly appointed Environment Minister, David Anderson, released a draft guide to the proposed Species at Risk Act, firmly recognizing that the legislation would form part of a three pronged approach to protecting endangered species. The other two parts of the strategy included the on-going implementation of the Accord and the development of stewardship and incentive programs. All three aspects of the new strategy required close cooperation and partnership with provincial and territorial governments as well as aboriginal people, landowners, scientists, environmental organizations, individuals, and industry.

The federal government's second attempt at legislation was officially tabled in the House on April 11, 2000 in the form of Bill C-33, the *Species at Risk Act.* Upon its introduction, Environment Minister Anderson noted that the bill strikes such a delicate balance between provinces, landowners and wildlife that it could not survive any major amendments.[94] Despite this warning to committee members and other stakeholders, Bill C-33 was roundly criticized by environmentalists as being too weak and discretion laden. [95] In an attempt to address some of the concerns raised over CESPA, the transboundary provisions which had been so vehemently opposed by the provinces were discarded in the new bill and replaced with a federal safety net that was broader in scope but arguably weaker in application. Under Bill C-33, the prohibitions against harm to listed species and their residences applied to aquatic species, migratory birds and to all species on federal lands within a province. These prohibitions would, however, only apply to listed species on provincial and territorial lands where the Environment Minister, following consultation with his provincial counterpart, believed that there were not adequate laws in place to protect the species and Cabinet had subsequently ordered their application.[96] A similar safety net was in place for the protection of critical habitat identified in a recovery strategy or action plan for listed species.[97]

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[94] Andrew Duffy, "Wildlife Bill Strikes Balance, Minister says: Species at Risk Act 'a titanic failure', Environmentalists Argue", *Ottawa Citizen*, April 12, 2000 at A3.
[95] *Ibid.*
[96] Bill C-33: *An Act Respecting the Protection of Wildlife Species at Risk in Canada*, 2nd Sess, 36th Parl., sections 34 and 35.
[97] *Ibid.* sections 59-61.

It has been suggested[98] that the shift away from the application of the transboundary provisions contained in CESPA towards the wider, albeit more discretionary, scope of the federal safety net was at least partially grounded in the decision in *R. v. Hydro-Quebec.*[99] The decision had been released in the interim period between bills and it afforded the federal government a greater constitutional footing over the protection of endangered species through its criminal law power. No longer did it need to rely solely on land ownership and other well established powers to provide effective legislation for species at risk.[100] However, the federal government also could not discount the need for provincial cooperation nor disregard continuing concerns over intrusion into provincial jurisdiction. As a result, the application of the safety net became dependent on political discretion and highly deferential to provincial legislation. Under the safety net envisaged by Bill C-33, the role of the federal government with respect to provincial species at risk remained residual in nature and was restricted to being something of an unwelcome watchdog. Moreover, the discretionary nature of the safety net had the potential to undermine its very constitutionality since a valid exercise of the federal criminal law power is dependant upon there being an appropriately structured prohibition and penalty scheme as opposed to a regulatory or administrative one. The lack of clarity surrounding the exercise of ministerial discretion also made the safety net unacceptable to both Quebec and Alberta. The government of Quebec questioned the federal government's constitutional authority regarding the management of habitat on provincial land and rejected Bill C-33 outright on this basis as well as on the grounds that it contravened the principles of environmental harmonization embodied in the Accord.[101] Similarly, Alberta opposed the bill, indicating that it would potentially challenge its constitutionality or withdraw from the National Accord.[102]

Whether or not either province would have been successful in its constitutional challenge became moot when Bill C-33 suffered the same fate as its predecessor and died on the order paper in November, 2000 when the federal election was called. By February, 2001, a new bill C-5, nearly identical to former Bill C-33, was introduced to Parliament. Over a year later and after considerable

[98] Elizabeth May, *Brief to the Standing Committee on Environment and Sustainable Development, Re: Bill C-5, the Species at Risk Act*, Sierra Club of Canada, May 30, 2001 [May]. Online: <http://www.sierraclub.ca/national/programs/biodiversity/wilderness/scc-brief-bill-c-5-2001.html>
[99] *Hydro-Quebec, supra* note 35.
[100] SARWG, *supra* note 91at 5. See also May, *supra* note 98.
[101] *House of Commons* Debates, No.097 (May 15, 2000) at 1825 (Jocelyne Girard-Bujold, reading a press release issued by the Quebec Ministry of Environment dated April 11, 2000).
[102] Gina Teel, "Alberta Opposes Wildlife Legislation", *Calgary Herald*, 12 April, 2000 at A10.

debate and amendment, the bill passed on June 11, 2002 and finally created Canada's *Species at Risk Act*.[103]

Much of the debate preceding SARA's passage focused on the jurisdictional issues already discussed in this chapter and the nature and extent of the federal safety net. While the provinces, as early as 1999, had agreed in principle upon a federal safety net for habitat, its application on provincial, territorial and private land remained unresolved. It would be inaccurate to suggest that this was the only difficulty in passing SARA. There were countless deliberations regarding the tension between science and politics in key decision making, ministerial discretion and accountability, the importance of protecting critical habitat, stewardship, compensation to private landowners, and public participation in the protection of species at risk.[104] Without question the need to protect species at risk and their habitats ultimately concerns industry, environmentalists, private landowners, aboriginals and provincial governments alike. The resultant economic, political, constitutional and international forces brought to bear by the various actors, stakeholders and institutions each played an important role in the final development of SARA.[105]

The constitutional and historical background discussed reveals some of the constraints and motivating forces facing the federal government. In attempting to address the concerns of each of these groups, the federal government crafted legislation designed to engender cooperation rater than conflict. Whether or not in so doing, it ultimately produced an Act which provides effective protection for species at risk throughout Canada is yet to be fully determined. However, this paper will demonstrate that the development of the legislation, the presence of the safety net and its threat of application served to motivate the provinces to produce better protection of species at risk within their borders. What follows is a brief examination of the mandate and structure of SARA, the nature of the safety net as a policy instrument, how it is meant to operate to protect species at risk and perhaps most importantly, whether or not it will likely achieve that purpose.

[103] *Supra* note 1.
[104] For example from March 22 to November 27, 2001, the Standing Committee on Environment and Sustainable Development met 42 times to consider Bill C-5 and heard from 134 witnesses regarding the content of the proposed SARA.
[105] For a thorough discussion of this issue see Illical, *supra* note 88.

SARA

SARA, as introduced at first reading, was very similar to its predecessor, Bill C-33. The basic structure and language of the Act with respect to listing, protection measures, habitat identification and protection, species recovery, stewardship and compensation remained unchanged. The opt-in mechanism for both the safety nets was also left unaltered despite the concerns that had been raised by the provinces regarding the potential jurisdictional reach of Bill C-33. After Bill C-5 was introduced in February, 2001, it was referred to the Standing Committee on the Environment and Sustainable Development for further study. Following extensive hearings conducted by the Committee in which they heard the testimony of numerous witnesses regarding the content and proposed wording of SARA, the Committee produced over 100 amendments to the Bill. Most of those amendments were, however, rejected by the government at report stage on the basis that they limited federal discretion under the Bill and were "contrary to the co-operative spirit of SARA". [106] The nature of the amendments as they relate to SARA's safety nets will be discussed later in this chapter.

The principles behind SARA's mandate are contained in the preamble and represent many of the factors which shaped the development of the legislation. The preamble recognizes Canada's international commitment to protect biological diversity and that the responsibility for the conservation of wildlife is shared amongst all levels of Canadian government. It underscores the need for cooperation and for the establishment of complementary legislation and programs aimed at protecting and recovering species at risk throughout Canada. SARA further acknowledges that cooperation between governments is necessary to maintain and strengthen national standards of environmental conservation and moreover, that the federal government is committed to the principles set out in intergovernmental agreements. Also noted in the preamble are the conservation efforts of individual Canadians, and the importance of scientific, community based, and traditional aboriginal knowledge in developing and implementing recovery measures.

Reading SARA's purpose in light of these recitals, it is clear that the Act's goal of preventing wildlife species from being extirpated or becoming extinct, and providing for the recovery of species[107] is to be achieved through the support, coordination and combined effort of individuals, communities and all levels of government. The government's commitment to coordination and

[106] Illical, *supra* note 88 at 103.
[107] *Supra* note 1, section 6.

complementary action and to the principle of inclusion in the protection of species at risk and their habitats has been repeatedly stressed in the language used and policy choices made throughout SARA. Government rhetoric confirms this position. Minister Anderson noted in evidence before the Committee that "partnership with provincial and territorial governments and private landowners is crucial".[108] At report stage, the government indicated that it had exhaustively studied both the cooperative and coercive approaches to protecting species at risk and determined that cooperative legislation was preferred.[109] Indeed, it was seen as being more Canadian.[110] It follows that an assessment of the effectiveness of the legislation in general, and the safety net in particular, must have regard to these principles. Although it is impossible to determine whether more effective protection of species at risk could have been achieved with a more coercive statute, the question which can be addressed is whether the federal government's emphasis upon cooperation and the mere threat of coercion has been sufficient to create more effective protection of species at risk at the provincial and territorial levels.

Listing and Protection from Harm

The analysis of this question must first begin with a brief overview of the structure and operation of the Act. SARA establishes a process for identifying, protecting and recovering species at risk. In order for a species to become eligible for the protection afforded in SARA, it must first be identified, assessed and recommended to be placed on the legal list established under the Act by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). Its mandate is set out in sections 14 to 31 of the Act. COSEWIC was first created in 1977, and was subsequently given legal status under SARA, as an independent scientific body of experts tasked with identifying and assessing species' risk of extinction in Canada.[111] COSEWIC must carry out its functions on the basis of the best available information regarding the biological status of a species, and may not take into account political, social or economic factors affecting that species. Once its assessments have been completed, COSEWIC must provide a status report, and make recommendations, to the Minister of Environment and the CESCC regarding those species it considers to be at risk. Within nine months of receiving COSEWIC's assessment, and upon the recommendation of the Minister of Environment, the Governor in Council may add the species to the list established under the Act as

[108] Anderson 2001, *supra* note 58.
[109] *House of Commons Debates*, No. 185 (May 8, 2002) at 1555 (John Maloney).
[110] *House of Commons Debates*, No. 68 (March 21, 2002) at 1340 (Alan Tonks).
[111] *Supra* note 1, s. 15. Species are assessed by COSEWIC as being extinct, extirpated, endangered, threatened, of special concern or not at risk.

being endangered, threatened, extirpated or of special concern. Only then is the species entitled to protection and recovery measures under SARA.[112]

Upon listing, two basic prohibitions against direct harm automatically apply to the species, provided it is found on federal land, it is an aquatic species or it is a migratory bird under the MBCA. Under section 32, it is an offence to kill, harm, or trade in a listed wildlife species that is listed as being extirpated, endangered or threatened. The Act also prohibits the damage or destruction of the residence of that same species.[113] As in Bill C-33, these prohibitions do not apply to species on land in a province that is not federal land unless an order is made by the Governor in Council indicating otherwise under the safety net provision. The Minister must recommend that such an order be made where he or she is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.[114]

Direct Harm Safety Net

The Committee proposed an amendment to section 34 which strengthened the application of the safety net concerning the basic prohibitions contained in SARA in three ways. Firstly, it made the application of the safety net by the Governor in Council mandatory where the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals. Secondly, it provided for a six month period for the federal government to develop, in consultation with the relevant provincial ministers, criteria to determine the scope and meaning of "effective protection" of species at risk throughout Canada. Finally, it required the Minister to consult with the public prior to recommending an order to invoke the federal safety net.[115] A similar

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[112] The addition of species to the List of Wildlife Species at Risk (Schedule I of the Act) is not automatic and further reference should be had to sections 14 to 31 for information regarding COSEWIC and the listing process.
[113] *Supra* note 1, s. 33. It should be noted that "residence" is defined in section 2 as a "dwelling place, such as a den, nest or other similar are or place that is occupied or habitually occupied by one of more individuals during all of part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating. Many scientists and environmentalists have noted that "residence" is neither a biological nor scientific concept and its inclusion in the Act was merely a political construct to restrict the application of the general prohibitions to a limited portion of the species' critical habitat. See for example, Geoffrey Scudder, *Evidence before the Standing Committee on Environment and Sustainable Development*, April 24, 2001 at 0925 and David M. Green, *Evidence before the Standing Committee on Environment and Sustainable Development*, April 24, 2001at 1010.
[114] *Supra* note 1, sections 34 and 35. Under section 80 of the Act, the Minister must also make an emergency order protecting listed wildlife species wherever it is located if he or she is of the opinion that the species in question faces imminent threats to its survival or recovery.
[115] Bill C-5R: *An Act Respecting the Protection of Wildlife Species at Risk in Canada*, 1st Sess, 37th Parl., sections 34 and 35 online:

amendment was put in place for the safety net contained in section 35 which applies to listed species located in the territories. The amendments essentially made the safety net mandatory, provided some definitive guidelines and structure for its application and created a citizen request mechanism to trigger its use. In so doing, the amendments created the possibility for greater accountability and certainty in the application of the safety net, while still allowing for provincial input and enhanced cooperation in the creation of more specific criteria to evaluate effective protection for all species.

Although many of the provinces supported the changes proposed by the Committee, the government rejected the amendments and reversed them at report stage believing that they went against the cooperative spirit of the Bill and would create undue tension in federal/provincial relations.[116] As passed, Cabinet makes the final determination regarding the circumstances under which the safety net will be invoked. Moreover, SARA does not contain any criteria as to how "effective protection" may be assessed, nor is there any public involvement in the decision making process.

SARA's limited scope requires that the provinces and territories shoulder much of the responsibility in protecting species at risk. The definition of "effective protection" therefore becomes pivotal in determining the circumstances under which the Minister must exercise his discretion to recommend invoking the federal safety net. Since no such definition exists, one can be inferred by considering the Act's stated objective of preventing species extinction and extirpation. According to Boyd, "effective laws to protect endangered species must designate species at risk based on scientific evidence, prohibit harming or injuring species at risk, protect the habitat of species at risk, require recovery plans to be developed and implemented and provide for effective enforcement, through incentives and penalties".[117] As will be discussed in Chapter 4, not all of the provinces have legislation and policies in place which meet Boyd's requirements and arguably the safety net could be invoked in those provinces. However, without any legal criteria for what constitutes effective protection, it becomes very difficult to determine definitively the circumstances under which the Minister must exercise his discretion to invoke the safety net in order to uphold the intent of the legislation.

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=37&Ses=1&Mode=1&Pub=Bill&Doc=C-5_2>

[116] Letters from Ontario, Alberta, Nova Scotia and PEI were received by government officials in December 2001 which approved the amendments to the safety net contained in sections 34 and 35 proposed by the Committee. See *House of Commons Debates*, No. 203 (June 11, 2002) at 1230 (John Herron). See also Kate Jaimet, "Liberals demanded favours to pass bill", *The Ottawa Citizen*, December 27, 2002, p. A1 [Jaimet].

[117] Boyd, *supra* note 49 at 183.

In its report to the Senate, the Standing Committee on Energy, the Environment, and Natural Resources made several important observations and recommendations regarding Bill C-5 and the safety net provisions contained within it. Most of the Committee's concerns focused on the limited scope of SARA and the uncertainty surrounding the application of the safety net. Among other things, the members directed the federal government to ensure that the safety net be invoked in cases where the enforcement, and not just the existence of provincial or territorial legislation is deemed to offer insufficient protection.[118] In that regard, it noted that the Minister of the Environment should consider provincial failure to list a COSEWIC listed species as an early warning sign of inaction necessitating the invocation of the safety net provisions.[119] The Senate Committee also recommended that during the five year review of the bill that the federal government consider making the application of the safety net mandatory as originally conceived by the Commons Committee.[120]

Habitat Protection

The discretionary application of SARA's prohibitions against harm to listed wildlife species located on provincial land constitutes the first of two safety nets contained in SARA. The second safety net concerns the protection of critical habitat. Habitat loss has caused approximately 80% of species reduction in Canada[121] and consequently, the protection of habitat is often vital to species' conservation. However, unlike the general prohibitions which apply immediately upon listing, critical habitat[122] protection in SARA is not available until the habitat has been identified in either a recovery strategy or an action plan which has been posted on the public registry.[123] Specifically, once the recovery of a listed species has been determined by the Minister to be both technically and biologically feasible, a recovery strategy must be prepared within one year of listing for endangered

[118] Third Report of the Standing Senate Committee on Energy, the Environment and Natural Resources, December 4, 2002.
[119] *Ibid.* See also *Senate Debates*, Volume 140, Issue 27 (December 9, 2002) at 1620 (Mira Spivak) [Spivak].
[120] *Ibid.*
[121] Jean-Luc Bourdages & Christine Labelle, *"Protecting Wild Species at Risk in Canada"*, Library of Parliament, PRB 00-19E, October 24, 2000, online: <http://www.parl.gc.ca/information/library/prbpubs/prb0019-e.htm>
[122] *Supra* note 1. Critical habitat is defined in section 2 as being "the habitat that is necessary for the survival or recovery of a listed wildlife species"
[123] *Ibid.* Sections 57 and 58. Note that management plans are prepared for species of special concern under section 65 of the Act.

species and two years of listing for threatened and extirpated species.[124] The recovery strategy must include "an identification of the species' critical habitat, to the extent possible, based on the best available information".[125] Because habitat protection is dependent upon its identification in a recovery plan, the language in this provision takes on some significance. The words "to the extent possible" were added by the Committee for the purpose of ensuring that critical habitat would be identified even in more difficult circumstances.[126] Under section 38 of the Act, the Minister must apply the precautionary principle in determining the extent to which critical habitat can be identified.[127] This principle enables recovery planners to identify critical habitat incrementally and not to delay identification based upon a lack of full scientific certainty thereby bringing the habitat protection measures into play sooner rather than later. This is especially important given that the Act does not contain any interim habitat protection measures.[128]

Regardless of whether critical habitat is identified in a recovery strategy or in an action plan, the Act requires the Minister to cooperate with the provinces, territories, wildlife management boards, other aboriginal organizations, or persons likely to be affected by such identification.[129] This provision reflects the principles of integration and cooperation between jurisdictions and individuals that percolates throughout the Act. Both from a practical and theoretical standpoint, this provision is considered as necessary to facilitate the better protection and recovery of listed species throughout Canada.

Following its identification, section 58 prohibits the destruction of any part of the critical habitat provided it is located on federal land or in any waters. Recognizing the government's clear jurisdictional responsibility for species protection and habitat conservation on all federal lands, for aquatic species and for migratory birds, the Committee widened the scope of critical habitat

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[124] *Ibid.* Subsection 42(1). Note that subsection 42(2) extends the time limit for species on the initial list to three years for endangered species and four years for threatened species.
[125] *Ibid.* Section 41(1)(c).
[126] John Herron, *Evidence before the Committee on Environment and Sustainable Development*, October 30, 2001 at 0910.
[127] The precautionary principle requires that "if there threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the loss of species should not be postponed for lack of full scientific certainty" *supra* note 1, s. 38. See also Environment Canada, *Draft Policy on the Identification and Protection of Critical Habitat under SARA* (Ottawa: Environment Canada, July 31, 2006) at 6 [Draft Policy].
[128] It should be noted, however, that section 80 of SARA enables the Governor in Council upon the recommendation of the Minister to make an emergency order to provide for the protection of listed wildlife species which identifies habitat necessary for the survival or recovery of the species and which includes provisions prohibiting activities which adversely affect the species and that habitat.
[129] *Supra* note 1, sections 39 and 48.

protection from that initially contained in Bill C-5 and made it mandatory.[130] Although the government rejected the Committee's amendment at report stage, some last minute pressure from liberal backbenchers caused Minister Anderson to strengthen the critical habitat protection afforded under SARA.[131] In its final form, section 58 provides mandatory critical habitat protection for listed species on federals lands or waters, aquatic species and migratory birds under the *Migratory Birds Convention Act.*[132]

Critical Habitat Safety Net

Where the critical habitat for a listed species is located in an area of a province or territory that is not federal land, protection is only available upon an exercise of Cabinet discretion under the Act's second safety net. Section 61 enables the Governor in Council to order that based upon the recommendation of the Minister, specific portions of identified critical habitat be protected. The Minister must make such a recommendation if he or she is of the opinion, following consultation with the appropriate provincial or territorial minister, that there are no provisions in SARA or any other Act of Parliament which protect the critical habitat,[133] and that the laws of the province or territory do not otherwise effectively protect the critical habitat. The Minister may also make the recommendation if a provincial or territorial minister or the Canadian Endangered Species Conservation Council has requested that it be made.

Like the safety net contained in section 34, the federal government chose to eliminate the criteria added by the Committee at Report Stage regarding what may or not may be considered "effective protection" for the purposes of invoking the safety net. Following an exhaustive study of Bill C-5, the Commons Committee had forwarded an amendment which removed the role of the Governor in Council and limited the exercise of ministerial discretion in section 61 by adding criteria to determine when the protection of critical habitat must be ordered. Under the proposed amendment, the Minister was required to make an Order protecting critical habitat that was not part of federal

[130] *Minutes of the Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, November 20, 2001 at 0912-1015, online, <http:cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=55710&Lang=1&PARL>

[131] Jaimet, *supra* note 116.

[132] *Supra* note 4. Note that section 58 of SARA creates three main categories for habitat protection followed by a complicated process for that protection. Protection of critical habitat is available for federally protected areas including national parks, national wildlife areas, specified marine protected areas and areas within the exclusive economic zone or on the continental shelf of Canada. For a more thorough discussion of the operation of the section see Smallwood *supra* note 12 at 29-34.

[133] Including separately negotiated conservation agreements authorized under section 11of SARA.

land when requested by a provincial or territorial minister, when recommended by the CESCC or when he or she was of the opinion that the laws of the province or territory did not effectively protect the critical habitat of the species. Criteria for determining effective protection included consideration of equivalent prohibitions, criteria for granting exemptions, effective enforcement and public access to information regarding relevant provincial and territorial laws. [134]

The government rejected the proposed amendment on the basis that the safety net should remain discretionary to prevent provincial and territorial uploading of responsibility for endangered species back onto the federal government. That is, by removing the discretion of the minister to determine when, and if, an order protecting critical habitat should be made, a provincial or territorial minister could routinely dictate the measures the federal government must take.[135] While it is true that this outcome is possible, it is a highly cynical approach to the problem of protecting endangered species and their habitats especially in view of the vociferous way in which the provinces have asserted jurisdictional responsibility for wildlife and the political consequences which would follow such a decision. The government also argued that the protection of critical habitat involved more than mere prohibitions and should be achieved through voluntary stewardship initiatives in the first instance.[136] It was suggested by then Assistant Deputy Minister, Karen Brown, that the criteria for assessing effective protection would be developed with the provinces, in both a bilateral and multilateral context rather than within the legislation itself.[137] However, at the time of writing, only three bilateral agreements have been placed on the SARA registry and none include provisions regarding the criteria to be utilized in assessing effective protection under either of the safety nets.[138] The former Director General of the Canada Wildlife Service has stated that the absence of these criteria constitute a massive flaw.[139]

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[134] *Supra* note 130. *First Report of the Standing Committee on Environment and Sustainable Development,* November 27, 2001, online: <http://cmte.parl.gc.ca/cmte/ComitteePublication.aspx?COM=213&Lang=1&SourceId=37052>

[135] Karen Redman, *Evidence before the Standing Committee on Environment and Sustainable Development,* November 20, 2001 at 0925.

[136] *Ibid.*

[137] Karen Brown, Evidence before the Standing Senate Committee on Energy, the Environment and Natural Resources, Issue 2, October 24, 2002.

[138] BC, Saskatchewan and Quebec have signed bi-lateral agreements with the federal government. Online: <http://www.sararegistry.gc.ca/sar/permit/administrative_e.cfm.>

[139] *Supra* note 75.

Criteria for Effective Protection

In its report to the Senate, the Standing Committee on Energy, the Environment, and Natural Resources urged the federal government to establish and make public specific criteria to assess the adequacy of provincial actions. According to the Deputy Chair, criteria would serve two important functions:

> They would be an accountability mechanism. Legislators and everyone else could examine federal action or inaction against them. Perhaps, more important, they would provide some certainty for the provinces and territories, our partners in the safety net approach. They and the public in any given province or territory would know, perhaps not where the federal government will draw the line in the sand, but at least what beach it will stand on.[140]

The criteria were not included in the final legislation and today it is still unclear which beach the federal government has chosen to stand upon, despite the fact that they have stated that "it is necessary to approach the analysis of "effective protection with as high a degree of national consistency and transparency as possible".[141] The significance of this fact cannot be understated given that the meaning and interpretation of "effective protection" is the lynch pin for the operation of the safety net and that most of the habitat for SARA listed species is under the management and control of the provincial and territorial governments.

In February, 2004, the federal government released a discussion paper which provides an outline for the policies to be used for determining whether critical habitat is effectively protected. It should be noted, however, that the draft policies are considered proposed guidelines and not entrenched policy even though more than 3 years have elapsed since the safety net provisions first came into full force and effect. Recognizing that the meaning of effective protection should reflect the purposes of the Act as a whole, the federal government has stated that

> "effective protection can be defined as the measures and mechanisms that can reasonably be expected to protect critical habitat from alterations that would reasonably be expected to reduce the critical habitat's capacity to provide for the recovery and survival of a S[pecies] A[t] R[isk].[142]

The federal government has thus adopted a reasonableness standard in determining whether or not particular activities would likely alter the habitat in question given the present and foreseeable

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[140] *Ibid.*
[141] Draft Policy, *Supra* note 127 at 16.
[142] *Ibid.* at 16-17. The federal government has clearly stated that it will treat the concepts of legal protection (section 58 federal lands) and effective protection (section 61, non-federal lands) in exactly the same manner.

conditions and use of the area. More recent policy documents, specifically aimed at clarifying the federal government's approach to implementing the discretionary sections of SARA regarding critical habitat, state that the effective protection measures must have a basis in law and that the activities which they are meant to control include those affecting but outside the area considered to be critical habitat.[143] These measures include conservation leases, stewardship or other agreements, land use laws, policies, regulations, permits and orders. Finally, an assessment of effective protection must also include an examination of the relevant enforcement and compliance regime which has been established by the responsible jurisdiction.[144]

It should be noted, however, that the federal government maintains a clear position with respect to its willingness to rely upon provincial management and protection measures to achieve effective protection. It has stated that "the Minister will evaluate whether critical habitat is being effectively protected ... in cooperation with the province or territory" and only on an as needed basis. [145] Formal guidelines for making effective protection determinations have yet to be made public and will include a consideration of the costs and benefits of additional protection.[146] Interviews with government officials revealed that most of the provinces would prefer clear criteria to be formally established for the circumstances under which the safety net provisions of SARA will be invoked.[147] Despite the foregoing policy positions, the federal government as yet has not been able to put the necessary mechanisms in place to ensure that the Act's objectives are being met. In an independent formative evaluation[148] of federal species at risk programs released in July, 2006, the government was found to be lacking a

> measurement and reporting framework to inform on actual implementation of the Accord, the degree to which complementary legislation and programs for the protection and recovery of species at risk have been put in place by other levels of Canadian governments, and the degree to which federally listed species at risk and their habitat are being effectively protected by those governments.[149]

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[143] Environment Canada, *Draft Policy on the Identification and Protection of Critical Habitat under SARA*, (Ottawa: Environment Canada, July 31, 2006) at 4.
[144] *Supra* note 127 at 18.
[145] *Supra* note 143 at 9.
[146] *Ibid.* at 10
[147] Alberta, BC, Manitoba, New Brunswick, Ontario and the Northwest Territories were amongst the jurisdictions which specifically stated during confidential interviews that such criteria would be helpful.
[148] "Formative evaluations are conducted in early years of program/policy delivery in order to assess the degree to which appropriate programs, processes and procedures have been put in place to ensure effective and efficient expenditure of resources." Stratos Inc, *Formative Evaluation of Federal Species at Risk Programs*, July 2006, at 1, online: <http://ec1051.imatics.com/working/SARA/1_e.html>
[149] *Ibid.* at 57.

The evaluation recommended that a policy/guidance framework to support the Act's safety net provisions be developed on an urgent basis and that a means of monitoring the extent to which all SARA listed species are legally or otherwise protected in the provinces be established.[150] It may be argued therefore that the decision not to include criteria and timelines for the invocation of SARA's two safety nets has made the implementation of the Act's objectives more difficult because of the resulting uncertainty and lack of accountability.

The evaluation revealed the fundamental dilemma faced by the federal government as it walks the tightrope of fulfilling its obligations under SARA and maintaining positive relationships with the provinces:

> On the one hand, it faces legal challenges and risks in instances where it must rely on provincial/territorial contributions to federally legislated obligations to effectively protect species at risk and their habitat. On the other hand, there are risks that the generally positive federal/provincial/territorial cooperation achieved to date through the Accord could be undermined if the federal "safety net" or other federal action is deemed necessary.[151]

This dilemma underscores the conflict that is entrenched in the federal safety net as a policy instrument. The safety net was introduced as a means of recognizing and engendering a cooperative working relationship with the provincial governments, yet just beneath the surface of that cooperation is the threat of unilateral action by the federal government. This dual personality of the safety net makes it a unique policy instrument, the nature of which will be discussed in the proceeding section.

The Safety Net as a Policy Instrument

The stated purpose of SARA is to prevent Canadian wildlife species from becoming extirpated or extinct and to provide for the recovery of endangered or threatened species. The federal government opted to restrict the general application of the Act to listed species on federal land, aquatic species or migratory birds; however, in an effort to broaden SARA's limited scope and establish a "national standard" of protection for endangered species, the concept of the safety net was developed and negotiated with the provinces. The mechanism is intended to resolve an unclear and unspecified division of constitutional powers and to recognize some of the practical and political realities of recovery planning and conservation.

[150] *Ibid.* at 58.
[151] *Ibid.* at 57.

Legal counsel for the federal government admitted that the safety net constitutes a novel approach to balancing provincial concerns over jurisdictional interference and the need for overarching legislation. In testimony before the Committee, counsel for the department of justice stated that the safety net was created specifically for the purposes of this legislation, "to implement the policy intention of working cooperatively with the provinces before the government asserts the criminal law power to bring in a general prohibition".[152] It is intended to be cooperative in nature and to "invite provinces and territories to act in a responsible manner".[153] As will be discussed in Chapter 4, it is an invitation that many have accepted from its initial inception to the present day.

The safety net is intended to be an "iron fist in a velvet glove" and it is clear that the ability of the federal government to act unilaterally to apply SARA's provisions when the provinces fail to protect species at risk and their habitats constitutes a coercive rather than a cooperative policy instrument. It is this coercive aspect that provides the safety net with its true strength as a policy instrument. The threat of federal action gives the safety net a unique ability to alter provincial and territorial behaviour and ultimately to bring about the creation of improved endangered species protection measures. However, many feel that the threat of federal intervention contained within the safety net is so "unclear and lacking in strength that there is very little chance it will ever be invoked,"[154] and consequently, there is no fist in the iron glove at all.[155] Although other discretionary "safety net" like provisions have been included in federal legislation where there are similar inter-provincial or international issues, they have never been used.[156] The question which will be addressed in chapter 3 is whether or not the federal government must in fact use these safety net provisions and undertake unilateral action against the provinces in order for them to be effective policy instruments.

Several issues will be examined in Chapter 4. Firstly, whether or not the safety net, either alone, or in conjunction with the development and passage of SARA, mobilized the provinces into providing better endangered species protection. Secondly, if the effects of the safety net and the development of SARA can be distinguished from other competing pressures on provincial governments to fulfill

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[152] David Near, Department of Justice, *Evidence before the Standing Committee on Environment and Sustainable Development*, November 20, 2001, at 0930 [Near].
[153] Karen Redman, *Evidence before the Standing Committee on Environment and Sustainable Development*, October 31, 2001 at 1555.
[154] Stewart Elgie, Evidence, *Proceedings of the Standing Senate Committee on Energy, the Environment, and Natural Resources*, Issue 5, November 26, 2002.
[155] Spivak, *supra* note 119 at 1620
[156] Stewart Elgie, *Presentation to the Standing Committee on the Environment and Sustainable Development Concerning Bill C-5, the Species at Risk Act*, citing *Canada Wildlife Act,* s.12(b); *Canadian Environmental Assessment Act*, s. 46-47, *Canada Water Act*, s.6 and s. 13, *Canadian Environmental Protection Act*, s.61.

their commitments under the National Accord. Thirdly, whether or not SARA and the safety net has brought about sufficient change in provincial legislation to result in equivalent, if not effective, protection for species at risk throughout Canada. Finally, in light of these issues, I will discuss whether SARA's safety net is likely to continue to motivate provincial endangered species' protection if the federal government chooses not to invoke it even in the face of provincial inaction.

The federal policy choices reflected in the development of SARA and its safety net were the result of a multi-actor, multi-level and multi-round decision making. The interaction of the various members and institutions which made up the policy network resulted in a relatively small number of possible instrument options from which the federal government could choose to resolve the problem of protecting and conserving endangered species throughout Canada.[157] SARA's safety net represents a somewhat distinct combination of cooperative and coercive policy instruments. In order to better understand the potential effectiveness of the safety net, it is useful to examine the difference between cooperative and coercive policy instruments in the intergovernmental context.

Cooperative and Coercive Policy Instruments

The constitutional overlap between the federal government and the provinces in matters of environmental policy dictates that there will be varying degrees of conflict and cooperation in the allocation of resources and responsibility. Harrison argues that federal provincial relations concerning the environment have gone through at least two cycles of harmony and discord during the last three decades. Each cycle has been characterized by some combination of three structural models of conduct and decision-making on the part of both levels of government; namely, unilateralism, collaboration and rationalization.[158] Unilateralism entails governments acting independently of one another without coordination of activities while both collaboration and rationalization involve some measure of intergovernmental cooperation. During the late 1980's, after a period of relative harmony, conflict erupted in intergovernmental relations as the federal government took on a greater role in environmental policy making and asserted unilateral action in

[157] *Supra* notes 152 and 153. For a comprehensive discussion regarding the roles of the various institutions and actors in the development of SARA see Illical, *supra* note 88.

[158] Harrison 1992, *supra* note at 125. For a more detailed discussion of the concepts of unilateralism, collaboration and rationalization see K.Harrison, "Intergovernmental Relations and Environmental Policy: Concepts and Context" in Patrick C. Fafard & Kathryn Harrison, eds., *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada*, (Kingston: Institute of Intergovernmental Relations, Queen's University and Saskatchewan Institute of Public Policy, 2000), 3 at 13 [Harrison 2000].

the areas of environmental protection and assessment.[159] By the early 1990's, however, both levels of government attempted to restore relations through a number of initiatives including the revitalization of the Canadian Council of Ministers of the Environment and the approval of the Canada Wide Accord on Environmental Harmonization. Both of these measures were designed to promote cooperation as an alternative to unilateralism.[160]

Within each of these cycles, there are clearly a range of activities within the conflict/cooperation spectrum of intergovernmental relations and one course of action is only preferable to the other to the extent that it is more effective, as a policy instrument, at resolving the problem in question.[161] It is arguable that in fact we could not have one with the other. Specifically, unilateralism and cooperation are "analytically inseparable ... because the limitations of unilateralism constitute the incentive structure for cooperation".[162] It is this inseparability that makes the safety net a potentially effective policy instrument. It should also be noted that the development of SARA, in and of itself, operated in much the same manner. That is, alongside their commitments under the National Accord, the threat of unilateral application of federal legislation motivated the provinces to provide better and more effective protection of species at risk within their borders over the period of time beginning in 1996 and extending to the present day. The federal government couched what could otherwise be considered unilateral action in cooperative rhetoric and pursued a more politically and strategically attractive means of attempting to achieve the policy objective of protecting species at risk throughout Canada.

Increasingly in the environmental arena and elsewhere, governmental policy has shifted beyond the traditional command and control model and embraced more cooperative regimes and other voluntary initiatives involving multi-sector and multi-variable approaches to governance. SARA forms part of the federal government's three pronged strategy to protect species at risk which also includes the Habitat Stewardship Program and the National Accord. Although SARA is the most traditional policy instrument of the three, it has more cooperative underpinnings than its American counterpart. Recognizing some of the potential shortcomings of an overly coercive approach, the federal

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[159] Harrison 2000, *ibid.* at 7.
[160] *Ibid.*
[161] Leslie A. Pal, *Beyond Policy Analysis: Public Issue Management in Turbulent Times*, (Scarborough, Ontario: Nelson/Thompson Learning, 2001) at 3 [Pal].
[162] Steven A. Kennett, "Meeting the Intergovernmental Challenge of Environmental Assessment" in Patrick C. Fafard and Kathryn Harrison, eds., *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada*, (Kingston: Institute of Intergovernmental Relations, Queen's University and Saskatchewan Institute of Public Policy, 2000), 105 at 107 [Kennett].

government cautiously tried to build upon the cooperative intergovernmental relationship created under the Accord, not only as a means of preventing a constitutional and political impasse but also as a way of responding to the existing alignment of resources and expertise over wildlife protection and management.[163] In that respect, the federal government recognized that the protection of species at risk in Canada required provincial involvement since in large measure "it is they who manage most of the lands and activities that affect the species and the critical habitat".[164] In its 2004 review of the successes and failures of the U.S. *Endangered Species Act,* Defenders of Wildlife specifically recommended that the federal government encourage increased cooperation with state and regional governments as a means of achieving more effective protection of endangered species. The report notes that by having state governments assume more responsibility for protecting threatened and endangered species greater progress in conservation would likely occur. The report, however, clearly states that when considering which conservation measures are appropriate for state authorities to undertake, federal standards must continue to be rigorously upheld.[165] It is here that difficulties may arise since not all state governments share the same perspective regarding the content and enforcement of these standards.

Intergovernmental conflict often occurs when governments have differing views about policy objectives or the instruments to be used to achieve those objectives. In the environmental context, this conflict frequently manifests itself in the fundamental tension between environmental protection and economic development.[166] In the federal/ provincial arena this tension is borne out by the fact that provincial economies are highly dependent upon resource exploitation and that "federal concerns for protection of the environment have the potential to jeopardize provincial priorities for resource development".[167] May and Burby compare the intergovernmental mandate performance of coercive and cooperative policies and find that their relative efficacy turns on the degree of commitment of lower level governments to policy objectives. They conclude that

> "Coercive intergovernmental policies, when effectively implemented, appear to motivate substantive compliance across the board. But, cooperative policies, when aggressively pursued, appear to be as effective in dealing with motivated jurisdictions. The beneficiaries of cooperative policies appear to be those leading jurisdictions that have the commitment and ability to collaborate in achieving policy

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[163] *Supra* note 13 at 1015. See also *House of Commons Debates,* No. 185, (May 8, 2002) at 1555 (John Maloney).
[164] *House of Commons Debates,* No. 202,(June 11, 2002) at 1610 (Murray Calder).
[165] William J. Snape III and Robert M. Ferris, *Saving America's Wildlife: Renewing the Endangered Species Act*", (Defenders of Wildlife: Washington D.C., February, 2004) online: <http://www.defenders.org/pubs/save06c.html >
[166] *Ibid.* at 111.
[167] Skogstad & Kopas, *supra* note 26 at 47.

objectives. Meanwhile, lagging jurisdictions with less commitment to state goals fall behind by either not complying or making more modest efforts to fulfill state policy objectives."[168]

In Canada, it is clear that some provinces have demonstrated a greater commitment to protecting species at risk than others. Since 1996, a number of environmental organizations have published report cards which evaluate how well each of the federal, provincial and territorial governments have fulfilled their obligations under the National Accord to provide basic protection for endangered species within their jurisdictions. The report cards assess governmental progress on providing effective legal protection and do not address voluntary, non-legislative or private conservation efforts. Over time, the grades give an accurate picture of which jurisdictions are more or less committed to addressing the problem of conserving biodiversity. At the time the Accord was agreed to in principle in 1996, Ontario, Manitoba, Quebec and New Brunswick were the only provinces to have legislation specifically aimed at protecting endangered species. Since then most of the provinces have come on board with either improved or new legislation; however, there remain a number of jurisdictions that can be considered as lagging behind the others. Over the years, Alberta, British Columbia, Saskatchewan and the Yukon have all consistently received failing grades for their endangered species protection efforts. Although the precise measures that each of the jurisdictions have taken since 1996 will be discussed in greater detail in Chapter 4, the varying level of commitment to the stated federal policy of protecting species at risk is precisely why the federal government cannot rely merely on cooperative measures.

The National Accord contains 14 specific criteria which require its signatories to establish complementary legislation and programs that provide for effective protection of species at risk.[169] It establishes a framework for cooperation but does not include any recourse for failed or insufficient implementation of the agreement, or any capacity building measures. As a strictly cooperative policy instrument, the National Accord has encouraged many provinces to provide increased protection for species at risk within their borders; however, the report cards clearly indicate that some jurisdictions lag behind in their implementation of the Accord. For example, even after

[168] Peter J. May& Raymond J. Burby, "Coercive versus Cooperative policies: Comparing Intergovernmental Mandate Performance" (1996) 5:2 *Journal of Policy Analysis and Management* 171 at 194.

[169] Amongst other things, these criteria require that the legislation and policies address all non-domestic species, provide an independent process for assessing the status of species at risk, legally designate species as threatened or endangered, provide legal protection for threatened or endangered species, provide for the development of recovery plans within one year for endangered species and two years for threatened species, ensure multi-jurisdictional cooperation for the protection of transboundary species through recovery plans, consider the needs of species at risk as part of environmental assessment processes, implement recovery plans, encourage stewardship and provide for effective enforcement.

agreeing to the Accord in principle, both Alberta and B.C. indicated that they did not intend to pass specific legislation protecting endangered species.[170] As predicted by May and Burby, governments which are less committed to the policy objective in question may languish under strictly cooperative policies and coercion may be required to induce participation and to achieve minimally acceptable outcomes.[171] Interestingly, it is in these two jurisdictions that the possible invocation of the safety net and use of the federal government's emergency powers under section 80 of SARA have first arisen. These minimally acceptable outcomes are essentially the national standards of protection outlined in SARA and the federal safety net is the coercive policy instrument necessary to achieve them. However, whether the safety net can be considered to be an effective instrument if it is never used remains to be answered.

At the time of writing the federal government has not exercised its discretion to apply any of the federal safety net provisions contained in SARA despite petitions filed by environmental groups across Canada.[172] Perhaps the most dramatic of these cases concerns the Northern Spotted Owl which makes its home in the old growth forests of southwestern British Columbia. Historically, there were as many as 500 adult pairs living in the healthy ranges of old growth forest that dominated a roughly 9,600 square kilometer area of southwestern BC.[173] Habitat loss and forest fragmentation due to extensive logging of the area has, however, had a devastating effect on their population. By the end of 2005, only 6 breeding pairs remained. What is even more startling is that notwithstanding repeated pressure from environmental groups and the province's own biologists, the BC government continues to be the largest logger of spotted owl habitat.[174]

In 2002, a provincial court judge highlighted the difficulties facing environmentalists in their efforts to protect the species and held that the BC government did not have legislation in place which would

[170] The Canadian Endangered Species Coalition, *Getting their Acts Together: A Report Card on the Implementation of the National Accord for the Protection of Species at Risk*, online <http://www.chebucto.ns.ca/environment/FNSN/cesc/report97.html#int>

[171] *Supra* note 168 at 175.

[172] Although there is no formal petition process contained in SARA, ENGO's have adopted this strategy as a means of requesting the Minister to exercise his power under the Act. Petitions requesting that the Minister make an emergency order under section 80 of SARA have been filed in respect of the Woodland Caribou and the Spotted Owl by a coalition of environmental groups. A similar petition was filed in August, 2006 by Sierra Legal and others requesting that the minister make a recommendation under section 34 to protect the tiny cryptanthe and small flowered sand verbena in Alberta. Other petitions have been filed in respect of the emergency listing of the Sakinaw salmon, and the identification of critical habitat for the piping plover.

[173] Larry Pynn, "Our Last Spotted Owls" in *British Columbia Magazine*, Spring 2006 50 at 53.

[174] Notice of Application, Federal Court of Canada (Trial Division), *Western Canada Wilderness Committee, David Suzuki Foundation, ForestEthics and Environmental Defence of Canada v. Minister of the Environment*, filed December 5, 2005.

protect the spotted owl from the risk of extirpation caused by the harvesting of old growth forests.[175] British Columbia does not presently have stand alone endangered species legislation and instead relies upon a patchwork of statutes which offer marginal protection for species and their habitats. A recent academic study has revealed that "the BC government has not sufficiently met its national and international obligations due to its low performance in the legal listings of scientifically recognized species at risk of extinction, a misconception of the purpose of species at risk legislation, arbitrary constraints on the protection of these species, and a lack of commitment to their recovery."[176]

Following the coming into force of SARA, environmental groups began to turn to the federal government in their quest to protect the spotted owl. On February 27, 2004 Sierra Legal Defence Fund made an application to the federal government seeking an emergency order pursuant to section 80 of SARA.[177] Under section 80, where a listed species faces an imminent threat to its survival or recovery, the Governor in Council may, upon the recommendation of the minister, make an emergency order for the protection of that species. A section 80 order may identify habitat that is necessary for the survival or recovery of the species and include provisions prohibiting activities which adversely affect the species and that habitat.[178] To some extent, section 80 thus operates in much the same way as the safety net provisions contained in SARA.

Unfortunately, despite the on-going logging practices of the British Columbia government and its impact on the owl's habitat, despite the lack of legal protection afforded the spotted owl by the province, and despite the tragic rate of owl population decline, neither Minister Anderson, nor any of his successors, have recommended that an emergency order be made under section 80 of SARA. Consequently, in early December, 2005, a coalition of environmental organizations filed a court action against the Minister of Environment to compel him to fulfill his obligations under SARA and to recommend the making of an emergency order to protect the Spotted Owl.
The federal government responded in February, 2006 by stating that it was willing to wait until provincial officials implemented their own recovery strategy before it would step in with an

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[175] *Western Canada Wilderness v. Cindy Stern et al,* [2002] B.C.J. No. 2036, 2002 BCSC 12360, (2002) 45 Admin. L.R. (3d) 161, (2002) 50 C.E.L.R. (N.S.) affirmed: *Western Canada Wilderness v. Cindy Stern et al,* [2003] B.C.J. No. 1581, 2003 BCCA 403, (2003) 15 B.C.L.R. (4th) 229, (2003) 1 Admin.L.R. (4th) 167, (2003) 1 C.E.L.R. (3d) 185.
[176] Paul M.Wood & Laurie Flahr, "Taking Endangered Species Seriously? British Columbia's Species at Risk Policies", (2004) 30:4 *Canadian Public Policy* 381.
[177] Correspondence from Devon Page, Staff Lawyer, Sierra Legal Defence Fund to the Honourable David Anderson, Minister of the Environment, Government of Canada, dated February 27, 2004. A similar application was made in respect of woodland caribou, dated December 15, 2005.
[178] *Supra* note 1, subsection 80(4)(c)(ii).

emergency order.[179] It should be noted that up until that time, the BC government had not implemented a recovery strategy for the owl which included adequate habitat protection measures, and had specifically chosen not to follow a 2003 recommendation by provincial biologists for a moratorium on logging of owl habitat. [180] A federal government official revealed in a confidential interview with the author that the province was indeed put on notice that the safety net provisions would be triggered if a recovery strategy was not put in place. There is also no doubt that the threat to use the safety net was in turn prompted by the litigation initiated against the Minister of the Environment.[181] On April 28, 2006, the British Columbia government announced its newly developed $3.4 million five year action plan to recover the spotted owl.[182] Although the action plan continues to have serious flaws due to its focus upon captive breeding and the absence of stringent habitat protection measures, the threat of federal interference in provincial jurisdiction motivated the BC environment minister to publicize and fund a recovery strategy that had languished for several years.[183]

A similar situation has arisen with the province of Alberta and its failure to provide effective protection for the tiny cryptanthe and the small flowered sand verbena. Both of these small annual vascular plants have been listed in Schedule I of SARA as endangered species yet receive almost no protection under the provincial *Wildlife Act*[184] simply because they have not been listed as "endangered plants" under the Act's regulations. Until such time as they are included as a prescribed species in the regulations, they will not receive any legal protection under provincial legislation. Even after listing, the Act does not require the identification or protection of critical habitat. Like the spotted owl, habitat loss as a result of human activity is the primary cause of the species' population decline. All of the other provincial statutes which could potentially be used to protect the tiny cryptanthe and sand verbena are subject to ministerial discretion and are of limited

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[179] *Supra* note 5 at 25.

[180] The Spotted Owl Recovery Team made its first recommendations regarding recovery measures in 1993; however, none of those options were pursued by the provincial government. Sierra Legal Defence Fund, Petition in Support of an Emergency Order pursuant to section 80 of the *Species at Risk* Act, 2002, c.29 for Protecting the Northern Spotted Owl, Vancouver, February 27, 2004 at 18. See also Environment News Service, "Spotted Owl Crisis Prompts First Legal Test of Canada's Species Law", December 7, 2005. Online: <http://www.ens-newswire.com/ens/dece2005/2005-12-07-03.asp>

[181] *Supra* note 75.

[182] Ministry of Agriculture and Lands, BC Government, News Release, *"BC Announces Spotted Owl Recovery Plan*", April 28, 2006. Online: < http://www2.news.gov.bc.ca/news_releases_2005-2009/2006AL0012-000514.htm>

[183] *Supra* note 173.

[184] Alberta Wildlife Act, *supra* note 14.

application. As of November, 2007, the Alberta government has not used any legal mechanism to identify, protect or recover either species.[185]

In August, 2006 a coalition of environmental organizations petitioned the federal Minister of the Environment to recommend to the Governor in Council that it apply the safety net and section 32 of SARA to the lands in Alberta where the tiny cryptanthe and the small flowered sand verbena live. The petitioners argue that based upon SARA's purpose, the definition of "effective protection" must include three crucial elements; namely, identification, protection and recovery. This definition recognizes that "an endangered or threatened species can only be protected from extinction if it is identified as needing protection, if harm to it and its habitat is prohibited and if recovery actions are undertaken".[186] To the extent that a province's laws do not provide these three elements, the threshold of effective protection is not met, and therefore, the petitioners argue that the Minister is compelled to recommend the application of the federal safety net. The circumstances of this case also provide the federal government with a unique opportunity to demonstrate its commitment to ensuring protection for species at risk throughout Canada with only minor socio-economic implications. Because these species occupy such a small portion of Alberta's prairie landscape there are almost no socio-economic repercussions following a decision to invoke the safety net. More than a year later, the federal government still has not publicly responded to the petition; however, it did post its recovery strategy for the tiny cryptanthe on the SARA registry in October, 2006. [187] The recovery strategy was prepared with the assistance of Alberta government officials.

The plight of the tiny cryptanthe and the small flowered sand verbena are only examples of the broader problem facing the federal government. Currently, there are several provinces and territories which do not have adequate measures in place to provide effective protection for species at risk.[188] The specific laws and policies in place in each jurisdiction will be discussed in greater detail in Chapter 4. For now it is sufficient to note that they do not have the three components for effective protection which can be inferred from SARA's purpose. It should be added that in October, 2006, environmental groups filed a submission with the Commission for Environmental Cooperation of North America (CEC) requesting that the Commission investigate the federal government's failure to

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[185] Devon Page, Sierra Legal Defense Fund, *Petition to the Minister of the Environment*, August 1, 2006 at 16.
[186] *Ibid.* at 12.
[187] Environment Canada, Species at Risk Public Registry online: <http://www.sararegistry.gc.ca/virtual_sara/files/plans/rs_tiny_cryptanthe_1006_e.pdf>
[188] Alberta, BC, the Yukon and Northwest Territories.

enforce the safety net and emergency order provisions of SARA.[189] On September 10, 2007, the CEC issued a notification pursuant to Article 15 of the *North American Agreement on Environmental Cooperation* indicating that the submission had merit, that the response issued by the federal government did not adequately address all of the issues raised by the submission, and consequently, that the allegations contained within it required further investigation. [190]

Despite the lack of action taken by the federal government, Alberta wildlife officials remain keenly aware of the possible application of the safety net and are currently attempting to bring forward amendments to the *Wildlife Act* through to the ministerial level. When asked if the threat of the safety net provisions contained in SARA motivated the province to provide additional habitat protection or tougher legislation as a means of securing jurisdictional authority, a provincial official responded in the affirmative, stating that "the threat has raised the profile of the legislation and its weaknesses" and has "caused the province to look into amendments [to its Act]".[191] This response is even more telling given the fact that the province does not believe that the federal government has the political will to invoke the safety net over the two endangered plant species[192] and suggests that the mere presence of even a weak threat may be sufficient to bring about increased protection for species at risk. But the question remains as to whether or not it is sufficient to bring about effective protection for species which is the true measure of its worth as a policy instrument.

The federal government has thus far opted not to use the safety net or its counterpart, the emergency order, despite being pressured by environmental organizations and being presented with clear opportunities for action. It has only exercised the threat value of the policy instrument through closed door discussions with two of the provinces in a limited manner. [193] Although this has produced some movement on the part of the provincial governments towards providing increased protection, significant problems remain. The mere threat of federal interference in provincial jurisdiction through the use of the safety net has not produced law and policy changes in either Alberta or BC that have been sufficient to produce effective protection for the species at risk which are the subject of the petitions discussed above. Thus, while provincial cooperation in the protection

[189] Sierra Club of Canada, *Submission to the Commission for Environmental Cooperation* (6 October 2006). Online: <http://www.sierraclub.ca/national/programs/biodiversity/wilderness/endangered-species/cec-submission-sara.pdf>
[190] Commission for Environmental Cooperation, *Notification to Council* (10 September 2007). Online: <http://www.cec.org/files/pdf/sem/06-5-ADV_en.pdf>
[191] Confidential Interview with provincial official, February 15, 2007.
[192] *Ibid.*
[193] *Supra* note 75.

of endangered species is vital, it alone may be "insufficient to ensure that the requirements and objectives of the federal *Species at Risk Act* will be met".[194]

In Chapter 4, I will discuss in greater detail the extent to which this threat, either in the form of the application of the federal safety net or the development of the legislation itself, has motivated the provinces to protect species at risk within their borders. The foregoing examination of the federal government's decision not to use the safety net and the subsequent provincial response suggests that threat alone may be insufficient to prevent species at risk throughout Canada from falling through the cracks in provincial legislation. There is no question that the future of the spotted owl in BC and the tiny cryptanthe and sand verbena in Alberta remain uncertain. Perhaps the CEC's decision to investigate the federal government's failure to enforce SARA will motivate Ottawa to invoke the safety net to identify and protect species at risk and their habitats, and undertake actions necessary to recover those species. Unfortunately, there is little evidence to suggest that it will in fact adopt such a course of action. Not only has the probable extinction of the spotted owl been insufficient to provoke federal action, historically, similar safety nets in environmental and other legislation have never been used. What follows in chapter 3 is a detailed examination of these other federal safety net provisions.

[194] Supra note 123.

Chapter 3 Safety Nets in Other Federal Environmental Legislation

"The safety valve for the public interest is unilateral action by the federal government within its jurisdiction."[195]

The jurisdictional overlap between the federal and provincial governments in the environmental arena was discussed at length in Chapter 2. Ottawa's expanding legislative presence in this area over the last four decades has often resulted in intergovernmental conflict over the provinces' perceived ability to manage and develop their natural resources without federal interference. The threat of federal unilateral action to regulate the environment can, and often does, operate as a catalyst for the creation or reform of provincial law and policy. This reform is undertaken as a means of defending provincial jurisdiction over the environment, and consequently, over the development and exploitation of their natural resources. This response appears to remain true even when the federal threat is not, in fact, acted upon.

This chapter involves an examination of a number of federal environmental laws including the *Canada Water Act*, the *Clean Air Act*, and the *Transportation of Dangerous Goods Act* (1982), the *Canadian Environmental Protection Act*, and the *Canadian Environmental Assessment Act*. Each of these statutes contains a provision or provisions which stipulates the circumstances under which a provincial government may be subject to, or opt out of, the application of federal legislation. All of these provisions have similar characteristics to the SARA safety nets discussed in the previous chapter, and an examination of their use and effectiveness as policy instruments offers insight into the potential use and impact of the safety nets contained in SARA.

Historically, Ottawa has been reluctant to undertake unilateral action against the provinces and most agree that collaborative federalism has generally characterized the last 25 years of intergovernmental relations in the environmental context.[196] However, the threat of federal interference in provincial jurisdiction has at times contributed to the development of a competitive response from provincial governments in the way of improved legislation and

[195] Higgins, Director General, Environmental Protection, Department of the Environment, *Minutes and Proceedings of the Legislative Committee on Bill C-74*, February 3, 1988 at 1645 [Higgins].
[196] Harrison, *supra* note 28, at 162-177. See also William R. MacKay, *Canadian Federalism and the Environment: The Literature*, (2004-05) 17 Georgetown International Environmental Law Review 25 at 48-49 for a general review of the literature on intergovernmental relations in the environmental context.

policies. This threat has manifested itself in the development of federal legislation generally, and more specifically, in provisions which operate in a similar fashion to the safety net contained in SARA. In general terms, these safety net like provisions enable the federal government to act unilaterally over environmental matters when the provinces have either failed to do so or have consented to the application of the federal law.

The purpose of this chapter is to discuss the historical development of these statutes and their respective safety net like provisions, to examine their similarities to the safety nets in SARA, to establish whether or not they have been used and if so, in what context, and finally, to demonstrate what, if any, reaction their presence, alongside the federal legislation itself, provoked in each province. In so doing, the goal is to reveal the unlikelihood that the federal government will apply the safety net in SARA directly. However, the threat of federal interference alone is often sufficient to motivate the provinces into improving their own legislation in order to secure greater jurisdictional control over environment matters. In that regard, the development and passage of federal environmental legislation often elicits a provincial statutory echo. Where the threat of interference becomes embedded in the safety net provisions of the federal legislation, it often continues to motivate provincial action in the way of improved environmental protection through the implementation of law and policy. Finally, I hope to show that this conclusion is consistent with what has happened in other environmental contexts. It should be noted that this chapter will not consider the effectiveness of the federal or provincial environmental legislation except in a very general way but will rather discuss the apparent cause and effect relationship which exists between the development of the federal legislation and its safety net like provisions as well as the ensuing behaviour of the provincial governments to the threat of unilateral action.

Canada Water Act

Like many other aspects of environmental law, the management and protection of water does not constitute a distinct head of power for either the federal or provincial governments under the *Constitution*.[197] One of the difficulties in determining constitutional authority over water

[197] A detailed discussion of the constitutional context of water management is outside the purview of this paper. For further information regarding the federal/provincial jurisdictional overlap see: J.Owen Saunders, *Interjurisdictional Issues in Canadian Water Management*, (The Canadian Institute of Resources Law: Calgary, 1988) at 7 [Saunders 1988]; Alastair Lucas , "Harmonization of Federal and Provincial Environmental Policies: the Changing Legal and Policy Framework" in *Managing Natural Resources in a Federal* State, J.O. Saunders ed., (Calgary: Carswell, 1986) 32 at 42 and Dale Gibson "The Constitutional Context of Canadian Water Planning", (1969) 7 Alberta Law Review 71.

resources is the mobile nature of the resource itself. This characteristic makes the application of proprietary rights more difficult, as well as requires that a distinction be drawn between water lying within the boundaries of a province and water which crosses provincial boundaries.[198] Provincial authority over water management rests primarily in the proprietary rights granted under section 109 and the various legislative powers under section 92 and 92A.[199] Although the federal government also exercises some proprietary rights over water within the provinces,[200] a stronger source of federal jurisdiction can be found in the enumerated heads of power listed in section 91 of the Constitution including navigation and shipping and fisheries.[201] These heads of power do, however, restrict the federal role in water management to the specific sector and activity in question. A more expansive role for the federal government in interjurisdictional water management may be grounded in the general power to make laws for the "peace order and good government" of Canada.[202] While this power is by no means without controversy, it was found by the Supreme Court of Canada in *R. v. Crown Zellerbach* that the POGG power could support federal legislation concerning the regulation of extra-provincial waters.[203] It was fundamentally upon this basis that the federal government passed the *Canada Water Act*[204] in 1970, and in so doing, took its first tentative steps towards claiming jurisdiction over interprovincial water management.[205]

Part I of the Act enables the federal government to formulate, design and implement comprehensive water management plans and is intended to encourage intergovernmental cooperation for the research and development of any such plans. It authorizes the Minister of

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198 Saunders 1988, *ibid.*

199 In particular, the provinces have exclusive jurisdiction over property and civil rights (s. 92(13)), local works and undertakings (s.92(10)) and the sale of public lands (s.92(13)). Additionally, s. 92A confers upon the provinces exclusive jurisdiction over the exploration, development and conservation of non-renewable natural resources.

200 Most notably with respect to water found within the territories, on Indian reserves, in national parks and on other federal lands.

201 Section 33 of the *Fisheries Act,* R.S.C. 1985, c. F-14 has been used by the federal government to manage water quality and pollution in relation to the protection and conservation of fishery resources. See *Northwest Falling Contractors Ltd. v. R.,* [1980] 2 S.C.R. 292.

202 See *Interprovincial Co-operatives v. Manitoba* (1975), [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 and *Zellerbach supra* note 44 for a consideration of the POGG power in the context of water pollution.

203 *Zellerbach, ibid.* See also Harrison, *supra* note 28 at 66; Stanley B. Stein, "An Opinion on the Constitutional Validity of the Proposed Canada Water Act", (1970) 28 U of T Faculty of Law Review 74; and D.R. Percy, "Appendix D: Federal/Provincial Jurisdictional Issues" in Harriet Rueggeberg and A.R. Thompson, *Water Law and Policy Issues in Canada*, (Vancouver: Westwater Research Centre UBC, 1984) at 81[Rueggeberg & Thompson].

204 *Supra* note 18.

205 James W. Parlour, "The Politics of Water Pollution Control: A Case Study of the Formation of the Canada Water Act, Part I: Comprehensive Water Resource Management; Part II: Nutrient Control", (1981) 12 *Journal of Environmental Management* 31 at 36.

Environment, with the approval of Cabinet, to enter into agreements with one or more provincial governments with respect to any waters in which there is a significant "national interest" for the purpose of providing programs to formulate comprehensive water resource management plans. These plans must also have regard to the efficient conservation, development and utilization of those waters.[206] Although the federal government is clear in its desire for provincial cooperation, the Act provides for unilateral action where such cooperation is not forthcoming. Specifically, section 6 requires the federal government to undertake the unilateral formulation of a comprehensive water management plan with respect to interjurisdictional, international or boundary waters[207] where all reasonable efforts to reach an agreement with one or more of the interested provincial governments have failed.[208] It should be noted, however, that the authority of the federal government to take independent action to develop a management plan is limited to only those waters in which there is "significant national interest". As will be shown, this caveat foreshadows the deferential approach to provincial interests that ultimately characterized the Act's implementation.[209]

Part II of the Act focuses on water quality management and appears, on its face, to mirror the provisions outlined above but in fact its potential breadth of application is much wider.[210] Section 11 authorizes the Minister of Environment to enter into agreements with provincial governments having an interest in the water quality management of any federal waters, or any waters the quality of which has become a matter of "urgent national concern". The agreement must provide for a water quality management program in respect of those waters and authorizes the Minister to establish jointly with the provincial government an agency whose function it is to plan and implement the program itself. While there is a clear mandate to encourage cooperation with the provinces in addressing the problem of water quality; the Act again provides the federal government with the ability to act unilaterally to carry out the functions of the agency, where collaborative efforts have failed. Thus, the federal government may plan, initiate and carry out a water quality management plan where all reasonable efforts to reach an agreement with a province respecting inter-jurisdictional waters, or the quality standards for those waters, have

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[206] *Supra* note 204, s. 5(d) and (e).
[207] *Ibid.* as defined in section 2. Most notably for these purposes, "interjurisdictional waters means waters, whether international, boundary or otherwise, that whether wholly situated in a province or not, significantly affect the quantity or quality of waters outside the province."
[208] *Ibid.* s. 6(1) and (2).
[209] Saunders 1988, *supra* note 197 at 28-29.
[210] *Supra* note 204. Part III of the Act which contains regulatory provisions regarding the establishment of "nutrient" controls including phosphates will not be discussed in this paper.

failed. In passing the *Canada Water Act* the federal government recognized that despite the cooperative spirit of the legislation, it could not "avoid its ultimate responsibility to take decisive and firm action when and where necessary"[211] and consequently, drafted the legislation to include the opportunity for unilateral action.

Because the definition of "interjurisdictional waters" includes waters which may be wholly situated within the boundaries of a particular province, the potential for federal interference in provincial jurisdiction over water as a natural resource is substantial.[212] This fact did not go unnoticed by the provinces. Both British Columbia and Quebec brought constitutional challenges against the proposed legislation, arguing that the federal government was encroaching on provincial jurisdiction over natural resources.[213] They were not alone in their dislike for the bill. Ontario and Alberta also opposed the Act and the provisions for unilateral federal action on the basis that the new legislation would likely conflict with existing provincial programs.[214] Although the four largest and wealthiest provinces voiced their opposition to the bill, the remainder of the provinces were either silent or supported the new legislation.[215]

It is interesting to note that the provisions which provoked the most provincial opposition are similar to those which caused the greatest controversy when SARA was first introduced, namely those which enable federal unilateral action in the absence of provincial cooperation. The provincial opposition also resulted in essentially the same response from Ottawa in each case. As in SARA, the federal government reassured the provinces that unilateral action would be pursued only as a matter of last resort. In discussing the ambit of the water bill, then Environment Minister J.J. Greene explained to the members of Parliament that the "enthusiasm and cooperation we have to date found in the provinces indicates very clearly that unilateral action is not likely to be required".[216] This deferential approach to provincial sensitivities ultimately contributed to what many consider to be the failure of the Act itself.[217] Although several

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[211] *House of Commons Debates*,2[nd] Sess., 28[th] Parl., November 20, 1969 at 1047(J.J.Greene).
[212] *Ibid.*
[213] Harrison, s*upra* note 28 at 74.
[214] *Ibid.* at 74. Roger Davies, "What do the Provinces Think", (1969) *Water and Pollution Control,* November, 64.
[215] New Brunswick, Nova Scotia, Saskatchewan and Manitoba supported the Act while PEI and Newfoundland made no public comment.
[216] *Supra* note 211.
[217] O.P. Dwivedi and R. Brian Woodrow, "Environmental Policy Making and Administration in a Federal State: The Impact of Overlapping Jurisdiction in Canada" in William M. Chandler and Christian W Zollner, eds. *Challenges to Federalism: Policy Making in Canada and the Federal Republic of Germany*

federal/provincial agreements dealing with water resource surveys, studies and programs were signed under Part I of the Act, no joint water quality management areas have ever been designated, either jointly or unilaterally. In 1985, the Inquiry on Federal Water Policy concluded that existing intergovernmental coordination was "seriously inadequate to cope with the complicated interdependence of federal and provincial responsibilities in water matters."[218]

A number of reasons for this implementation failure have been suggested. Harrison posits that the "cautious form of the statute rendered implementation vulnerable to provincial unwillingness to cooperate and to lack of federal resolve to wield the instrument of unilateralism".[219] It has also been argued by several commentators that the implicit threat of federal interference gave rise to provincial action which ultimately rendered its application unnecessary.[220] Moreover, given that the jurisdiction of the federal government to exercise unilateral action was grounded in the POGG power, and the strength of this jurisdictional source was by no means secure, the potential legal and political costs of using the safety net were likely too high.[221] A final explanation offered for the Act's poor implementation is that its novel provisions required additional time to assess public, government and industry reaction and for the federal government to act accordingly.[222] Given that nearly forty years has passed since the Act came into force and Part II of the Act remains unused, a more likely explanation is that at least some of the legislative gap in water quality management was filled by the provinces.[223] That is, provincial governments responded to the threat of federal unilateralism by adopting their own legislative initiatives aimed at water management and pollution control. According to Thompson, "the threat of unilateral federal action in the *Canada Water Act* merely acted as a spur to increased provincial action to ensure that river systems remained under provincial control no matter what boundaries they cross". [224] Saunders agrees with this conclusion noting that the "provinces tended to head off the possibility of extended federal environmental regulation by enacting their own laws and basing them as

(Kingston: Institute of Intergovernmental Relations, Queen's University, 1989) at 279-281. Saunders 1988, *supra* note 197 at 30. See also Harrison, *supra* note 28 at 101

[218] Peter H. Pearse, Fracoise Bertrand and J.W. MacLaren, *Currents of Change (Inquiry on Federal Water Policy final Report)*, (Ottawa: Canada Dept. of the Environment, 1985) at 172.

[219] Harrison, *supra* note 28, at 101.

[220] Andrew R. Thompson, *Environmental Regulation in Canada: An Assessment of the Regulatory Process* (Vancouver: Westwater Research Centre, 1980) at 22 [Thompson]. Kernaghan Webb, *Pollution Control in Canada: The Regulatory Approach in the 1980's* (Ottawa: Law Reform Commission of Canada, 1988) at 19 [Webb]. Saunders 1988, *supra* note 197 at 35.

[221] Rueggeberg and Thompson, *supra* note 203at 25. See also Peter Nemetz, "Environmental Regulation in Canada" (1986) 26 Natural Resources Journal 551 [Nemetz].

[222] Webb, *supra* note 220 at 24.

[223] Harrison, *supra* note 28 at 101.

[224] Thompson, *supra* note 220.

clearly as possible on provincial ownership of natural resource, property and civil rights and local undertakings."[225]

British Columbia was particularly vocal about its motives for introducing the *Water Resources* Bill in 1971.[226] The Bill was intended to provide a comprehensive program for water management which would reflect the social and economic needs of the province.[227] Addressing the media, then Resources Minister Ray Williston stated that "the bill is an effort to fill the present federal provincial vacuum in water management, as well as provide a framework for greater control over water resources in the province".[228]Alberta established its Environment Ministry in 1970, one of the first provinces to do so and passed the *Clean Water Act* [229]in 1971. This statute was created for the purpose of dealing with water pollution and the creation and operation of water facilities within the province. Ontario adopted its umbrella environmental protection legislation[230] in July, 1971. It is often used interchangeably with the pre-existing *Water Resources Act* [231]to combat sources of water pollution in the province. [232] Like Alberta, Ontario also created its Ministry of Environment that same year. Thus the provincial response to the federal initiative was not limited to legislative endeavours. It has been suggested that "the creation of the environment ministries in Ontario and Alberta provided some early evidence that the possibility of federal action, among other factors, could assist in prompting provincial governments to act on environmental matters."[233]Other provincial initiatives that follow closely on the heels of the passage of the *Canada Water Act* include Saskatchewan's *Water Management Act,* Manitoba's *Clean Environment Act*, and Quebec's *Environmental Quality* Act, all of which were assented to in 1972. [234] Most of these statutes adopted a regulatory regime which was devoted to pollution control through the use of contaminant discharge standards for water, air and land.[235]

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[225] Saunders 1988, *supra* note 197 at 35.
[226] Legislative Assembly of British Columbia, 2nd Session, 29th Parl. 1971, Bill No. 79, *Water Resources Act.*
[227] Lt. Governor Hon. John R. Nicholson, Throne Speech, Legislative Assembly of British Columbia, January 20, 1972 at 2.
[228] Bob McConnell, "BC Takes Water Control Steps", *The Province*, March 19, 1971, p.12.
[229] S.A. 1971, c.17
[230] *Environmental Protection Act,* R.S.O. 1990, c. E.19; S.O. 1971, c. 86.
[231] R.S.O. 1990, c.O.40.
[232] Canadian Environmental Law Association, online: <http://www.cela.ca/faq/cltn_detail.shtml?x=1496#1518>
[233] Mark Winfield, "The Ultimate Horizontal Issue: The Environmental Policy Experience of Alberta and Ontario, 1971-1993", (1994) 27:1 *Canadian Journal of Political Science* 129 at 148 [Winfield].
[234] S.S. 1972, c.146; S.M. 1972, C. 76, and S.Q. 1972, c.49, respectively.
[235] Webb, *supra* note 220 at 13.

Harrison argues that both levels of government place a higher value on environmental jurisdiction during periods of greater voter consciousness of environmental issues. [236] The late 1960's and early 1970's are widely accepted as being the first such period of increased public awareness of environmental issues throughout Canada. It is also during these periods of amplified voter perception that "politically appealing policies will likely provoke each level of government to seek to enlarge its own jurisdiction and to defend this jurisdiction against incursions by the other level".[237] The *Canada Water Act* was introduced as a paradigm of interprovincial cooperation over the management of Canadian water resources. Yet within its framework lay a clear assertion of federal authority over the environment in the form of unilateral action where cooperation with provincial governments was not forthcoming. It is argued here that this threat of jurisdictional interference, although never utilized, was sufficient to initiate increased activity over the regulation and management of provincial water quality. The outcome of this activity was improved legislation at the provincial level and ultimately, it was achieved without the potential legal and political costs associated with the unilateral action authorized under the Act.

These legislative improvements should not, however, be viewed as a sufficient response to the problem of interjurisdictional water management in Canada. Although an examination of the effectiveness of the provincial response in terms of how well Canadian water resources have been in fact managed, protected and conserved as a result of the implementation and enforcement of provincial laws is beyond the scope of this paper, there is no question that water quality management remains an unresolved policy problem for Canada. It has been argued that "despite extensive negotiations and some agreements, the Canadian federal system has generally failed to translate effectively concern over interjurisdictional water issues into concrete coordinated action by governments".[238] Hoberg argues that without the federal carrot of financial assistance and the stick of unilateral action and enforcement, Canadian municipal and provincial governments have not provided as much pollution control as might otherwise have been the case[239]. Kennett also concludes that the disappointing record of cooperative federalism in interjurisdictional water management requires that the exercise of federal jurisdiction may indeed be necessary to address the ongoing policy problem of integrated watershed management in Canada. And there is clearly evidence to suggest that it persists as a problem.

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[236] Harrison, *supra* note 28 at 162.
[237] *Ibid.* at 24.
[238] Steven A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis*, (Calgary: Canadian Institute of Resources Law, 1991), at 99.
[239] George Hoberg, Keith Banting and Richard Simeon, (eds.) *Degrees of Freedom: Canada and the United States in a Changing World,* (McGill Queen's University Press) at 378.

The most recent information released by Statistics Canada reveals that the water quality guidelines established by the CCME for protecting aquatic life are often not being met at many sites throughout Canada.[240] More particularly, the report states that freshwater quality at 356 monitoring sites in southern Canada were rated at either "fair" or "poor" 56% of the time and that 115,000 tonnes of pollutants were discharged directly into Canada's surface waters in 2005.[241] The federal government may therefore need to do more than simply threaten to use its authority over interjurisdictional water management through the *Canada Water Act.* Indeed, according Muldoon and McClenaghan, "Canada is facing a water crisis. This crisis is not simply a result of pollution, overuse, and depletion of water resources, but also of bad management, mainly due to the absence of a clear governance framework to oversee the protection, conservation and good management of Canada's water resources."[242] While there is a clear need to coordinate and cooperate with the provinces over water management, the timidity of the federal government in exercising its powers under the *Canada Water Act* or in implementing the undertakings in its Federal Water Policy[243] has contributed to the sub-optimal regime in existence today.[244]

Clean Air Act

The early 1970's were characterized by increasing public awareness and the political saliency of environmental issues. The federal government responded to this pressure by undertaking legislative action and reform across a number of sectors. The *Clean Air Act*[245]was introduced in 1971 and like the *Water Act*; it was predicated upon a new and somewhat uncertain federal assertion of authority over environmental matters. The Act attempted to address the potential for constitutional challenge from the provinces and generally adopted a cooperative approach to the problem of regulating air pollution.

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[240] Statistics Canada, *Canadian Environmental Sustainability Indicators: Highlights Report, 2007*, (Ottawa: Government of Canada, 2007). Online: <http://www.ec.gc/environmentandresources/CESIHL2007/CESIHL2007_e.cfm#s4>

[241] *Ibid.*

[242] Paul Muldoon and Theresa McClenaghan, "A Tangled Web: Reworking Canada's Water Laws" in Karen Bakker ed., *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007) at 245 [Muldoon & McClenaghan].

[243] *The Federal Water Policy* was issued in 1987, following the Inquiry on Federal Water Policy in 1984-85. It was an attempt to define the federal role in water management; however, it remains largely a "statement of good intentions that have gone unfulfilled". For a discussion regarding this issue see Muldoon & McClenaghan *ibid.* and J. Owen Saunders and Michael M. Wenig, "Whose Water? Canadian Water Management and the Challenges of Jurisdictional Fragmentation", in Karen Bakker ed., *Eau Canada: The Future of Canada's Water* (Vancouver: UBC Press, 2007) at 119.

[244] *Ibid.*

[245] *Supra* note 16.

Although it has been suggested that interprovincial air pollution is well within the ambit of the federal POGG power,[246] Ottawa opted instead to base this legislation primarily on the criminal law power under section 91(27) of the Constitution.[247] In this regard, the Act provided for the prescription, by regulation, of national emission standards for air contaminants which "constitute a significant danger to the health of persons"[248] Thus, the application of these standards within the provinces was limited to two circumstances – namely, where the emission represented a significant danger to human health or where it would be likely to violate an international obligation. The federal government has only established enforceable emission standards for risk to human health for four substances: lead from secondary lead smelters, asbestos from mining and milling operations, mercury from chlor-alkali plants and vinyl chloride from vinyl and poly-vinyl chloride manufacturing.[249]

Section 4 of the Act also authorizes the federal government to establish by regulation "national ambient air quality objectives" with respect to any air contaminant for three different ranges of air quality.[250] However, the Act did not authorize the Minister to make any further recommendations with respect to specific emission standards within a province until the national ambient air quality objectives had been formally agreed upon and adopted by that province by agreement.[251] Thus, although the Act enabled the federal government to establish specific emission standards, its authority to implement and enforce those standards was severely hampered by the need for provincial agreement and cooperation. Despite the fact that the federal government developed non-binding National Ambient Air Quality Objectives in 1973 and

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[246] Gibson, *supra* note 30 at 84.

[247] The offense provisions of the *Clean Air Act* have subsequently been considered by the Manitoba Court of Queen's Bench in the case of *Canada Metal v. The Queen* (1983) 144 D.L.R. 124 [*Canada Metal*]. The Court upheld the statute as being *intra vires* Parliament on the basis of both its criminal law power and its residual power to enact laws for the "peace order and good government" of Canada. With respect to the criminal law power, the court noted that the Act "in pith and substance" is directed to the protection of public health.

[248] *Supra* note16, subsection 7(1)(a). However, under section 7(1)(b) the federal government does rely on its POGG power to the extent that the Act also authorizes the establishment of national standards for the emission of air contaminants which would likely result in the violation of an international obligation relating to the control and abatement of air pollution. See also Harrison, *supra* note 28 at 71.

[249] C.R.C. 1978, c. 412, c. 405, c. 406 and SOR 79/299, respectively. It has been noted that these standards are not directed at all stationary sources and their application has been uneven, directed most often at serious local problems with immediate health implications. See Margaret Mellon & Marcia Valiante et al, *The Regulation of Toxic and Oxidant Air Pollution in North America,* (Toronto: CCH Canadian Limited, 1986) at 110[Mellon & Valiante].

[250] National Ambient Air Quality Objectives represent levels of air quality that are "tolerable", "acceptable" or "desirable" and are a measurement of the amount of a particular contaminant in the air at a particular time.

[251] Sections 19 and 20.

following years,[252] the provinces did not formally accept them and thereby restricted federal activity in the area of air pollution control within provincial boundaries.[253] Moreover, the Act did not provide any mechanism to implement the objectives or any timeline in which to do so. The federal role in controlling air pollution was subsequently reduced to simply one of data collection, analysis and information sharing.[254]

However, the nature of the federal role in combating air pollution was established even prior to the enactment of the legislation. During the early federal provincial committee meetings held prior to the creation of the Act, the ground rules for federal involvement were established partly to help allay provincial fears about the expected clean air legislation. In particular, it was agreed that the responsibility of the federal government would be to develop air quality criteria and goals, to coordinate the uniformity of data collection by the provinces, to assemble and distribute scientific and technical information, to provide technical assistance to the provinces that could not provide it themselves, and to handle interprovincial air pollution.[255] The limited nature of this role was further exacerbated by the jurisdictional uncertainties surrounding the assertion of federal authority over air emissions and consequently, formal action under the Act was largely limited to the control of toxic air contaminants produced by a handful of industrial operations.[256]

The precondition of provincial acceptance of federally mandated national ambient air quality objectives so weakened the threat of unilateral action that it is not surprising that the Act met with very little opposition from provincial governments.[257] Then Minister of Fisheries and Forestry, Jack Davis, speaking to the House of Commons at second reading noted that

> [w]ithout exception our provincial authorities ... have welcomed our federal initiative in respect of clean air... They are prepared to accept National Air Quality Emission standards set at the point of emission. All they ask is that they be consulted, that they have some say in the development of these particular, objectives, guidelines and standards.[258]

The reasons for provincial support seem to vary based upon the size of the province. That is, the smaller provinces offered to make their legislation complementary, and looked to the federal

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[252] Ambient Air Quality Objectives, No. 1 (C.R.C. Vol. IV, c. 403 and c.404)
[253] Nemetz *supra* note 221 at 557-58.
[254] *Ibid.*
[255] G. Bruce Doern and Thomas Conway, *The Greening of Canada: Federal Institutions and Decisions* (University of Toronto Press: Toronto, 1994) at 90.
[256] Roger Cotton and Alistair R. Lucas eds., *Canadian Environmental Law*, (2d ed.), looseleaf (Toronto: Butterworths, 2000) at para. 4.154 [Cotton & Lucas].
[257] Harrison, *supra* note 28 at 76.
[258] *House of Commons Debates*, February 19, 1971 at 3577

government for administrative and technical expertise in developing the appropriate air quality standards. Conversely, the larger provinces were pleased that those jurisdictions which had less stringent standards would be required to conform to national standards and thereby reduce jurisdiction shopping on the part of industry.[259]

Because most of the larger provinces had air pollution control legislation in place by the time the federal government passed the *Clean Air Act*,[260] the provincial legislative response to the Act generally took the form of new regulations which mirrored the National Ambient Air Quality Objectives established by the federal government in 1973[261]. The objectives were established for sulphur dioxide, carbon monoxide, ozone, nitrogen dioxide and particulates; those substances being considered the most prevalent air contaminants, and consequently, the best indicators of air quality.[262] The national objectives were developed based upon the recommendations of a joint federal/provincial committee which examined not only the scientific and technical aspects of the standard setting process, but also included within its analysis the social, economic and political factors affecting the determination of the maximum tolerable, acceptable and desirable levels of air quality. According to Franson, "the most striking observation ... is the very great influence that Canadian Federal limits have on the limits set by the provinces". He notes further that the federal "desirable" or "acceptable" levels of contaminants are closely approximated by most of the provinces.[263] This outcome is likely the result of the multilateral bargaining process used by the federal and provincial governments to establish the standards themselves rather than the weak and unenforceable threat of unilateral action contained within the Act.

The Act also enabled the federal government to establish emission guidelines pertaining to industrial air pollution. To date, guidelines have been prepared for emissions from the cement industry, metallurgical coke manufacturing, the asphalt paving industry, arctic mining, packaged incinerators, the wood pulping industry and thermal power generation. However, like the ambient air objectives, the guidelines were not enforceable within the provinces and

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[259] House of Commons, *Standing Committee on Fisheries and Forestry, Minutes of Proceedings and Evidence*, April 27 1971, at 7:11

[260] BC, Alberta, Saskatchewan, Manitoba, and Ontario had air pollution control statutes in place by July, 1971 while the Atlantic provinces on the whole trailed behind, waiting until 1973 before passing similar legislation. Quebec introduced its *Environmental Quality Act,* R.S.Q., c. Q-2 in 1972.

[261] C.R.C. 1978, c. 403 & 404, SOR/78-74

[262] Mellon & Valiante, *supra* note 249 at 93.

[263] M. Franson, *et al,* "Environmental Standards: A Comparative Study of Canadian Standards, Standard Setting Processes and Enforcement" (Edmonton: Environment Council of Alberta, 1983) at 3 [Franson].

consequently, the ability of the federal government to ensure adherence to uniform standards throughout Canada was severely limited.

The federal government's role of information collection and guidance in the establishment of objectives (as opposed to one of implementation and enforcement of national standards) was formalized through a number of bilateral federal-provincial accords which were signed in the mid-1970's. The purpose of the Accords, which were signed by seven out of the ten provinces,[264] was to enhance the effectiveness of environmental control activities across jurisdictions. Under the auspices of the Accords, the provinces agreed to establish and enforce requirements at least as stringent as the federal standards. In return the federal government agreed, following consultation with the provinces, to establish non-enforceable scientific criteria, ambient air objectives and emission guidelines. The Accords thus gave primary responsibility for enforcement of national baseline requirements to the provinces; however, the federal government retained the right to reassert its enforcement capabilities should the province fail to do the job. Although the provinces were expected to enforce the restrictions placed on the emission of air contaminants, active enforcement was not forthcoming. Following his review of the creation, implementation and enforcement of environmental standards for both water and air pollution across several jurisdictions, Franson concludes that "curiously, it is very difficult to tell how well environmental standards are being complied with" or enforced.[265] This finding is consistent with the enforcement records of other federal environmental statutes from the same time period. Harrison notes that "despite a record of widespread and persistent non-compliance with federal standards, the federal government rarely intervened".[266] Thus with the signing of the Accords, and the federal government's subsequent abdication of responsibility for enforcement of national standards, the potentially far reaching arm of Ottawa's involvement in controlling air pollution under the *Clean Air Act* effectively evaporated and with it the, albeit, weak safety net.

In an effort to provide the United States with reciprocal protection against air pollution causing acid rain, the federal government amended the *Clean Air Act* in 1980,[267] and in so doing authorized the imposition of national emission standards within a province where the air contaminant emitted constitutes a danger to the health, safety or welfare of the citizens of another

[264] Quebec, BC and Newfoundland did not sign accords with the federal government.
[265] Franson, *supra* note 263 at 16.
[266] Harrison, *supra* note 28 at 107.
[267] *An Act to Amend the Clean Air Act*, S.C. 1980-81-82-83, c. 45.

country.[268] Prior to the enforcement of any such standard the Minister must first ensure, through consultation with the provinces, that the danger cannot otherwise be reduced or eliminated by action taken pursuant to a provincial law and if so, that all steps have in fact been taken in that regard. This amendment provided the federal government with another opportunity to undertake unilateral action against the provinces; however, in introducing the bill, the environment minister explained that he did not anticipate Ottawa ever using this power against the provinces but rather it was included as a means of providing reciprocity with the American *Clean Air Act* and consequently of advancing negotiations with the U.S. in controlling acid rain. True to its word, the federal government has never utilized this provision against the provinces and the general nature of intergovernmental relations with respect to acid rain can be characterized as cooperative. Harrison offers a number of reasons for the collaborative efforts of both levels of government, noting that jurisdictional issues took a back seat to solving the high profile and international problem of acid rain. Offering a carrot of $150 million in financial aid for pollution control technology (but without the stick of unilateral action), the federal government effectively bought provincial cooperation by subsidizing industrial pollution abatement. In the absence of jurisdictional infighting and aided by substantial funding, Canadian efforts to control acid rain have contributed to a significant decrease in the chemical and biological impacts of acid rain on eastern Canadian lakes and have achieved some measure of success.[269]

The Act was ultimately repealed and replaced by the *Canadian Environmental Protection Act*[270] (CEPA) in 1988. The ability of the Minister of the Environment to establish environmental quality objectives, guidelines, limits and codes of practice was continued under Section 8 of CEPA.[271] Similarly, the National Ambient Air Quality Objectives and emission guidelines originally developed under the Act are still used by the federal government to set unenforceable benchmarks for safe levels of certain air contaminants. In its recently released proposed regulatory framework for air emissions under Bill C-30, the *Clean Air Act*[272], the federal government recognized that the variety of non-compulsory measures that they have historically

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[268] The application of this provision is, however, conditional upon their being a reciprocal clause in the legislation of the other country. See *Clean Air Act,* R.S.C. 1985, c.32, s.24.

[269] Boyd, *supra* note 49 at 107. See also *Canadian Environmental Control Newsletter*, No. 463, July 2, 1992, at 3833.

[270] *Supra* note 37 and the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 [CEPA 1999]. Those provisions relating to International Air Pollution will be discussed later in this chapter.

[271] CEPA, 1999 *ibid.* s. 54.

[272] Bill C-30, *An Act to amend the Canadian Environmental Protection Act, 1999, the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act (Canada's Clean Air Act),* 1st Sess., 39th Parl., 2006.

relied upon to reduce air pollution, are insufficient to reduce the health and environmental risks across the country.[273] The changes proposed under the rubric of Bill C-30, include mandatory and enforceable reductions in emissions of greenhouse gases and air pollutants from all major industrial sources. Of greater significance here is the federal government's acknowledgement that while cooperation with the provinces, territories and aboriginal peoples is critical to the achievement of environmental quality,

> "national consistency is necessary to provide a minimum level of air quality for all Canadians, to ensure a level playing field, and to protect competitiveness for Canadian industry ... by avoiding a patchwork of different regulations being applied to the same industrial sectors".[274]

In order to fulfill this objective, the federal government proposes to enter into "equivalency agreements" authorized under CEPA with those provinces that set emission standards that are at least as stringent as federal ones. Whether or not Canadians will in fact see the creation of yet another safety net in the environmental legislative context is unclear given that Bill C-30 died on the order table as a result of the parliamentary prorogue in September, 2007. The Bill, and the federal government's attempt at "turning the corner" on greenhouse gas emissions and air pollution does, however, represent a recognition of the as yet unsatisfied need for mandatory standards to control emissions and of the federal government's responsibility to ensure that those standards are met throughout Canada.

Transportation of Dangerous Goods Act (1982)

In 1979, as a result of a train derailment in Mississauga and the release of toxic chlorine gas from its cars, over 225,000 people in the surrounding area were evacuated from their homes for up to five days. The federal government responded to the accident and the subsequent public outcry by commissioning an inquiry into the event. Although the event did not actually prompt the introduction of Bill C-25 in the House of Commons in November of that year, it certainly added impetus for the federal government to address the wide range of health and safety issues arising from the transportation of dangerous goods across Canada.[275] The accident crystallized the importance of these issues and the need to rise above the haphazard and incomplete collection of

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[273] Government of Canada, *Regulatory Framework for Air Emissions*, (Ottawa: Environment Canada, 2007) at iii. Online: <http://www.ecoaction.gc.ca/news-nouvelles/20070426-1-eng.cfm>
[274] *Ibid.* at 5
[275] *House of Commons Debates*, November 27, 1979, 1760 (Hon. Don Mazankowski, Minister of Transport).

existing laws that governed the transportation of dangerous goods.[276] The objective of the proposed legislation was to "establish a single legislation under which existing agencies, whether federal or provincial, can apply everywhere in Canada a set of regulations governing standards, procedures and labelling for the handling of dangerous goods by any means of transport".[277] Prior to the enactment of the *Transportation of Dangerous Goods Act*[278] (TDGA) in 1980 there were a myriad of federal and provincial statutes which regulated various modes of transport or goods but there was no umbrella statute in place that would provide uniform and consistent standards across Canada and upon which industry and the public could rely.[279]

This patchwork of legislation was due in part to the jurisdictional overlap between the federal and provincial governments over the subject matter in question.[280] Generally speaking, the Constitution provides the federal government with jurisdiction over interprovincial and international transportation matters, and conversely, gives the provinces exclusive control over transportation within their boundaries. Specifically, the enumerated heads of power assigned to the federal government under section 91 of the Constitution which also touch on the transportation of dangerous goods include the regulation of trade and commerce, navigation and shipping, criminal law and its residual POGG power. Authority over local works and undertakings, property and civil rights and matters of a merely local or private nature give provincial governments jurisdiction over the intra-provincial carriage of goods.[281] In order to alleviate some of the jurisdictional concerns previously discussed arising out of environmental matters, the federal government opted to remove all references to the environment within the TDGA, specifically noting at third reading that:

> [T]he value of the bill rests on its implementation and its regulation which calls for the cooperation of both the federal government and the provinces. The provinces have generally supported this bill under its present title, and it was within the realm of the provinces that there was objection to calling this or implying that this was also an environmental bill. The inclusion of such reference ["to protection of the environment"] in the title might be misleading since the words could be construed at some future date to allow for amendments to the act which

[276] *Ibid.*
[277] *House of Commons Debates,* May 2, 1980 at 672. (Hon Jean –Luc Pepin, Minister of Transport).
[278] R.S.C. 1985, c. T-19, S.C. 1980-81-82-83, c.36.
[279] *Supra* note 277. See also Murray Rankin, *Dangerous Moves: The Law Responds to the Transportation of Dangerous Goods*, (1990) 24 U.B.C. L. Rev. 191 at 213[Rankin].
[280] John Douma, *Transportation of Dangerous Goods in Canada*, (Toronto: Butterworths, 1990) at 1.
[281] For a general discussion of the division of powers as it relates to the field of transportation see Patrick J. Monahan, *Constitutional Law* (3d ed.), (Toronto: Irwin Law, 2006), at 356.

> might involve the environment, remedial measures, compensation and new regulatory powers which are outside the ambit of this bill. It would also raise objections from the provinces that the bill is ultra vires the federal government".[282]

The purpose of the TDGA thus shifted from environmental protection to the promotion of public safety in the transportation of dangerous goods. From that perspective, the Mississauga train derailment clearly underscored the need for legislation which would provide the federal government with the tools necessary to manage emergencies affecting the health and safety of Canadian citizens. Moreover, the scattered laws and policies which existed prior to the passage of the TDGA revealed the necessity for uniform legislation to be applied throughout Canada since the failure of one province to accept uniform procedures could potentially endanger the residents of other provinces. Therefore, the federal government relied on its residual POGG power[283] to create a statute which applied to the handling, offering for transport and transporting of all dangerous goods, by any means of transport within Canada.[284]

The Minister of Transport is authorized under section 25 of the TDGA to enter into agreements with provincial governments to formalize the implementation, administration and enforcement of the Act and its regulations. However, where such agreement is not reached, the Governor in Council, upon the recommendation of the Minister, may unilaterally proclaim the coming into force of the Act, or any part of it, within the province.[285] Before such a proclamation is made, all reasonable efforts to reach an agreement over a period of at least twelve months following the commencement of negotiations must have been exhausted.[286] Thus, the application of the federal TDGA within provincial boundaries was made the subject of a safety net which, while subject to provincial agreement, can be essentially characterized as an "opt-in" policy instrument. That is, the federal legislation does not apply automatically but rather only where a province has not met the conditions required by the Act.

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[282] *House of Commons Debates*, July 16, 1980 at 2976 (Robert Bockstael, Parliamentary Secretary to the Minister of Transport). See also Derek Hillier, *Transportation of Dangerous Substances*, (1982) 31 U.N.B.L.J. 135 at 141.
[283] Rankin, *supra* note 279 at 214.
[284] *Supra* note 278, subsection 3(1). It should be noted that this provision is limited by those interprovincial modes of transport described in paragraphs 5(a) to (e) of the *National Transportation Act.* Subsection 3(3) also exempts from application the transportation of dangerous goods which have been specified by regulation, which are under the sole direction of the Minister of National Defence or which have been issued a permit by the Minister of Transport.
[285] *Supra* note 278, section 33(4)
[286] *Ibid.*

No proclamations were ever made under the TDGA and like the other safety nets discussed in this chapter, unilateral action by the federal government was never undertaken. Rather, the provinces passed complementary legislation, mirroring the federally mandated requirements for intra-provincial dangerous goods transportation.[287] Most of these provincial statutes were enacted within a few years of the TDGA (and its regulations) coming into force. The provincial acts were grounded upon the belief that a consistent method of transporting dangerous goods across Canada was critical for the protection of the health and safety of all citizens as well as for the stable operation of the transportation and manufacturing industry. For example, the Alberta government responded to opposition complaints about the potential overlap of their proposed *Transportation of Dangerous Goods Control Act*[288] with existing provincial statutes by explaining that the effort being made involved all of the other provinces and the government of Canada. The Minister of Transport summarized provincial motivation as follows: "We are trying to achieve a consistent method of transporting dangerous goods throughout Canada"[289]. This view was echoed by the government of Saskatchewan:

> ... our government's total purpose in introducing this bill on the transportation of dangerous goods is simply to provide the people of Saskatchewan with the safest, most viable transportation system anywhere in Canada. And that's why we have accepted and are working with not only just the federal government but with other provincial governments as well, to co-ordinate this type of transportation system.[290]

In keeping with this approach, the various regulations created under provincial and territorial legislation adopted the federal regulations, which were finally promulgated in 1985. Given the degree of complexity and the number of technical requirements embedded within the federal regulations, it is understandable that the provinces and territories chose this step.

The obvious need for uniform standards across Canada also seemed to supersede the jurisdictional difficulties which might have otherwise characterized the transportation of dangerous goods as an environmental statute. The Minister of Transportation and Highways for British Columbia summarized the position generally adopted by the provincial governments by stating that

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[287] Rankin, *supra* note 279 at 215.
[288] S.A. 1982, c. T-6.5.
[289] Alberta, Legislative Assembly, *Official Report of the Debates (Hansard)*, November 9, 1981 at 1557 (Moore).
[290] Saskatchewan, Legislative Assembly, *Official Report of the Debates*, June 3, 1985 at 1430 (Garner)

> [T]he ministers of transportation of all the Canadian provinces agreed several years ago ... it is essential that all regulations be identical regardless of whether the mode of transportation is under federal jurisdiction as it is in shipping, the national railways, aviation or interprovincial trucking activities or under provincial jurisdiction as in the provincial railways and interprovincial trucking.[291]

This approach carried with it an implicit recognition of the federal authority to legislate over the transportation of dangerous goods as a matter of national concern[292] and with it a cooperative attitude in the face of the threat of unilateral federal action contained within the TDGA. Because the jurisdictional authority of the federal government was not questioned, the provinces did not dispute the potential application of the federal legislation if they failed to reach an agreement under section 25 of the Act. In this way, the threat of application of the federal Act was particularly strong and the provinces responded in kind by adopting a cooperative attitude. No doubt the possible consequences for public health and safety of a legislative failure with respect to the transportation of dangerous goods, as demonstrated by the Mississauga train derailment, also provided the requisite impetus for intergovernmental cooperation. Moreover, the TDGA can be distinguished from the previous two examples of federal environmental legislation on the basis that its impact on provincial natural resource development was limited. Consequently, it did not produce the same defensive posture that occurred with respect to the federal statutes regarding air and water. Finally, both industry and provincial economies benefited from consistency in the transportation of dangerous goods[293] and thus, there was little political downside to adopting the federal regulation. From this perspective, it is possible to conclude that the federal safety net acted merely as insurance against the relatively small risk of provincial non-compliance. Following the enactment of provincial legislation across Canada by the end of the decade, the risk no longer existed and the provision was subsequently amended in the new *Transportation of Dangerous Goods Act, 1992.*[294] The present

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[291] British Columbia, Legislative Assembly, *Official Report of Debates*, February 13, 1985 at 4938 (Hon. A. Fraser, Minister of Transportation and Highways).
[292] *Supra* note 290 at 1445.
[293] E.M. Vomberg, *Regulating the Transportation of Dangerous Goods*, (1983) 21: 3 Alberta Law Review 488 at 500.
[294] S.C. 1992, c.34

TDGA simply gives the Minister the power to enter into agreements with provincial governments with respect to the administration of the Act.[295]

Canadian Environmental Protection Act

As the 1980's progressed, environmental issues became increasingly important to the Canadian public. The federal government responded to this pressure by reasserting its role in environmental protection.[296] The *Canadian Environmental Protection Act*,[297] (CEPA) first introduced in December, 1986 was intended to be the keystone legislative effort in that regard. Discussing the draft bill at a Canadian symposium on jurisdiction and responsibility for the environment in the spring of 1987, Tom McMillan, then Minister of the Environment stated that

> ... the federal government has a responsibility to act to the limits of its own jurisdiction in this and in other areas. While loathe to provoke inter-jurisdictional territorial warfare, the federal government recognizes it must take a strong role, both through direct action and through example. And that role must not be reduced to exercising only what authority the provinces themselves choose not to wield.[298]

Alongside its assertion of federal jurisdiction over the regulation and control of toxic substances, the Act consolidated a number of existing statutes administered by Environment Canada including the *Environmental Contaminants Act*,[299] the *Ocean Dumping Control Act*[300], the *Clean Air Act*,[301] and Part III of the *Canada Water Act.*[302] The underlying premise of CEPA is to provide a "cradle to grave" approach to the regulation and management of toxic substances through the use of uniform national standards and other regulatory actions. This premise necessarily reflected a broad view of federal jurisdiction over the environment that predictably caused concern for many of the provincial governments.

The federal government based CEPA on both its criminal law power under section 91 of the Constitution and its residual POGG power. The intent of the federal government to rely upon both sources of jurisdiction is revealed in the wording of various provisions throughout CEPA.

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[295] *Ibid.* section 4. See also Cotton and Lucas, *supra* note 256 at 4.162.
[296] Harrison, *supra* note 28 at 115-161.
[297] *Supra* note 37.
[298] The Honourable Tom McMillan, "Luncheon Address", in Donna Tingley (ed.), *Environmental Protection and the Canadian Constitution*, (Edmonton: Environmental Law Centre, 1987) 51 at 53.
[299] R.S.C. 1985, c. E-12
[300] R.S.C. 1985, c. 0-2
[301] R.S.C. 1985 c. C-32
[302] *Supra* note 18

For example, the preamble refers to the "presence of the toxic substances in the environment as being a matter of national concern" and the characterization of the word "toxic" in section 11 requires that the substance in question must constitute a danger to either human health or the environment.[303] The Supreme Court of Canada subsequently upheld the federal regulation of toxic substances as being a valid exercise of its criminal law power in *R.* v. *Hydro-Quebec*.[304] Writing for the majority, LaForest J. noted that the federal government's authority over the regulation of toxic substances was not, however, absolute. He stated that "in truth, there is a broad area of concurrency between federal and provincial powers in areas subjected to criminal prohibitions, and the courts have been alert to the need to permit adequate breathing room for the exercise of jurisdiction by both levels of government".[305] And it was precisely this "breathing room" that the provinces tried so hard to protect during the negotiations leading up to CEPA's eventual passage in 1988.

Provincial Regulatory Equivalency

From the outset, the provinces expressed strong objections to CEPA's jurisdictional reach. The strongest opposition came from Quebec, which resisted the bill on the grounds that it duplicated provincial powers. As a result of the repeated requests of Clifford Lincoln, the Quebec Minister of the Environment, the notion of "equivalency" was introduced.[306] Specifically, the equivalency concept enables the provinces to opt-out of the application of certain CEPA regulations if both levels of government have agreed that the provincial regulations are "equivalent" to the federal ones. Bowing to provincial pressure, Environment Minister McMillan introduced several amendments to the draft Act in November, 1987 which ultimately brought this concept to fruition.[307] McMillan justified the inclusion of the equivalency provisions on the basis that it was always the federal government's intention to bring forward a framework within which the federal

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[303] The current *Canadian Environmental Protection Act, 1999,* received Royal Assent on September 14, 1999 and was the product of a nearly 6 year process to review and revise the original CEPA. Although the preamble of the current CEPA has been enlarged to include a number of references to the need for national leadership and goals with respect to environmental protection, it still refers to the presence of toxic substances as being of "national concern". The definition of "toxic substances" is now contained in section 64 of CEPA, 1999. See also Harrison, *supra* note 28 at 130.
[304] *Supra* note 35.
[305] *Ibid.* at 312-313.
[306] *House of Commons Debates*, No.093, April 27, 1998 at 1325 (Clifford Lincoln)
[307] Charles Caccia, *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-74*, February 3, 1988 at 1555.

law could co-exist with provincial law, noting that Ottawa "wanted to rationalize the system and to coordinate it, if not integrate it."[308]

Under section 10 of the Act, [309]the federal government may enter into an agreement with a province or territory providing for the non-application of federal regulations[310] made under CEPA. Such an agreement is preconditioned on the fact that there are equivalent regulations in force within that jurisdiction and that there are citizen investigation provisions under environmental laws of that jurisdiction similar to those contained in CEPA.[311] As noted in the 1990/91 CEPA Annual Report, "[a]n equivalency agreement may therefore be seen as a contract between the federal Minister and his or her provincial counterpart for the cooperative delivery of a national environmental standard. A separate equivalency agreement must be established for each CEPA regulation in each province and territory".[312] Subsection 10(8) further provides that an equivalency agreement shall terminate within 5 years of its coming into force.

At the time, the inclusion of the equivalency provision was criticized by some as being too deferential to provincial interests[313], but Harrison argues that while CEPA "acknowledges concurrent provincial authority it no longer unconditionally concedes the lead role to the provinces".[314] The Act thus represents a significant policy shift from previous federal environmental legislation. Under CEPA, the threat of unilateral action by the federal government, and consequently, the "safety net" is embodied in the very existence of the Act. According to a former Assistant Deputy Minister of the Environmental Protection Service, the equivalency provision "acts as an invitation to jointly set the bar on national standards" and through the CEPA regulatory process, beginning with the decision to list a substance as being toxic, the federal government can "drive the behvaviour of the provinces".[315] Thus, the threat of unilateral action by the federal government to list, and ultimately regulate, a substance provides

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[308] Hon. Tom McMillan, Minister of the Environment, *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-74*, February 3, 1988 at 1540.
[309] *Supra* note 37, subsections 34(5)-(10).
[310] *Ibid.* Applies to regulations made under subsection 93(1), 200(1) or 209(1) or (2)
[311] *Ibid.* Subsections (1) and (3)
[312] Environment Canada, *CEPA Annual Report, 1990/91* (Ottawa: Environment Canada, 1992) at 9. It should be noted that the Minister's authority to enter into equivalency agreements has been widened under CEPA, 1999 to include aboriginal governments.
[313] See for example, Richard D. Lindgren, "Toxic Substances in Canada: The Regulatory Role of the Federal Government" in Donna Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's*, (Alberta: Environmental Law Centre, 1990) at 37[Tingley].
[314] Harrison, *supra* note 28 at 131.
[315] Interview with Barry Stemshorn, conducted January 4, 2006.

Ottawa with the ability to set the agenda with the provinces. Moreover, the backstop of equivalency is only made available to a given province following an unprecedented level of scrutiny by the federal government.

Shortly after CEPA became law, Environment Canada produced an Enforcement and Compliance Policy[316] which stipulated the conditions under which equivalency would be achieved. Under this policy, the specific criteria needed to establish equivalency include:

(i) Equal level of control as sanctioned by law;
(ii) Comparable compliance measurement techniques;
(iii) Comparable penalties;
(iv) Comparable enforcement policies and procedures that are consistent with this Enforcement and Compliance Policy;
(v) Comparable rights of individuals, resident in Canada to request investigation of a suspected offence and to receive a report of the findings.[317]

Although these criteria were supported by the CCME Task Force on Federal Provincial Partnerships for Environmental Protection in their 1990 Report,[318] the legal authority of the federal government's position with respect to comparable enforcement policies and procedures has been questioned.[319] However, the plain and natural meaning of "equivalent" would likely "encompass not only toxic substance standards, but also the mechanisms for achieving those standards".[320] It has been suggested that as a result of the inclusion of this evaluation of provincial enforcement, the "very process of entering into an equivalency agreement raises the spectre of a federal audit of the provincial enforcement and compliance system" with the outcome being that the incentive of provincial sovereignty over pollution sources has been all but extinguished.[321] Whether or not the federal government has the legal authority to consider equivalency criteria as a matter of policy beyond those set out in the Act is beyond the scope of this paper. What is clear is that the legal uncertainties regarding the appropriate interpretation of

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316 Environment Canada, *Canadian Environmental Protection Act, Enforcement and Compliance Policy* (Ottawa: Environment Canada, 1988).
317 *Ibid.* at 15.
318 Canadian Council of Ministers of the Environment, *Report of the Task Force on Federal Provincial Partnerships for Environmental Protection,* (CCME, 1990)
319 Alastair Lucas, "Jurisdictional Disputes: Is 'Equivalency' a Workable Solution" in Tingley, *supra* note 313 at 33-34.
320 *Ibid.*
321 Linda F. Duncan, "Trends in Enforcement: Is Environment Canada Serious about Enforcing its Laws?" in Tingley *supra* note 313, 51 at 55. See also Harrison, *supra* note 28 at 141.

equivalency have contributed to the difficulties associated with the implementation of this important provision.[322]

To date, only one equivalency agreement has ever been signed. In 1994, the province of Alberta and the federal government entered into an equivalency agreement concerning the control of toxic substances.[323] A discussion with Alberta officials revealed a number of problems encountered during the negotiation of that agreement including the onerous legislative review process, the requirement of equivalency of form versus effect of the regulations and the lengthy time period required to negotiate the agreement. Each of these issues will be discussed in turn as well as the criteria for comparable citizen investigation provisions.[324]

In anticipation of the five year review of CEPA, an independent evaluation of CEPA conducted by Resource Futures International recognized the limitations of a substance by substance approach and noted that the criteria for equivalency agreements were overly strict.[325] The combined result of these two conditions is that

> ... for each and every equivalency, the entire set of regulations and/or statutory materials existing in any province or territory must be compared with the CEPA or regulations thereto on a point by point basis to determine, based on fairly stringent criteria, whether a true "equivalency" exists.[326]

The onus also rests with the province to demonstrate that its legislation meets the federal requirements.[327] Indeed, the provinces would prefer an "equivalency of results" approach to the issue. A strict interpretation of equivalency means that many of the permitting schemes utilized by provincial legislation do not meet the equivalency criteria since CEPA does not use this type of regulatory framework. However, if the standards permitted under the provincial legislation ultimately have the same effect as the federal standards, then the provinces argue they should be

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[322] Supra note 1. See also Harrison, *supra* note 28 at 141.
[323] *An Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta*, online: Environment Canada, *CEPA Environmental Registry*, <http://www.mb.ec.gc.ca/pollution/e00s61.en.html.>
[324] Confidential telephone interview, Alberta Ministry of Environment official, conducted November 16, 2007.
[325] Environment Canada, *CEPA Annual Report 1993-94*, (Ottawa: Environment Canada, 1995) at 2.
[326] Roger Cotton and David R. Snider, "An Overview of the Canadian Environmental Protection Act" in Canadian Bar Association, *Canada's Environmental Laws*, 1989 (Toronto: Canadian Bar Association, 1990) at 21.
[327] Hon. Mr. Tom McMillan, *Minutes of the Proceedings and Evidence of the Standing committee on Environment and Sustainable Development on Bill C-74,* November 25, 1987 at 1545.

considered equivalent to the federal regulations.[328] The explicit adoption of this view by the federal government has been advocated by the Standing Committee on Environment and Sustainable Development which recently concluded its 5 year statutory review of CEPA, 1999. In particular, the Committee has recommended that "the government amend s.10 of CEPA, 1999 to clarify that provincial permitting systems may qualify as equivalent and add that equivalency agreements must contain provisions for monitoring to ensure that their effects are equivalent".[329] The Committee has cautioned, however, that looking only at "equivalent effects" may be too broad to ensure true equivalency of pollution prevention regimes.[330]

A third constraint facing provincial governments' ability to utilize the equivalency provisions of CEPA is the automatic sunset clause that terminates an agreement made under subsection 10(8) every 5 years. Given the length of time associated with the negotiation of these agreements, the five year life span creates an excessive administrative burden for the provinces without any net gain.[331] Finally, in order to achieve equivalency, provincial legislation must also include a citizen right to investigate alleged offences similar to that outlined in sections 17 to 20 of CEPA.[332]Specifically, section 17 provides that any adult Canadian resident may apply to the Minister for an investigation of any offence under the Act. During the committee meetings prior to CEPA's passage in 1988, some of the provinces indicated to the Director General of Environmental Protection that they would be prepared to bring forward new legislation to meet this equivalency criteria.[333] In fact, during the next 6 years, Alberta, Saskatchewan, Ontario, Nova Scotia, and the Yukon all passed legislation which mirrors the requirement set out in CEPA for citizen investigations, further evidencing their intention to take advantage of the equivalency provisions in CEPA.[334] However, simply facilitating the opportunity to enter into equivalency

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[328] Ms. Cynthia Wright, *Minutes of the Proceedings and Evidence of the Standing Committee on Environment and sustainable Development on the Statutory Review of CEPA, 1999,* December 4, 2006 at 1625.

[329] Standing Committee on Environment and Sustainable Development, *The Canadian Environmental Protection Act, 1999 – Five Year Review: Closing the Gaps*, (Ottawa: April, 2007), online: Parliament of Canada, <http://cmte.parl.gc.ca/Content/HOC/committee/391/envi/reports/rp2614246/envirp05/05-rep-e.htm#part45>.

[330] *Ibid.* This view was consistent with comments made by Alberta government officials regarding the negotiation of the existing equivalency agreement.

[331] *Supra* note 324.

[332] *Supra* note 270, subsection 10(3)(b).

[333]Higgins, *supra* note 195.

[334] *Environmental Protection and Enhancement Act*, R.S.A. 2000, C. E- 12, s.196; *Environmental Management and Protection Act*, R.S.S. 2002, c. E 10.21, s. 63; *Environmental Bill of Rights*, S.O. 1993, c. 28, s.74(1); *Environment Act*, S.N.S. 1994-1995, c.1, s.115; *Environment Act*, S.Y. 1991, c.5, s.14. Newfoundland recently amended its *Environment Act*, S.N.L.2002, c.E.14.2, to include similar provisions

agreements with the federal government was insufficient for most provinces to overcome the difficulties of meeting the other federal criteria. Thus, although theoretically the equivalency provisions represent an excellent legislative tool for the cooperative exercise of federal and provincial jurisdiction over the environment, and ultimately, for the harmonization of provincial standards, in practical terms they have not achieved their intended objective due to underuse.[335]

Equivalency Agreement with Alberta

The equivalency agreement with Alberta was signed in 1994 and exempts the province from the application of federal regulations governing pulp and paper mills, secondary lead smelter releases and vinyl chloride releases.[336] Following the 1987 announcement by the U.S. Environmental Protection Agency that dioxins were present in the effluent of pulp mills, the federal and provincial governments faced significant pressure to develop new regulations to control the release of dioxins and other chlorinated substances.[337] Aware of the risks of inconsistent regulatory standards, all of the provinces subsequently entered into negotiations with Ottawa to establish national standards of protection under the auspices of the CCME. [338] Although both levels of government supported the harmonization of federal and provincial standards, in the end subtle differences existed between them, with the federal government ultimately adopting a weaker standard than it had originally proposed due to industry and provincial pressure. Alberta, however, pursued an independent regulatory path and set control standards for provincial pulp mill effluent at a higher level than that of the federal government, ultimately harbouring resentment at the lack of support for tougher standards.[339] It is within this context that the equivalency agreement with the federal government was subsequently negotiated and signed. Although the development of the national standards preceded the signing of the agreement and the provinces participated in the creation of those standards; only Alberta completed an equivalency agreement. Alberta's motivation to overcome the significant barriers to enter into an equivalency agreement was based not only on a historical sensitivity to federal intrusions into

(sections 91-92) See S.N.L. 2006, c.12, s.2. Those provinces which currently remain ineligible under section 10 to enter into equivalency agreements are BC, Manitoba, PEI and Quebec.

[335] Harrison, *supra* note 28 at 155.

[336] *Supra* note 323. It should be noted that there are no longer any secondary lead smelters operating within the province.

[337] For a detailed review of the development of pulp mill regulations in Canada see Kathryn Harrison, "The Regulator's Dilemma: Regulation of Pulp Mill Effluents in the Canadian Federal State", (1996) 29:3 *Canadian Journal of Political Science* 469.

[338] *Ibid.*

[339] *Ibid.* at 488.

provincial jurisdiction, but likely heightened by the particular circumstances of the standard setting process.

Thus, while it is true that these multilateral efforts at harmonization clearly influenced the development of the federal standard, whether or not the provinces would have acted to regulate independently and without the support of national standards is doubtful. For example, in British Columbia, where the environmental impact of pulp mills was the most visible, the province declined to act unilaterally, preferring instead to wait until the federal standard had been set before establishing its own regulation.[340] Similar decisions were made by all of the smaller provinces. Moreover, Harrison concludes that much of the independent behaviour displayed by the larger provinces was due to the public demand for tough environmental standards and consequently, would likely be subject to a weakening commitment as public interest wanes.[341] Therefore, while the carrot of sovereignty over environmental protection in the context of CEPA has been insufficient to motivate the majority of provincial governments to go through the necessary hoops to obtain an order of equivalency, the stick of unilateral action has provided the provinces with increased impetus to participate in the creation of national standards.

Harmonization

Kennett has stated that the "limitations of unilateralism constitute the incentive structure for cooperation".[342] This principle lies at the heart of the harmonization initiatives undertaken by the CCME. Following the passage of CEPA, the CCME pursued the objective of pre-empting federal unilateralism through the harmonization of federal and provincial legislation and environmental standards, placing emphasis on the elimination of jurisdictional overlap.[343] It has done so most recently, through the creation of the Canada-Wide Accord on Environmental Harmonization.[344]The Canada-Wide Accord was signed by all of the federal, provincial and territorial governments, but was not endorsed by the province of Quebec. It sets out a number of principles upon which the environmental management activities, roles and responsibilities of both

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340 *Ibid.* at 489.
341 *Ibid.* at 496.
342 Kennett, *supra* note 162 at 107.
343 Additional reasons for the pursuit of the harmonization agenda are expressed in Marshall Ogan, "An Evaluation of the Environmental Harmonization Initiative of the Canadian Council of Ministers of the Environment", (2000) 10 J.E.L.P. 15.
344 Canadian Council of Ministers of the Environment, *A Canada-Wide Accord on Environmental Harmonization,* January 29, 1998. Online: CCME,
<http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf>

levels of government are to be guided. The Accord also encompasses three sub-agreements regarding inspection, standards and environmental assessment.

Of particular note for these purposes, is the provision contained in both the main agreement and the sub-agreements that "when a government has accepted obligations and is discharging a role, the other order of government shall not act in that role for the period of time" determined by the relevant agreement.[345] This clause demonstrates the parties' intention to rationalize environmental management and to operate in a fashion similar to the "equivalency" concept. In this respect, the incentive of the provinces to enter into an equivalency agreement under section 10 has been weakened. It has been suggested that the equivalency and administrative agreements authorized under CEPA are intended to be the mechanism through which concurrent federal/provincial responsibilities can be cooperatively exercised.[346] Moreover, the threat of unilateral action on the part of the federal government has been all but negated as a result of the harmonization accord. Within its framework, Ottawa no longer occupies a position as national leader but instead is merely "one voice among thirteen governments".[347] It has been suggested by Ogan that the federal government's acquiescence to this regime will likely result in less effective environmental protection but whether or not that is indeed the case is an issue outside the scope of this paper.[348]

International Air and Water Pollution

Two additional divisions of CEPA which explicitly recognize the concurrency of federal and provincial jurisdiction over the environment are the sections governing international air and water pollution. Division 6 of CEPA enables the Minister of the Environment to address international issues which may arise where the release of a substance within Canada contributes to air pollution in another country or which is likely to violate an international agreement binding on Canada concerning air pollution.[349] Division 7 of CEPA relates to international water pollution and parallels division 6 in both structure and operation.[350] Where the pollution originates from a non-federal source, the Minister must consult with provincial, territorial or aboriginal governments

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[345] *Ibid.* Clause 6.
[346] Paul Muldoon, *Evidence* as included in Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Minister of the Environment*, December 1997.
[347] *Supra* note 343 at 29.
[348] *Ibid.*
[349] *Supra* note 270, sections 166-174
[350] *Ibid.* Sections 175-184.

responsible for the source in order to provide them with an opportunity to prevent, control or correct the pollution.[351] Where, however, that government cannot prevent or control the pollution under its own laws or chooses not to do so, the Minister must take unilateral action to correct the problem. This step may include a recommendation to the Governor in Council that regulations be passed to address the relevant air or water pollution.[352]It should be noted, however, that the Minister may exercise his or her discretion to apply these provisions where the country affected by the air or water pollution emanating from a source within Canada, does not have a reciprocal agreement concerning the prevention, control or correction of pollution.

As noted in the section relating to the *Clean Air Act*, this provision was originally included within CEPA as a means of providing reciprocity with the United States with respect to acid rain.[353] In 2000, Canada and United States included within the rubric of that agreement an "Ozone Annex" which commits both nations to reducing nitrogen oxides (NOx) and volatile organic compounds (VOC) emissions which cause ground level ozone and smog.[354] Although no regulations have ever been passed pursuant to either Division 6 or Division 7, it was as a result of Ontario's difficulty in meeting the NOx emission caps stipulated by the Ozone Annex that Ottawa has had the opportunity to consider utilizing section 166 of CEPA. What is significant to note for these purposes is that section 166 operates in a similar fashion to the safety net contained within SARA – namely, that it enables the federal government to take unilateral action when a provincial or territorial government is not able to address adequately, through its own laws and policies, pollution emanating from a source within its boundaries.

In September 2001, it became apparent that Canada was in danger of defaulting on its obligations under the Ozone Annex if Ontario did not develop a satisfactory plan to reduce the NOx emissions coming from its coal burning electricity plants.[355] Pressured by its international commitments, then federal Minister of Environment, David Anderson, threatened Ontario with using "the power of law, if necessary, to force the recalcitrant province to cut its emissions".[356] The Minister was not alone in his view of the problem and the U.S. Environmental Protection

[351] *Ibid.* Subsection 166(2) and subsection 176(2)
[352] *Ibid.* Subsection 166(3) and subsection 176(3)
[353] *Agreement Between the Government of Canada and the Government of the United States of American on Air Quality,* March 31, 1991, (1991) C.T.S. 3, 30 I.L.M.678
[354] Reuters, "Canada, U.S. Agree to Reduce Pollution", *Victoria Times-Colonist*, December 8, 2000 at A4.
[355] Kate Jaimet, "Ontario Faces Federal Smog Crackdown: Minister attacks Provinces 'Defective' Plan to Reduce Power-Plant Emissions", *Ottawa Citizen*, September 5, 2001, A1.
[356] *Ibid.*

Agency also sent a letter to the province detailing the perceived flaws in its proposed emissions trading system. [357]

In the end, the federal government backed down and did not intervene to prevent trans-boundary air pollution under section 166 of CEPA. Instead, recognizing that in order to justify the politically dangerous step of unilateral action against Ontario, the federal government would have to prove that the province had not done all that was necessary to meet the targets outlined in the Ozone Annex,[358] it chose to rely on "a long-standing and open dialogue" with the province to ensure that Canada could meet its Ozone Annex commitment.[359] Thus, faced with pressure to fulfill its international obligations, the federal government exerted pressure on Ontario to revise its NOx emissions trading plan by threatening to use section 166 of CEPA, but did not in fact go the extra step and utilize the "safety net", and simply resorted to political and bureaucratic negotiations.

This outcome confirms what has now become a predictable pattern with respect to the federal government's willingness to utilize its jurisdictional authority to regulate unilaterally vis a vis the provinces to achieve the desired environmental end. In January, 2004, Ontario announced it was committed to eliminating all coal-fired power plants by 2007.[360] This step would have enabled Ontario to meet its obligations under the Ozone Annex; however, the McGuinty government has subsequently extended this deadline to 2009, bringing provincial compliance into question. Thus, although Ontario responded to the threat of federal intervention by taking the steps necessary to meet its commitments under the Ozone Annex, it seems to have backpedaled from this position. It is possible to query whether or not this might have been the case if the federal government had followed through and actually used section 166 of CEPA to ensure compliance.

Conclusion

The late 1980's brought renewed public interest in and attention to environmental issues and both levels of government responded by enacting new legislation, often modifying or consolidating existing statutes. The introduction of CEPA extended the federal government's reach into the environmental arena beyond where it had ever been and subsequently heightened provincial

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[357] *Ibid.*
[358] *Supra* note 315.
[359] Office of the Auditor General, Report on Environmental petitions, Petition No. 55, online: <http://www.oag-bvg.gc.ca/domino/petitions.nsf/viewe1.1/3C675A5AA10B204B85256DA2005932EA>
[360] Ministry of Environment, *Ontario's Clean Air Action Plan (CAAP)*, June 21, 2004, online: <http://www.ene.gov.on.ca/programs/4708e.htm>

jurisdictional concerns over the authority to regulate in the environmental context. As a result the provinces pushed hard for the inclusion of the equivalency concept within the framework of the Act, as a means reasserting their authority to manage environmental matters within their jurisdiction. However, the strict criteria for equivalency established by the federal government was too difficult for the provinces to meet and consequently only one equivalency agreement has been signed with the province of Alberta, despite legislative efforts on the part of many of the provinces to satisfy the citizen investigation requirements of the Act. Several provinces also responded to CEPA by increasing the fines and penalties under existing environmental statutes to match those contained in the federal Act.[361] Thus, although the threat of federal intrusion into provincial jurisdiction brought some legislative change on the part of the provinces, the price tag for the negotiated solution of "equivalency" was too high for most. As a result, the provinces "reverted to a second-best strategy of precluding federal unilateralism" and pursued the harmonization of national standards through the CCME.[362] Under the harmonization regime, the federal government has, in many respects, lost much of the ability to use what can be a powerful instrument in its tool kit of effective environmental protection – namely, its ability to threaten the provinces with unilateral action except in relation to trans-boundary issues.

Canadian Environmental Assessment Act

Responding to the growing demand for environmental protection in the late 1980's, the federal government committed itself to introducing new environmental assessment legislation in its 1989 throne speech.[363] By the end of the year, the federal court had released its decision in *Canadian Wildlife Federation Inc.* v. *Canada (Minister of the Environment)*.[364] The outcome of the case effectively bound the federal government to undertake environmental assessments which it had previously considered discretionary under the existing *Environmental Assessment Review Process Guidelines Order* (EARPGO). The judgment established a federal presence in the field of environmental assessment and taken together with the 1992 Supreme Court of Canada decision in *Friends of the Oldman River Society v. Canada (Minister of Transport),*[365] provided a strong impetus for Ottawa to produce its new legislation sooner rather than later. These two decisions also further exacerbated the strain on intergovernmental relations that had followed CEPA's

[361] Harrison, *supra* note 28 at 154.
[362] *Ibid.* at 143.
[363] *House of Commons Debates*, 34th Parliament, 2nd Session, April 3, 1989 at 1600 (Right Hon. Brian Mulroney).
[364] *Rafferty Almeda, supra* note 50.
[365] *Oldman, supra* note 11.

enactment as the provinces increasingly felt that their ability to control the development of natural resources within their boundaries had become compromised. In June 1990, the federal government introduced the *Canadian Environmental Assessment Act* (CEAA) as Bill C-78. That bill would later die on the order paper and it was subsequently reintroduced in the spring of 1991 as Bill C-13. After months of review, study and amendment, CEAA received royal assent in June, 1992 and was brought into force in January, 1995.

The decision in *Oldman* was significant for several reasons but perhaps most notably because it confirmed the constitutional authority of federal involvement in environmental assessments under the POGG power. Writing for the majority, LaForest J. stated that "although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction" and that "once the initiating department has thus been given the authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction."[366] Thus, the Supreme Court forced a reluctant federal government to undertake an environmental assessment of what it had considered to be a strictly provincial project and in so doing clearly extended the federal government's duty to take action under the EARPGO. The provinces and industry both feared that the new federal assessment regime dictated by the courts would result in considerable delays for projects which had previously received provincial approval. The federal government introduced CEAA as a means of replacing the Guidelines as well as "to alleviate the concerns of industry and provinces about the scope of federal EARPs and costliness of duplicate provincial and federal EIAs".[367]

The basic purpose of the CEAA is to ensure that the environmental effects of a project are considered before federal authorities take action in connection with the proposed development. In fulfilling this purpose, the federal government must take action that promotes the principle of sustainable development.[368] More specifically, CEAA authorizes the federal government to undertake an environmental assessment for those projects which involve federal land, federal funding or certain federal permits, as well as for those projects where the federal government is a proponent, in whole or in part.[369] The regulations provide a list of the permits and activities which

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[366] *Ibid.*
[367] Skogstad & Kopas, *supra* note 26 at 55.
[368] *Supra* note 17, s.4; S.C. 2003, c.9, s.1. Section 4 was amended following the 5 year review of the Act to incorporate the "precautionary principle" into the purposes of the Act and to recognize the need to prevent the potential adverse effects of a project.
[369] *Ibid.* Section 5.

trigger an assessment as well as those projects which are exempted from the Act due to their relative insignificant environmental consequences.[370]

Although the Act contains provisions which address the concurrency of federal and provincial jurisdiction over environmental assessment and the potential for both conflict and cooperation between the two levels of government,[371] the perceived threat of federal interference in provincial authority over economic development brought heavy opposition from the provinces when the bill was first introduced in the fall of 1990.[372] Provincial views were presented by the Hon. John Reynolds, B.C.'s then Minister of the Environment, and Chair of the CCME at a Committee hearing which was examining CEAA's predecessor, Bill C-78.[373] He proposed a number of amendments to the bill, but without question the one which created the greatest controversy was that regarding the inclusion of an equivalency provision analogous to that found in CEPA. The provinces pushed for the amendment to enable the federal government to transfer responsibility to a province for all or part of an environmental assessment where that province has "equivalent" assessment processes in place.

This proposition was subsequently resurrected in the fall of 1991, by Ralph Klein, as CCME chair, when the Committee began its review of the new Bill C-13. Under the proposal, the Minister was authorized to exercise his discretion in determining whether or not such a delegation would occur and the federal government would retain the right to use its environmental processes if it was not satisfied with the outcome of a provincial review.[374] It was submitted that the use of an equivalent provincial process would be "the most efficient, effective and consistent manner in which to proceed" with jurisdictional overlap in the area of environmental assessment.[375] The motivation behind equivalency was openly and consistently stated as being the prevention of

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370 *Ibid.* Section 7.

371 One of the stated purposes of the Act is to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process. The need for cooperation between jurisdictions was underscored further following the 5 year review of the Act when the objective of promoting cooperation and coordinated action was added to section 4 of CEAA. The Act also provides for cooperation between jurisdictions during screenings and comprehensive studies under section 12, for the creation of joint review panels under section 40 and for the establishment of administrative agreements under section 54 of the Act. Section 17 also enables the federal government to delegate the conduct of any part or all of a screening or comprehensive study to another jurisdiction, including the provinces.

372 For a detailed discussion of the provincial perspective upon CEAA's introduction see Harrison, *supra* note 28 at 136-9.

373 The proposed amendments represented the views of all of the provinces and territories except Quebec.

374 The Hon. Ralph Klein (Chairman, Canadian Council of Ministers of the Environment), *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-13*, November 19, 1991 at 10:8.

375 *Ibid.*

federal intrusion on the provinces' constitutional right to determine the development of their own resources.[376]

The federal government did not, however, accede to the request of the provinces and it rejected the inclusion of the equivalency concept in CEAA on the basis that it "would eliminate federal involvement in the assessment of those [major] projects most likely to be of national concern and to require significant decision from the federal government".[377] Instead it relied on the delegation provisions contained in section 17 and the creation of joint panels under section 40 of the Act to maximize cooperation with the provinces and hopefully minimize duplication and overlap in the assessment process.[378] Equivalency also created the unpalatable political and bureaucratic situation of the "federal government sitting in judgement of provincial jurisdictions in determining who was and was not equivalent".[379] Indeed, this issue has plagued the implementation of the equivalency provisions under CEPA.

Although the federal government adopted a more assertive role in the development of CEAA with respect to provincial demands for equivalency than it had under CEPA, it was couched in a now familiar cooperative refrain in an effort to restore intergovernmental relations. Federal officials reassured the provinces that they would not unnecessarily get involved in projects within provincial boundaries. Of the roughly twenty five thousand projects which were assessed by the federal government between 1995 and 2000, approximately 2% were subject to both provincial and federal EAs.[380] Yet provincial concerns over jurisdiction, ownership and management of natural resources, duplication of effort, standard setting, costs and the potential for conflict persist.[381] In an effort to alleviate some of these concerns, the provinces have pursued two different avenues as a means of attempting to secure their constitutional authority over

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[376] *Ibid.* at 10:10.

[377] Mr. Michael Dorais, (Executive Chairman of the Federal Environmental Assessment Review Office), *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-13*, November 7 1991, 9:8.

[378] Karen Brown, Vice-President, Policy and Regulation of the Federal Environmental Assessment Review Office, *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-13*, November 26, 1991, 12:9.

[379] Mr. Lee Clark (Parliamentary Secretary to the Minister of the Environment), *Minutes of the Proceedings and Evidence of the Legislative Committee on Bill C-13*, December 12, 1991, at 15:25.

[380] Canadian Environmental Assessment Agency, *Review of the Canadian Environmental Assessment Act: A Discussion Paper for Public Consultation* (Ottawa: Minister of Public Works and Government Services, 2000). Online: Canadian Environmental Assessment Registry, <http://www.ceaa.gc.ca/013/001/0002/0001/index_e.htm#7-1>

[381] *CEAA Five Year Review: Provincial Jurisdiction and the Canadian Environmental Assessment Act*, April, 2000, at 1-24. Online: Ontario Ministry of the Environment, <http://www.ene.gov.on.ca/envision/ceaa/index.htm/ceaa/CEAA1.pdf>

environmental assessment and natural resource development:[382] they have taken steps to improve their respective environmental assessment legislation and have endeavoured to reduce intergovernmental conflict, jurisdictional overlap and duplication through harmonization initiatives under the auspices of the CCME. Each of these will be discussed in turn.

Provincial Legislative Response

In an attempt to colonize their jurisdiction over environmental assessment, several of the provinces responded to the development and passage of CEAA by introducing or improving their own legislation. In keeping with its strong desire to protect the nature and pace of natural resource development within its boundaries, Alberta was one such province. Following the involvement of the federal government in the environmental assessment of the proposed *Al Pac Pulp Mill* in 1989, intergovernmental tensions mounted. Consequently, the Alberta government began to push hard for legislative reform in an attempt to occupy the field and thereby prevent federal intrusions into provincial jurisdiction. This sentiment was echoed by Ralph Klein, then Minister of the Environment for Alberta when he appeared before the Committee reviewing Bill C-13. Although acting in his capacity as Chair of the CCME, he argued that the changes undertaken by the provinces to improve their EA processes should be viewed as "equivalent" for the purposes of the CEAA and deserved federal recognition as such.[383] Moreover,

> [t]he matter of pre-empting such federal moves aligned the Alberta Department of Federal and Intergovernmental Affairs with the Department of the Environment's efforts at legislative reform. It was felt by both agencies that the provision of a solid legislative basis for the province's environmental impact assessment process would weaken federal justifications for interventions in the future.[384]

The eventual passage of Alberta's *Environmental Protection and Enhancement Act* in 1992 resulted in the emergence of a one of the most stringent EA processes in Canada at the time.[385] This improved stringency in provincial EA processes was not unique to Alberta. In 1995, British Columbia amended its *Environmental Assessment Act* [386] creating what many considered to be the

[382] It should be noted that these efforts are over and above the calls for legislative reform that stemmed from the 5 year review of CEAA in 1999. Among other changes, the provinces advocated once again for the inclusion of the equivalency concept in the revised CEAA.
[383] *Supra* note 374 at 10:12.
[384] Winfield, *supra* note 233 at 144.
[385] David Jonathan Greenwood, *Healthy Competition: Federalism and Environmental Impact Assessment in Canada 1985-1995*, MA Thesis, University of Waterloo, 2004 at 64.
[386] R.S.B.C.1996, c. 119; amended S.B.C. 2002, c.43.

most progressive provincial EA law in Canada.[387] According to one BC official, the court cases of the early 1990's did not take sufficient consideration of the separation of powers between the governments and this fact effectively jumpstarted provincial efforts to streamline EA processes.[388] Similarly, Quebec viewed CEAA as an unwarranted intrusion into provincial affairs. Pierre Paradis, then Minister of the Environment, stated in June, 1990 that the proposed CEAA represented a threat to Quebec and that the "federal government, in wanting to take on responsibilities for these big industrial projects, will force the provinces, including Quebec, to occupy their field of jurisdiction."[389] On January 24, 1996, Quebec did in fact adopt the necessary regulations to include large scale industrial projects such as pulp and paper mills, aluminum smelters, cement plants, oil refineries, chemical manufacturing plants and many others within the purview of its environmental impact and review legislation.[390]

Saskatchewan undertook a significant review of its EA legislation and processes in 1991. Although the Saskatchewan Environmental Assessment Review Commission made numerous recommendations for reform including increased harmonization efforts with other jurisdictions, no amendments were made to the provincial Act. However, it should be noted that Saskatchewan has established a strong working relationship with the federal government which has served to strengthen the assessment processes when both levels of government are involved.[391] It may be the case that Saskatchewan's limited legislative reform and it's greater reliance on federal administrative involvement is related to provincial capacity.[392]

In January 1995, Nova Scotia passed the *Environment Act*[393] which consolidated and replaced 16 pre-existing environmental statutes. Part IV of the Act and its accompanying *Environmental Assessment Regulation*[394] addresses environmental assessment within the province. The procedures contained in Part IV were changed drastically from the previous environmental assessment legislation and like CEAA, specifically prescribe sustainable development as one of the purposes of the Act. Referring to the changes to the environmental assessment provisions of

[387] Supra note 385. See also Boyd, *supra* note 49 at 157. BC subsequently amended its BCEAA in 2002, substantially weakening its effectiveness.
[388] Supra note 385 at 99.
[389] Philip Authier, "Federal Environmental Impact Plans May Force Quebec to Move: Paradis", *Montreal Gazette*, 20 June 1990.
[390] *The Regulation to Amend the Regulation Respecting Environmental Impact Assessment and Review*, O.C. 101-96, January 24, 1996, *Gazette Officielle du Quebec* (Pt.2.) Vol. 128, No. 6, 1046-1048.
[391] *Supra*, note 385 at 101.
[392] *Ibid.* at 117.
[393] S.N.S. 1994-95 c.1
[394] N.S. Reg. 26/95.

the Act, Robert Harrison, Minister of the Environment stated that "we have borrowed from our sister provinces and territories and the federal government in the creation of this bill".[395] The environmental assessment provisions were also introduced for the purpose of harmonizing provincial legislation with the CEAA and depend a "great deal upon the federal regime..."[396]To that end, the Act authorizes the Minister to enter into agreements with other levels of government for the purpose of joint reviews and for the creation of single hearings as a means of reducing overlap and duplication.[397] Other significant measures in the Act introduced in 1995 which incorporate concepts within CEAA include the creation of an independent environmental review board and the establishment of public hearings.

Manitoba amended its *Environment Act* in 1990 to include transboundary provisions which authorize joint environmental assessments and enable the Minister to submit a project to the environmental assessment of another jurisdiction. These provisions are grounded in the notion of equivalency and require that the other jurisdiction's process be at least equivalent to that of Manitoba. Ontario also introduced the notion of equivalency in its amendments to the provincial *Environmental Assessment Act*[398] in 1996. In an attempt to eliminate overlap and duplication in the assessment process, the province made harmonization with the federal legislation one of the focal points of its amendments.[399] In this regard section 3.1 of the Act provides the Minister of Environment with the authority to vary or dispense with requirements under the Act where the assessment requirements of another jurisdiction are equivalent to provincial ones.[400] Where the minister exercises his discretion under this section, written reasons for the decision must be provided.[401] Although this provision, taken together with other amendments introduced in 1996, has been criticized as providing the Ontario government with too much discretion in the administration of environmental assessment,[402] it is beyond the scope of this paper to assess the effectiveness of the provincial EA regimes. Rather this analysis is confined to examining the effect that the introduction of the federal CEAA had on provincial law and policy. In that regard, although Ontario had serious concerns over jurisdictional infringement by the federal

[395]Nova Scotia, Legislative Assembly, *Official Report of Debates (Hansard)*, (7 November 1994) at 5:45 (Hon. Robert Harrison, Minister of the Environment).
[396] *Ibid.*
[397] *Supra* note 393, sections 47 and 48.
[398] R.S.O. 1990, c. E.18 as amended S.O.1996, c.27
[399]Ontario, Legislative Assembly, (13 June 1996) at 1350 (Hon. Brenda Elliott, Minister of the Environment).
[400] *Supra* note 398 section 3.1
[401] *Ibid.*
[402] Boyd *supra* note 49 at 157. See also Alan D. Levy, "A Review of Environmental Assessment in Ontario" (2002) 11 *Journal of Environmental Law and Practice* 173.

government,[403] Winfield suggests that it viewed the CEAA as an opportunity for the other provinces to raise their environmental assessment standards and in so doing, level the playing field for industrial development across jurisdictions.[404] It is argued here that CEAA and the threat of federal intervention in provincial jurisdiction over natural resource development have indeed resulted in changes in environmental assessment throughout Canada which have generally contributed to improved EA processes.

The provincial governments continue to view their EA reforms as an important step towards securing jurisdiction over natural resource management and have requested the federal government to acknowledge those legislative changes in reconsidering the concept of "equivalency". During the 5 year review of CEAA undertaken in 1999, all of the provincial governments (except Quebec) worked cooperatively to develop consensus recommendations relating to such issues as jurisdiction, the application of CEAA and assessment procedures. In their submission to the federal government they noted that "the provinces and territories have made substantial advances in practices of environmental assessment in their respective jurisdictions since CEAA was first enacted".[405] These advances are acknowledged as being jurisdictionally motivated. The report states that "[w]hile the details of the respective legislation differ, the provinces and territories share a fundamental commitment to their constitutional responsibilities for the environment". [406] It is clear that belying the provincial request for a reconsideration of the equivalency concept was a concern for the protection of provincial and territorial jurisdiction. The federal government did not, however, include the requested amendment in the revised CEAA.

Harmonization

As efforts to have "equivalency" accepted by Ottawa failed, the provinces sought an alternate way to constrain federal unilateralism. Utilizing the multilateral forum of the CCME, the provinces initially pursued the harmonization of federal and provincial EA regimes by way of "process coordination". In fact, Kennett argues that in the case of overlapping assessment jurisdiction, there are strong incentives for some form of intergovernmental cooperation with respect to issues of efficiency, procedural certainty, and the long term viability of the process

[403] *Supra* note 385 at 110.
[404] *Supra* note 384 at 149.
[405] *Supra* note 381 at 3-28.
[406] *Ibid.*

itself.[407] The CCME produced a model framework agreement for bilateral federal-provincial agreements. The framework agreement was intended to provide a baseline for cooperation and coordination between existing EA regimes. The first such bilateral was signed by the province of Alberta in 1993 and since that time, most of the provinces have entered into bilateral agreements with the federal government.[408] Kennett suggests that process coordination "appears to address many of the costs of overlapping EA regimes without sacrificing the benefits of process dualism in cases where both governments have jurisdictional interests and regulatory responsibilities".[409]

More recently, the harmonization initiatives undertaken by the CCME have taken the form of process substitution, resulting in a rationalization of EA regimes for a given project. Both the Canada-Wide Accord on Environmental Harmonization and the Environmental Assessment Sub-Agreement have provided the structure for this initiative. The provinces have forwarded the position that the avoidance of duplication and the reduction of interjurisdictional conflict can be best achieved through increased harmonization, which is the principle theme of the Accord.[410]But there is some question as to whether or not the level of overlap and duplication suggested to exist by the provinces is indeed so problematic. The Standing Committee on Environment and Sustainable Development in its analysis of the Harmonization Initiative of the CCME concluded that there is insufficient overlap and duplication of environmental regulations and activities to suggest that the cost savings and efficiencies projected will be achieved.[411] Moreover, the potential withdrawal of the federal government from decision making, standard setting and the environmental assessment process may result in an overall reduced level of environmental protection. Kennett concludes, like many others, that the marginal increases in efficiency brought about by process substitution are likely not worth the significant risks to the weakening of the process itself.[412]

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[407]Kennett, *supra* note 162 at 110.
[408] To review these agreements see the Canadian Environmental Assessment Registry, online: <http://www.ceaa.gc.ca/013/agreements_e.htm#1>
[409] Kennett, *supra* note 162 at 120.
[410] *Supra* note 381, at 1-18. As previously noted, Quebec did not sign the Accord.
[411]Report of the Standing Committee on Environment and Sustainable Development, *An Analysis of the Harmonization Initiative of the CCME,* October 20, 1997. Online: Parliament of Canada, <http://cmte.parl.gc.ca/Content/HOC/committee/361/ensu/reports/rp1031507/ensurp01/report-e.htm#assessment>
[412] Kennett, *supra* note 162 at 130. See also Mark Winfield, "Environmental Policy and Federalism" in Herman Bakvis and Grace Skogstad (eds.), *Canadian Federalism: Performance, Effectiveness and Legitimacy*, (Don Mills: Oxford University Press, 2002) 124.

Thus, the development of CEAA resulted in some provincial legislative reform as a means of securing provincial jurisdiction from the threat of federal unilateralism. To the extent that provincial efforts at obtaining federal recognition of equivalent EA processes were unsuccessful, the provinces pursued two methods of harmonization. Both were aimed at reducing jurisdictional overlap, duplication, and ultimately, federal unilateralism. While there is clearly some procedural efficiency to be gained from coordinating EA processes across jurisdictions, the potential loss of strong environmental protection may not be worth the price of the process substitution envisioned by the Harmonization Accord. Furthermore, the harmonization initiative reduces what has been shown to be an effective policy instrument in protecting the environment – namely, the ability of the federal government to threaten unilateral action.

Transboundary Provisions

The threat of unilateral action is expressly referred to in the transboundary provisions of CEAA. In particular, section 46 authorizes the federal government to undertake an environmental assessment of a project that is to be carried out within a province where the Minister of the Environment is of the opinion that that the project may cause significant adverse environmental effects in another province.[413] A project may, however, only be referred for such an assessment where the Minister and the governments of all the interested provinces have not otherwise agreed on a manner of conducting an assessment of the interprovincial effects of the project.[414] Although an interested party or province may petition the federal government to undertake an assessment under section 46, it does not obligate the Minister to do so. Moreover, the scope of the transboundary provisions is substantially limited to the extent that its application must not be otherwise precluded by the general triggering mechanism contained in section 5 of the Act.[415] It should also be noted that CEAA contains mirror provisions enabling a federal environmental assessment for projects with potentially adverse international transboundary effects.[416]This discussion will, however, for the most part focus on interprovincial matters.

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[413] *Supra* note 17, subsection 46(1).

[414] Moreover, the environmental assessment process agreed to by the parties must meet the criteria set out in subsection 46(2). For the purposes of section 46-51 an "interested province" is defined in subsection 46(5) as a province in which the project is to be carried out; or a province that claims that significant adverse environmental effects may occur in that province as a result of the project.

[415] Meinhard Doelle, "The Canadian Environmental Assessment Act: New Uncertainties, But a Step in the Right Direction" (1994) 4 J.E.L.P. 59 at 83.

[416] *Supra* note 17, section 47. Section 48 of CEAA deals with projects that may have interjurisdictional effects involving aboriginal lands and certain types of federal land.

Section 46 thus provides yet another example of a safety net like provision within a federal environmental statute. That is, it authorizes unilateral action by the federal government where the province is unable or unwilling to address the problem independently or in consultation with Ottawa. The constitutional underpinnings for this safety net can be found in the residual POGG power of the federal government and are based upon the provincial inability test for matters of national concern.[417] Although the federal government's constitutional authority for the transboundary provisions is sound, its use has been very limited. Although the federal government receives a number of petitions every year[418] to examine the potential transboundary effects of a project, it has only referred one project to a review panel under section 47.

In October, 2003, the federal government received a petition from a number of groups requesting a review of the building of a thermal oxidizer by Bennett Environmental Inc. in Belledune, New Brunswick. The petitions alleged that the facility would cause adverse effects in Quebec and on certain Indian reserves in New Brunswick and Quebec. In June of the following year, the Minister referred the project to a review panel in order to examine its potential transboundary effects to ensure that there were no human health concerns for the affected communities. Bennett subsequently, filed an application for judicial review, challenging the Minister's decision. The matter was finally decided by the Federal Court of Appeal in 2005.[419] The court held that because the construction of the project was substantially complete at the time of the referral, it was not a project within the meaning of the Act. That is, because the project was no longer within the framework of a proposed facility, it could not be the subject of a review panel assessment.[420] It is possible to speculate therefore that had the federal government not delayed for over 6 months between the time that they received the petition and the time of the referral, the result may have been different.

There are likely several reasons which may be offered to explain why the federal government has not utilized the transboundary provisions of the CEAA more frequently. Clearly, the statutory limitation placed on its application by section 5 of the Act, has effectively reduced the scope of

[417] *Zellerbach, supra* note 44. See also *Canada Metal supra* note 247 and *Oldman, supra* note 11. For a discussion of these cases as they relate to the transboundary provisions see Steven A. Kennett, "The *Canadian Environmental Assessment Act*'s Transboundary Provisions: Trojan Horse or Paper Tiger?" [1995] 5 J.E.L.P. 263.

[418] In 2001-02, the federal government initiated the investigation of 13 projects subject to requests or petitions under the transboundary provisions of the Act. In 2003/04 there were 7 and in 2004/05 there were 8 such petitions.

[419] *Bennett Environmental Inc. v. Canada (Minister of the Environment)* (2005) 16 C.E.L.R. (3d) 1 (F.C.A.)

[420] *Ibid* at 25, per Sharlow J.A.

projects which come within the purview of sections 46, 47 and 48 to all but a very few. In fact, in the 12 years since the CEAA came into force, the federal government has only had occasion to refer a project to a review panel once. Secondly, the federal government may only exercise its discretion under these provisions provided that a prior agreement has not been reached with the relevant jurisdiction. This condition enables the federal government to negotiate with the government in question to resolve the EA issue without taking the politically difficult step of acting unilaterally. It appears therefore that a federal referral to a review panel will likely depend upon an unusual set of circumstances and an exercise of political will. The federal government's reluctance to intervene using these "safety net" like instruments in environmental assessments is consistent with what we have seen in other areas involving interjurisdictional resource management and the environment.[421]

This review of CEAA and its safety net like provision is intended to provide a parallel example of the development and implementation of a federal environmental statute which contains the threat of federal unilateral action. It demonstrates that the federal government's introduction of CEAA resulted in substantial provincial opposition during the development of the legislation and that the threat of federal interference in provincial jurisdiction over natural resource management and development helped to push the provinces into legislative EA reform. CEAA and the subsequent provincial reform have helped to improve the overall quality of EA processes throughout Canada. The provinces have insisted that this improvement has brought about equivalent provincial legislation. However, the refusal of the federal government to recognize provincial equivalency has led to greater harmonization efforts to further contain the threat of interference. Whether these harmonization efforts and the apparent weakening of the federal threat of unilateral action will ultimately result in better environmental protection remains to be seen.

Conclusion

The objectives of this chapter were to review the historical development of each of the statutes studied, outline the nature of the safety nets contained within them, determine whether or not they have been used to ground unilateral action by the federal government, and lastly, to assess the provincial reactions to both the legislation and the safety nets, where applicable. There are a number of conclusions which can be drawn from the foregoing analysis. Generally speaking, as the constitutional basis for federal involvement in the environmental arena became clearer over

[421] Kennett, *supra* note 162 at 278

time, Ottawa became more assertive in its role in the management and legislation of the environment. For the most part, this assertiveness was not well received by the provinces. However, as the provinces became more accepting of the fact that the federal government's presence in environmental matters was inevitable, they began to move towards trying to limit the extent of federal interference in provincial jurisdiction.

Across each of the statutes studied, the provinces responded to the development of federal environmental legislation and the consequent threat to provincial jurisdiction by engaging in several different activities. Where possible, the provincial governments voiced their opposition to the expanding federal role during the development of the legislation itself. They sought amendments to proposed legislation which would enable them to opt-out of the application of federal legislation and often required that federal action be conditional upon provincial agreement and cooperation. More often than not this opposition was followed by reassurances from the federal government that unilateral action would only be undertaken as a matter of last resort. Additionally, the increasingly expansive role of the federal government in the environmental arena has frequently spurred provincial legislative reform. This reform can generally be characterized as falling into one of two broad categories – firstly, reform which attempted to mirror or exceed national standards and procedures and secondly, reform which focussed on the harmonization of federal and provincial laws and policies.

There are several examples of both kinds of reform discussed in this chapter. The legislation adopted by Alberta, BC, and Ontario following the introduction of the *Canada Water Act* was intended to secure jurisdiction over water management within provincial borders. The promulgation of ambient air quality standards by many jurisdictions mirrored the national objectives established under the *Clean Air Act* despite the relatively weak threat embodied in the federal legislation. Although the wholesale adoption by the provinces of the uniform standards contained in the *Transportation of Dangerous Goods Act, 1982* and its accompanying regulations provides the clearest example of improved provincial legislation in response to a federal initiative, it may be distinguished from the other initiatives to the extent that it did not involve a jurisdictional conflict over natural resources. The amendments undertaken by Alberta, Saskatchewan Ontario, Nova Scotia and the Yukon to include citizen investigations in their environmental protection legislation as required by the equivalency criteria established under CEPA are evidence of provincial attempts to protect their jurisdiction over environmental management. While these amendments were not necessarily passed for the purpose of improving the quality of provincial environmental legislation, they ultimately had that effect. The reforms undertaken by Alberta, Quebec, BC, and Nova Scotia following the passage of CEAA were adopted in response to the federal legislation and contain measures aimed at securing provincial interests over environmental assessment and the development it regulates. This "simple competition to occupy policy space"[422] with the federal government has thus often resulted in more accountable and better environmental law and policy throughout Canada. The final, and most recent, way in which the provinces have responded to federal environmental legislation is through the multilateral harmonization initiatives of the CCME. By pursuing a multilateral approach to standard setting and environmental assessment processes, the provinces have effectively reduced the threat of federal interference in provincial jurisdiction.

The review undertaken in this chapter of the safety net like provisions reveals that the federal government's historical reticence to carry out the threat of unilateral action manifests itself in the nearly complete non-use of these clauses. The federal government has never taken the politically unpalatable step of using a safety net either because the provinces have done what was needed to meet the federal threat, as in the case of the TDGA, or because the legal and political costs associated with unilateral action have been too high, as in the case of the *Water Act* or in the case of the international air pollution provisions in CEPA. A third possible reason for federal reticence to use safety net provisions may be that the cooperative measures undertaken by both levels of government have provided ample opportunity to negotiate solutions to difficult environmental problems with little accountability to the public.

On the one occasion where the federal government threatened Ontario with use of safety net concerning international air pollution and the emission of NOx, the province responded by developing a policy aimed at reducing the necessary emissions within the time frame dictated by the Ozone Annex. Thus, the mere threat of federal intervention spurred provincial action. What is of significance, however, is that Ontario subsequently revised its decision to eliminate coal burning electricity plants, extending its deadline from 2007 to 2009. Without federal sanctions, Ontario thus did not maintain the environmental measures it had instituted following the pressure exerted by the federal government. One wonders whether this same outcome would have occurred had Ottawa opted to act unilaterally by imposing restrictions on NOx emissions rather than merely negotiate with Ontario.

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[422] Skogstad & Kopas, *supra* note 26 at 56.

The safety net in SARA represents a similar example of the threat of unilateral action on the part of the federal government to take steps to protect species at risk in those jurisdictions which do not have measures in place to provide effective protection for listed species. As yet, the federal government has not exercised that threat through the actual use of the safety net provisions, even in the face of tremendous public pressure and the potential irreversible loss of species. Given that the historical review of similar safety net use demonstrated little evidence of a federal government willing to step on provincial toes for the sake of environmental protection, it seems likely that the safety nets in SARA will be used sparingly, if at all. However, we have seen that the threat of unilateral action alone may be sufficient to bring about improved provincial legislation. Given the constitutional division of powers over the environment and the federal reluctance to test the limits of its jurisdiction, the bulk of wildlife and habitat management presently remains within provincial hands. Therefore, the ability to use this threat to motivate provincial action is both an effective and important policy instrument. What follows in Chapter 4 is an assessment of the degree to which the provinces have responded to this threat in the context of protecting species at risk throughout Canada.

Chapter 4 Provincial Species at Risk Legislation

Out of concern for both the political and constitutional backdrop that the management and protection of endangered wildlife and their habitats entails discussed in Chapter 2, the federal government deliberately chose to restrict SARA's scope of application to federal land and to the protection of federally listed species. As a result, much of the burden of protecting species at risk throughout Canada falls upon provincial shoulders.

However, in an attempt to provide a final backstop of protection, the federal government included the safety net provisions within SARA's framework. It authorizes the federal government to act unilaterally to protect species at risk where a province or territory has failed to provide effective protection. The purpose of the safety net is to create a seamless web of protection for species at risk and their habitat wherever they may live. Thus, the threat of federal intrusion into provincial jurisdiction over the management of wildlife and their habitat became embedded in the Act itself. Yet, SARA and the safety net were presented collectively, as cooperative policy instruments in the protection of species at risk. Specifically, the safety net was intended to be an invitation for the provinces and territories to act in a responsible manner. It is submitted that a similar invitation was extended by the passage of the federal legislation itself. That is, the threat of federal interference in provincial jurisdiction was present in the very existence of the legislation and it helped to drive the provinces to develop the law and policies necessary to enable them to secure jurisdiction over wildlife and habitat. This chapter involves an examination of the degree to which the provincial and territorial governments have accepted this invitation.

In particular, this chapter will consider the extent to which the development, passage and implementation of SARA and its safety nets, alongside provincial obligations under the National Accord to establish legislation for the protection of species at risk, have motivated the provinces to raise the overall standard of endangered species protection and to meet the standard of effective protection required by the Act. More specifically, it will review the current provincial and territorial laws and policies aimed at protecting species at risk, how they have changed over the period beginning in 1995 to the present day, the factors which have served to bring about those changes, and more importantly, whether or not those changes have resulted in the creation of protection throughout Canada which is equivalent to that afforded under SARA. It is argued here that the threat of federal interference in provincial jurisdiction over the management of wildlife and their habitats which underlies both the development and passage of SARA has motivated the provinces to establish better legislation for the protection of species at risk. Moreover, this threat has persisted in the form of the Act's safety net provisions. However, in the final analysis, while threat alone has been sufficient to provide increased impetus toward legislative reform, it has not been enough to bring about equivalent protection across all jurisdictions.

British Columbia

British Columbia is the most biologically rich of all of the provinces in Canada. It is home to over 70% of all bird and mammal species that populate this vast country.[423] It is therefore imperative that British Columbia, as primary custodian, protect this abundant wealth of biodiversity for all of us. However, today, the province is one of the few remaining jurisdictions in Canada without stand alone endangered species legislation. British Columbia relies, instead, on a number of different acts, as well as forestry and wildlife policies to protect species at risk and their habitats. This legislation includes the *Wildlife Act*, the *Forest Practices Code of British Columbia Act,* and the *Forest and Range Practices Act.*[424] In this section I will examine some of the legislative history of the provisions which serve to protect BC's species at risk in order to better understand how the province has responded to the development of SARA and the safety net.

Prior to SARA's passage, British Columbia actively campaigned against federal endangered species legislation on the basis that it intruded upon provincial jurisdiction over land and natural resources.[425] This position was hardly credible given the fact that the province did not have its own stand alone legislation for endangered species. As early as 1996, the provincial government promised that it would begin to develop legislation to protect and conserve endangered species. However, this promise was subsequently revoked the following year by Environment Minister, Cathy MacGregor, despite British Columbia's obligations under the recently signed National Accord. She claimed that the *Forest Practices Code* would protect the province's 743 then acknowledged species at risk. [426]

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[423] Colin Rankin and Michael M'Gonigle, "Legislation for Biological Diversity: A Review and Proposal for British Columbia", (1991) 25 U.B.C. L. Rev. 277 (Special Edition: Environmental Law).
[424] R.S.B.C. 1996, c. 488 [Wildlife Act], R.S.B.C. 1996, c. 159 [Forest Code], and S.B.C. 2002, c.69, respectively.
[425] Confidential Interview with provincial officials, December 6, 2006. See also Sierra Club of Canada online: Rio Report Card, 1997 <http://www.sierraclub.ca/national/rio/rio97-provincial.html> and Rio Report Card, 1999 <http://www.sierraclub.ca/national/rio/rio99.html>
[426] Sierra Club of Canada, online: Rio Report Card, 1996 <http://www.sierraclub.ca/national/rio/1996/rio_bc.html>

In 1994, the BC government passed the *Forest Practices Code of British Columbia Act*[427] and alongside it produced several regulations and implementation guidelines. Provisions for the conservation of biological diversity were included within the Code's *Identified Wildlife Management Strategy (IWMS).*[428] Under the IWMS, forest dependent species at risk could be identified and legally designated as eligible for protection. The first IWMS was introduced in February, 1999 and listed 36 species and 4 plant communities requiring protective measures. However, the government placed a significant limitation on the potential ability of the IWMS to protect designated species. More specifically, an internal policy was developed which stipulated that the IWMS could not impact the province's timber supply by more than one percent. Given the degree to which the BC economy relies on timber resources, the goal of protecting species at risk has always been tempered against the "reality of a working forest".[429] Perhaps this more than any other reason explains British Columbia's relative lack of legislative protection for endangered species through the period beginning in 1994 to the present day.

The IWMS was not, however, the province's only means of protecting species at risk. At the time BC agreed to the principles outlined in the National Accord, the *Wildlife Act*[430] also contained provisions to enable the identification and listing of vertebrate species as either endangered or threatened.[431] Recognizing that this definition restricted the application of the Act to only a fraction of the species at risk within the province, and that consequently BC would be unable to fulfill its obligations under the National Accord, the provincial government first considered amending its legislation in 2000. The amendments were finally passed in May, 2004, extending the government's ability to designate invertebrates and plant species under the Act.

The changes contained in the *Wildlife Amendment Act*[432] formed part of a broader strategy being implemented in British Columbia to improve the identification, management and protection of species at risk found in the province. Although the new provisions have been characterized by government officials as being part of a unique "made in BC" strategy, some of the terminology and elements of Bill 51 and the timing of its introduction were admittedly influenced by the

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[427] Forest Code, *supra* note 424.
[428] *Operational and Site Planning Regulation*, B.C. Reg. 107/98
[429] Ministry of Water, Land and Air Protection, Government of British Columbia, "Identified Wildlife Strategy News Release", No. 330-30ELP98/99-101, February 19, 1999.
[430] Wildlife Act, *supra* note 424.
[431] To date only four species have been listed in the regulations to the Act as being threatened or endangered: the burrowing owl, the sea otter, the Vancouver Island Marmot and the White Pelican. See BC Reg. 253/2000.
[432] S.B.C. 2004, c. 56 [Amendment Act]

implementation of SARA and the coming into force of the "safety net". Specifically, "Bill 51 was in part designed to respond to this clause in SARA, to make clear to any future federal minister ... that the province does have laws in place to effectively protect federally listed wildlife species that are found in the province."[433] Thus, the amendments were enacted and designed to "meet some of BC's obligations under the Accord; and to provide a provincial legislative response to SARA (i.e. assert the province's jurisdiction for the purposes of the SARA safety net provision (s. 34(2) and (3))."[434] Whether or not the amendments, taken together with BC's other legislation and policies aimed at protecting species at risk, satisfy that criteria is a separate question altogether.

As a result of the changes, Cabinet is now able to designate in the regulations to the Act endangered, threatened or extirpated species, including plants and invertebrates which were previously unprotected. Following listing, species, and their residences, are eligible for protection against direct harm.[435] It should be noted that, unlike SARA, the provincial listing process remains a matter of policy and is consequently subject to the discretion of Cabinet. Moreover, the amendments do not obligate recovery strategies or management plans. Recovery efforts are to remain a matter of program and policy. Finally, the amendments do not address the issue of critical habitat for species at risk and the provincial government continues to rely on protection available through other related legislation, including the *Forest and Range Practices Act.*

This Act replaces the *Forest Practices Code* and continues to provide its predecessor's protection through a separate listing of species at risk. In May, 2004, the Minister of Water, Land and Air Protection, by an order made under a regulation to the Act, designated 39 SARA-listed species as potentially being affected by forest or range management on Crown land and therefore requiring protection in addition to that provided by other mechanisms.[436] These species formed part of the 2004 Identified Wildlife Management Strategy. The adoption of the new IWMS and the establishment of the list coincided with the passage of the *Wildlife Amendment Act*, and they formed part of the implementation of the wider provincial strategy to provide effective protection for species

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433 Confidential interview with BC Environment Ministry, Conservation Planning, May 9, 2005

434 Confidential interview with BC Environment Ministry, Biodiversity Branch staff conducted December 6, 2006.

435 Amendment Act, *supra* note 432.

436 Government of British Columbia, Order – Category of Species at Risk, May 3, 2004 (Government Actions Regulation B.C. Reg. 17/04). Online: Government of British Columbia, Ministry of Water, Land and Air Protection, <http://wlapwww.gov.bc.ca/wld/documents/identified/approved_sar_order_list.pdf>

at risk mentioned earlier.[437]It has been suggested that this step was taken as a means of preventing the federal government from intruding on provincial land to protect these national species at risk.[438]

Thus, the foregoing review reveals that over the period beginning in 1999 and extending to 2004, the BC government took a number of steps to provide increased protection for species at risk within the province. In March 1999, the first IWMS list of forest dwelling species was created. This development follows on the heels of the two national workshops conducted by Ottawa to develop federal species at risk legislation, and the 1998 meeting of Wildlife Ministers, during which the concept of the federal safety net was first introduced. According to BC government officials, the introduction of Bill C-33 and the federal safety net caused concerns regarding the potential "encroachment on provincial jurisdiction over land and resources".[439] The listing of 4 species by regulation under the Wildlife Act and the initial impetus to amend the Wildlife Act both occurred in 2000. Both of these changes have been at least partially attributed to the federal introduction of Bill C-33 and the safety net. [440] Further improvements to the breadth of protection available to species at risk within the province occurred in 2004 with the amendments to the Wildlife Act. That the timing of the amendments coincides with the coming into force of SARA and its safety net, is perhaps, a testament to the threat value inherent in the safety net to motivate the provinces to provide effective protection to species at risk. Moreover, according to BC officials, the risk of the federal government applying the safety net has been reduced as a result of the amendments made to the *Wildlife Act*.[441] Clearly, the threat contained within the safety net served to motivate the province to improve its endangered species legislation.

Other significant steps taken by the province to provide increased protection for species at risk which are attributable to SARA include: an increase in emphasis on COSEWIC listed species in implementing the *Forest and Range Protection Act*, an increase in the number of recovery teams for all COSEWIC listed species and current plans to develop a policy framework for management of species at risk. [442] Perhaps one of the most newsworthy policy developments was the spotted owl recovery plan announced by the provincial government in the spring of 2006. After years of governmental delay and ongoing legal and public pressure from environmental groups, the province

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[437] *Supra* note 434.
[438] Paul M. Wood & Laurie Flahr, "Taking Endangered Species Seriously? British Columbia's Species-at-Risk Policies", (2004) 30:4 *Canadian Public Policy* 381 at 393.
[439] *Supra* note 434.
[440] *Ibid.*
[441] *Ibid.*
[442] *Ibid.*

finally announced that it would implement a multi-million dollar, five year plan to recover the critically endangered northern spotted owl. The recovery plan focuses on capturing and breeding the remaining spotted owls living in the province but, according to a number of NGOs, does little to protect the old growth forests which constitute their habitat.[443] The then Director General of the Canadian Wildlife Service, has stated that a provincial recovery strategy would not have been announced without the direct influence of the safety net. During ministerial level negotiations, the federal government threatened to use its emergency protection power under SARA if BC did not act to provide for the owls' recovery.[444] However, whether or not the recovery plan forwarded by the provincial government will be sufficient to recover the spotted owl from the brink of extinction remains a matter of some debate.

Thus, while the development of federal endangered species legislation and its threat of interference in provincial natural resource management has influenced BC's law and policy for protecting species at risk, the question remains: has SARA and its safety net fulfilled its purpose as a policy instrument? In other words, has it achieved effective protection for species at risk in the province of British Columbia? Although it is too early to determine whether or not this is in fact the case, it is possible to ask whether or not the BC government achieved legal protection for species at risk that is comparable or "equivalent" to that offered under SARA.

In BC, listing under either an IWMS or the *Wildlife Act* continues to be dependent upon political discretion. Although listing under SARA is not completely science based, reasons for not accepting COSEWIC recommendations must be published on the registry. Presently, BC has provided legal protection against direct harm for 4 species under the *Wildlife Act*. It should be noted that no additions to the list have been made since the Act was amended in 2004 to widen the scope of protection beyond vertebrates and to include all wildlife species. In fact, the province has yet to bring the amendments into effect. Additionally, the province has listed 71 species under the *IWMS*. Contrast this with the 174 species located within the province and listed under SARA.[445] Thus, approximately only 37 percent of SARA listed species receive some measure of protection within the province of British Columbia. Clearly, for many species this is not "equivalent" protection.

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[443] "2010 Winter Olympics Prompt B.C. Plan to Recover Spotted Owl", *Environment News Service*, May 1, 2006 online: <http://www.ens-newswire.com/ens/may2006/2006-05-01-02.asp>

[444] Telephone Interview with Trevor Swerdfager, former Director General Canadian Wildlife Service, conducted February 22, 2007.

[445] BC Conservation Data Centre 2007, BC species and Ecosystems Explorer, BC Ministry of Environment, Victoria, BC online: <http://srmapps.gov.bc.ca/apps/eswp/ accessed January 17, 2008>. It should be noted that the data includes species of special concern for both BC and SARA listed species.

Although the *Wildlife Act* protects listed species from direct harm, there are no habitat protection measures included in the Act. And while there is some protection afforded species listed under the IWMS, it is limited by the 1% cap on timber supply discussed earlier and applies only to species covered by the provincial *Forest Act*. Finally, recovery strategies remain merely a matter of policy and are not statutorily required. On this basis alone, British Columbia has not come even close to achieving equivalency with SARA based protections. It is possible to conclude therefore that while SARA and the safety net have gone some distance in improving endangered species law and policy in the province of British Columbia, there is still a long distance yet to go before species will receive effective protection.

Alberta

Alberta was a vociferous opponent of SARA and the federal safety net. Even before the concept of a federal safety net was first discussed in 1998,[446] the Alberta government opposed federal interference with the province's ability to manage its own species. Alberta objected to CESPA and its international transboundary provisions on the basis that the federal government had exceeded its environmental authority by attempting to regulate species located on provincial lands.[447] When Bill C-33 and its federal safety net provisions were formally introduced in the fall of 2000, Albertan concerns regarding the potential federal interference in provincial jurisdiction over wildlife were magnified.

Alberta viewed Bill C-33 as being intrusive and in violation of the cooperative principles embodied in the Accord. [448] Then Environment Minister, Gary Mar, indicated that Alberta would possibly challenge the constitutionality of the Bill on the grounds that ultimate authority over wildlife rested with the provinces and not with the federal government.[449] Although the challenge was never brought, the province remained nervous about the federal safety net when SARA was re-introduced in February, 2001.[450] A discussion regarding the degree to which these concerns have subsequently motivated legislative action or the adoption of policies by the provincial government in an attempt to preempt the operation of the safety net follows.

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[446] Canadian Intergovernmental Conference Secretariat, News Release, September 28, 1998. Online: <http://www.scics.gc.ca/cinfo98/83062528>
[447] Amos, *supra* note 26 at 155.
[448] Byfield, Mike, "Who is Endangering Whom? Ottawa's SARA shows disturbing parallels to its draconian US Equivalent", 27 *Report Newsmagazine* (12) (Edmonton: October 23, 2000) at 18.
[449] Teel, Gina. "Alberta opposes wildlife legislation", *Calgary Herald*, April 12, 2000 at A10.
[450] Illical, *supra* note 88 at 107.

Alberta's endangered species currently receive protection under the provincial *Wildlife Act,* and its accompanying regulation.[451] Provisions specifically aimed at protecting not just wildlife, but all species at risk were passed in May, 1996. The amendments were intended to reaffirm the province's commitment to the Canadian Biodiversity Strategy as well as complement the national approach to endangered species conservation by other jurisdictions across Canada.[452] Prior to these changes, the protection afforded species at risk under Alberta's *Wildlife Act* was woefully inadequate and did not provide for the assessment, designation or listing of endangered species. An interview with an Alberta government official revealed that the amendments were at least partially induced by the development of federal endangered species legislation.[453]

"Endangered species", as they are now defined in the Act, include those animals, invertebrates, plants, alga, fungi and fish prescribed by the Minister in Schedule 6 of the regulations. Upon being listed in the regulations as "endangered", species may not be hunted, harassed, captured, willfully injured or killed.[454] The Act also prohibits the disturbance or destruction of the den or nest of a listed species under section 36. As of November, 2007 there are 15 species listed in schedule 6 of the regulations as being endangered. In 1997, the regulations listed 5 species as endangered and 6 as threatened. Only four species have been added in the intervening period, namely the Sage Grouse in 2000, Ord's Kangaroo Rat in 2002, the Mountain Plover and the Short Horned Lizard in 2006. As of November, 2007 less than one third of species on Schedule 1 of SARA are listed in the regulations to the provincial *Wildlife Act* as being either endangered or threatened[455] and no invertebrates, plants, fish, algae or fungi have been prescribed under the regulations. Although those species designated in the regulations receive some protection against hunting as well as the disturbance of their nests and dens, the protection of their habitat is subject to the discretion of the Minister[456]. This provision has never been used.

The 1996 amendments also established the Endangered Species Conservation Committee (ESCC) for the purpose of making recommendations to the Minister regarding which species should be so

[451] *Supra* note 14; *Wildlife Regulation,* Alta. Reg. 143/1997

[452] Alberta, Legislative Assembly, Hansard, May 14, 1996, (Amery, Member of Parliament Calgary-East introducing Bill at Second Reading).

[453] Confidential Interview with government official from Sustainable Resource Development, February 15, 2007.

[454] *Supra* note 14, sections 1 and 25.

[455] *Ibid.* There are 32 species listed in Schedule I as being either endangered or threatened living in Alberta. The province lists 15 species in its regulations but of those only 10 are SARA listed species.

[456] *Ibid. s*ubsection 103(1)(u).

prescribed.[457] Although the composition of the Committee is not specified in the Act, it is currently comprised of 19 members representing various sectors including industry, environment, government and agriculture. A scientific subcommittee is also established under section 6 of the Act to study and assess endangered species. The province considered the creation of the ESCC, and the scientific subcommittee, as an important step in fulfilling its obligations under the Accord.[458] It should be noted, however, that the recommendations of the ESCC are not legally binding and listing remains subject to political discretion. To assist in the expansion of the Species at Risk Program, Alberta Environment devoted $4.7 million in funding over a two year period beginning May, 2000. Much of this money was directed into the work of the ESCC.[459] Since 2003, this funding has, however, been substantially reduced.[460]

The ESCC may also advise the Minister with respect to the preparation and adoption of recovery plans for endangered species. The recovery plans may include population goals and the identification of critical habitat; however, neither is statutorily required. While no timelines for the preparation of recovery plans are mandated by the Act, the development of recovery strategies is increasingly becoming a focus for the ESCC. Following the passage of SARA in December 2002, the federal influence on the protection and recovery of species at risk in Alberta has become apparent. Recovery planning for species that are listed both nationally and provincially must now meet federal requirements.[461]

Recognizing the need to prevent vulnerable species from becoming threatened or endangered, the ESCC created a new category of assessment called "special concern", initially listing two species as being of special concern in May, 2000. Seven others have been added since that time. Although not a legal designation, the use of the status category "special concern" appears to be an attempt by the ESCC to maintain consistency across jurisdictions. The decision to use the additional status category followed the introduction of Bill C-33 in Ottawa, which included the same definition. Curiously, in the Species at Risk Program Reports for 2001/02 and 2002/03, the definition "special concern" is noted as being draft wording for a proposed *Wildlife Amendment Act*, but the reference to

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457 *Ibid.* section 6

458 Alberta Sustainable Resource Development, Fish and Wildlife Division, *Alberta Species at Risk Report No. 55* (Edmonton: Alberta Sustainable Resource Development, 2002) at v. Online: Government of Alberta, Sustainable Resource Development <http://www.srd.gov.ab.ca/fishwildlife/speciesatrisk/pdf/SAR_55.pdf>

459 *Ibid.* See also Government of Alberta News Release, No. 00-046, Wednesday May 31, 2000.

460 Alberta Sustainable Resource Development, Fish and Wildlife Division, *Alberta Species at Risk Report No. 100* (Edmonton: Alberta Sustainable Resource Development, 2005)

461 *Ibid.* See also *supra* note 458.

a proposed legislative change was removed in the 2003/04 report.[462] This would seem to indicate that statutory amendments to the *Wildlife Act* to bring the legislation more in line with SARA were anticipated but have subsequently been dropped from the provincial agenda.

Thus, although several legislative and policy changes have been adopted by the Alberta government since Ottawa first announced its intention to bring forward endangered species legislation in 1994, two are of particular significance. The 1996 amendments to the *Wildlife Act* were passed prior to the Accord and following the announcement of the proposed federal legislation. The amendments were publicly acknowledged as "being complementary to the national approach to endangered species conservation by other jurisdictions across Canada".[463] It is therefore highly probable that they were adopted as a response to perceived federal expansion into provincial jurisdiction over wild species and natural resource management. The increased funding made available in 2000 by the Alberta government was likely spurred on by an infusion of federal monies announced in April 2000 to assist in the implementation of SARA. The additional funding was fully intended by Minister Mar to be a clear indication of the provincial commitment to protecting endangered species and a statement of provincial authority over the matter. According to a media report, "Mar believes the provinces should have the ultimate power in dealing with wildlife other than fish and migratory birds ... This commitment should highlight that".[464] It may be the case that some of the other changes discussed above were similarly motivated.

Since 2000, SARA and the threat of federal intervention have provided relatively minor motivation for the province to improve protection for species at risk at either the law or policy level. Although there has been significant pressure from environmental groups to provide the necessary safeguards for the SARA listed tiny cryptanthe and the small flowered sand verbena, both plants have not been included under the Wildlife Act regulations.[465] Environmental groups have pursued their cause with the federal government and have filed a petition requesting that the protections afforded endangered species under the safety net be applied to these small plants. According to an Alberta government official, this step, and the resulting federal examination of provincial law and policy, has caused the province to look into amending their legislation. However, even though the petition was filed in August, 2006, the situation remains unchanged. Moreover, the threat of the federal government

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[462] *Ibid.* See also Alberta Sustainable Resource Development, Fish and Wildlife Division, *Alberta Species at Risk Report No. 77* (Edmonton: Alberta Sustainable Resource Development, 2003)
[463] *Supra* note 453.
[464] Ed Struzik, "Species at Risk Bolstered by \$2M", *Calgary Herald*, April 25, 2000, A1.
[465] As of November, 2007.

using the safety net in this case is viewed by government officials as being highly unlikely.[466] Politically, it would be a very bold move for Ottawa to take over the protection of two small plants and the Alberta government has stated that they would "fight it all the way".[467]

One policy area that has seen some improvement following SARA's passage is in the development of recovery plans. SARA has "engendered clearer thinking" about recovery planning generally and has produced "the necessary infrastructure of documents, protocols and working groups".[468] As a result of these changes there has been an acceleration of recovery plan production since SARA. As of November, 2007, 10 out of the 12 recovery plans which have received government approval were prepared following the coming into force of SARA in 2004.

Thus, while SARA has had some positive impact upon Alberta law and policy governing species at risk within their borders, it is clear that the province has not moved far enough along the path towards having equivalent legislation. Since listing remains subject to political discretion, protection against direct harm is inadequate for roughly two thirds of the species at risk within the province; and finally, habitat protection and recovery planning are not required under the law. Although there is some feeling within the ministry that there is a need for new stand alone legislation, it has been difficult to get the issue of endangered species on the political agenda.[469] It is perhaps for this reason that more has not been accomplished in the protection of species at risk in Alberta.

Saskatchewan

In 1994, the government of Saskatchewan introduced a new environmental policy which included measures designed to preserve biological diversity and to ensure sustainable use of renewable resources and ecosystems.[470] This environmental policy recommended the enactment of endangered species legislation as a necessary step in preserving biological diversity within the province. The policy also reflected Saskatchewan's willingness to meet its national and global responsibilities

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[466] *Supra* note 453.
[467] *Ibid.*
[468] Interview with Steve Brechtel, Wildlife and Management Branch, June, 2005.
[469] *Supra* note 453.
[470] Government of Saskatchewan, Ministry of Environment, *Caring for Saskatchewan's Biodiversity: A Progress Report on Government Related Initiatives Towards Implementing the Goals of the Canadian Biodiversity Strategy*, (Regina: Government of Saskatchewan, February, 1999) at 1.

arising out of the Rio Convention. In May, 1995, Saskatchewan endorsed the Canadian Biodiversity Strategy. [471]

The following October, Saskatchewan agreed in principle to the commitments contained in the National Accord and in March 1997, the provincial government introduced significant amendments to the *Wildlife Act*.[472] The amendments were specifically drafted to "establish legislative authority to designate, protect, and recover plant and animal species at risk."[473] Contained in the Act was a new definition of wild species which embraced all wild organisms including any plant, animal or other organism such as pollen, spores, eggs, tissue or genetic material. It was intended to provide the broad mandate for the protection of plants, animals, and invertebrates throughout Saskatchewan and to honour the province's obligations under the Accord. At second reading of the Bill, then Minister of the Environment noted that: "Saskatchewan is committed to the principles of the Accord and has worked cooperatively with other provinces, territories, and the federal government over the past two years to develop a national approach to endangered species conservation in Canada".[474] In 1999, the government further recognized the need to pass regulations and develop an enforcement policy in order to achieve the effective protection for species at risk mandated by the Accord.[475] Future amendments to align the Wild Species at Risk Regulations[476] with SARA are anticipated, as are reciprocal listings of SARA listed species which fall under provincial jurisdiction.[477]

The Act constitutes the primary means by which endangered and threatened species are protected in Saskatchewan. It applies to "wild species at risk" which include any native wild species that have been designated and listed by the Lieutenant Governor in Council by regulation as being extirpated, endangered, threatened or vulnerable.[478] The first 15 plants and animals protected under Part V of the Act were officially designated in January, 1999.[479] No additional species have been added since that time; however, preparation and review of status reports of 35 more species have recently been

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[471] *Ibid.*
[472] S.S. 1998, c. W-13.12. The 1998 Act is identical in principle to the *Wildlife Act, 1997* and merely incorporates small changes under the *Wildlife Amendment Act, 1998 (An Act to Amend the Wildlife Act, 1998*) S. S. 1998, c.65 – assented to June 27, 2000.
[473] Saskatchewan, *Legislative Assembly,* Hansard, April 11, 1997 at 1100 (Honourable Lorne Scott, Minister of Environment)
[474] *Ibid.*
[475] *Supra* note 470 at 7.
[476] R.R.S. Chapter W – 13.11 and Reg. 1
[477] Confidential Interview with Saskatchewan Ecosystem Management Branch Official, May 3, 2007.
[478] *Supra* note 472, s. 2 and s. 49.
[479] *Wild Species at Risk Regulation*, (effective January 20, 1999) lists 9 endangered species, 1 threatened species and 5 extirpated species

undertaken. Statements made by then Minister Lorne Scott indicate that the inclusion of the species in the regulations worked to uphold Saskatchewan's commitments under the Accord to designate, protect and recover species at risk in the province.[480]

Although Saskatchewan uses the same risk categories and definitions as the federal listing Committee on the Status of Endangered Wildlife in Canada (COSEWIC), currently, 28% of SARA Schedule I endangered and threatened species are listed under provincial legislation. The additional listing of the proposed 35 species cannot come soon enough in order to close the gap on this disparity. In making a listing determination, the minister may request and consider scientific and community-based advice.[481] Listing thus involves some consideration of scientific based assessments but still depends upon political discretion. In October, 1999, the Scientific Working Group and the Endangered Species Advisory Committee were created under section 8 of the Act for the purpose of providing independent advice to the Minister regarding species assessments. Government officials clearly viewed the creation of the committee as a major step towards fulfilling Saskatchewan's commitments under the Accord.[482]

Designation under the current regulations provides some protection for those species against the destruction or disturbance of their den, house, nest or usual place of habitation.[483] This provision is, however, subject to the caveat that where the usual place of habitation of a listed species is causing or likely to cause damage to property, habitat destruction may be authorized by license.[484] Similarly, section 51 of the Wildlife Act prohibits direct harm to listed species except where there is potential damage to human health or property.[485]

The Act authorizes, but does not obligate, the minister to prepare, prioritize and implement recovery plans to protect listed species. Priority for the development and implementation of recovery plans is at the discretion of the minister and may depend upon scientific information available as well as technical and economic feasibility. The minister may also adopt recovery plans from other jurisdictions where appropriate. There are, however, no timelines mandated by the Act for recovery

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[480] Government of Saskatchewan, Environment and Resource Management, Press Release 99-155, March 3, 1999.
[481] *Supra* note 472, s. 48(2).
[482] Government of Saskatchewan, Environment and Resource Management, Press Release 98-782, October 7, 1998.
[483] *Supra*, note 472, section 5
[484] *Ibid.*
[485] *Ibid.* Section 52.

plans. Presently, Saskatchewan has in place recovery plans for the swift fox, burrowing owl, piping plover, sage grouse, the whooping crane, wood bison, ferruginous hawk, greater prairie chicken, loggerhead shrike and Baird's sparrow.[486] Other species are being assessed. Currently, there are two additional recovery plans posted on the SARA registry and there are several others which are in process. Of the completed Saskatchewan recovery plans, 9 are SARA listed endangered or threatened species.

Funding for species recovery in the province is also extremely limited. RENEW reports annually on the funding contributed by the various provincial and territorial governments, as well as, NGOs, regional and municipal governments, universities, corporations and other organizations. In each of the last 3 annual reports published by RENEW, the Saskatchewan government has made lower financial contributions for the recovery of endangered species than many other provinces, as well as other non-governmental organizations, zoos and aquariums.[487]

There are no provisions in the Act regarding the preservation of critical habitat for designated species; however, the provincial government may, by regulation, set aside Crown land as wildlife habitat under the *Wildlife Habitat Protection Act*[488] (WHPA). Habitat protection on private land is done voluntarily by landowners under the *Saskatchewan Conservation Easement Act*[489] which was passed in 1996. The
Biodiversity Action Plan (2004-2009) directs the government to act to protect the habitat of species and ecosystems, but provides little direction as to how that may be best accomplished, relying instead on the notion that there presently exists ongoing cooperation with land owners and managers to implement the relevant protection. The Action Plan does clearly indicate, however, that there is a need for integration between provincial wildlife legislation and SARA.[490]

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486 Canadian Parks and Wilderness Society, Saskatchewan Chapter, online: <http://www.cpaws-sask.org/parks_wilderness/species_at_risk.html>
487 Canadian Endangered Species Conservation Council, *RENEW 2004-05 Annual Report: Recovery of Nationally Endangered Wildlife* (Ottawa: RENEW, 2006). For example, in 2004 the Saskatchewan government provided a total of $56,900 to RENEW while its neighbours Alberta and Manitoba gave $212,144 and $350,275. By comparison, the Calgary Zoo contributed $159,500 to RENEW's efforts.
488 S.S. 1983-84, c.W-13.2
489 S.S. 1996, c.C-27.01
490 Government of Saskatchewan, Ministry of Environment, *Caring for Natural Environments: A Biodiversity Action Plan for Saskatchewan's Future 2004-2009,* (Regina: Government of Saskatchewan, 2006) at 12. Online: Government of Saskatchewan, Ministry of Environment <http://www.environment.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=544,543,94,88,Documents&MediaID=221&Filename=Biodiversity+Action+Plan.pdf>

The majority of the initiatives undertaken by Saskatchewan in the last decade occurred in the mid to late 1990's. The signing of the Accord and the introduction of federal species at risk legislation motivated the province to amend its wildlife statute to better protect species at risk. These amendments along with the creation of the Endangered Species Advisory Committee and the designation in regulation of fifteen plant and animal species in 1999 have all been publicly acknowledged by government officials as being in furtherance of Saskatchewan's obligations under the Accord. Future amendments to the regulations, as well as the addition of reciprocal listings will likely be introduced in an effort to maintain consistency with SARA and the federal policies implemented under it.[491] In that respect, the requirement for a regulatory amendment in order to add species to the endangered and threatened list is seen as being overly cumbersome and officials would prefer to have the ability to add to their lists as a matter of policy. It is hoped that in so doing, they would be better able to keep pace with SARA listings.[492] Perhaps the biggest difficulty facing Saskatchewan is that there is insufficient funding available to deal with recovery planning on a species by species basis, especially within the time framework dictated by SARA. [493]

At this time, Saskatchewan government officials do not view the safety net as a credible threat and feel it is imperative that cooperation exist between the two levels of government in order to protect species at risk within the province effectively. Interestingly, however, they do "use" the potential threat of federal interference embodied in the safety net as a means of inducing the politicians to move species protection onto their agendas. According to one official, the safety net is a "good idea if it is used to support provincial objectives".[494] Recognizing the important contribution that SARA has made to the protection of endangered species within the province, it was noted that SARA has served as "an impetus to do more; and compelled us to look at these issues and to work with the feds".[495]

In Saskatchewan's case, it is difficult to separate out the influence of the province's commitments under the National Accord from the potential impact of the development of the federal endangered species legislation, in terms of what motivated Saskatchewan to revise its Wildlife Act in 1997. Since that time, although there has been some interest in harmonizing aspects of provincial legislation with SARA, most notably with respect to listing, little has been accomplished since 1999

[491] Correspondence with Government Official, Ecosystem Management, Saskatchewan Environment, May 19, 2005.
[492] *Supra* note 477.
[493] *Ibid.*
[494] *Ibid.*
[495] *Ibid.*

with respect to broadening the net of species at risk protections. Recovery planning remains discretionary and presently is stalled due to financial constraints. Similarly, habitat protection is not statutorily mandated and is limited to land owned by the provincial crown. From this standpoint, it is clear that there is more to be accomplished before Saskatchewan can claim that it has equivalent protections in place to those available under SARA. Furthermore, given that government officials do not view the safety net as a credible threat, it is not clear what will motivate them under the current regime to achieve effective protection for species at risk living within their boundaries.

Manitoba

Manitoba was the fourth province to have legislation specifically aimed at protecting species at risk in Canada. On March 15, 1990, the *Endangered Species Act*[496] came into force. The Act was created for the purpose of ensuring the protection and survival of endangered and threatened species in the province.[497] The Act was amended in 1993[498] to enable the reintroduction of extirpated species back into the province. It should be noted that the Act applies to a variety of species, including mammals, birds, reptiles, amphibians, fish, or plants.[499] Since this legislation came into being long before the federal government showed signs of developing federal endangered species legislation, no correlation can be drawn between the development of SARA and the provincial Act. What remains for consideration is the extent to which provincial policies or actions with respect to the protection and recovery of species and their habitats have been influenced by the threat of federal interference into provincial jurisdiction. What follows then, is an examination of provincial law and policy and how it has been affected by SARA and the safety net.

Under Part III of the Act, the Lieutenant Governor in Council may, by regulation, designate species to be endangered, threatened, extirpated or extinct. However, the decision to list species remains discretionary. The Lieutenant Governor in Council established the Endangered Species Advisory Committee, the composition of which must include a majority of members with scientific expertise, to advise the minister in respect of species that should be designated under the regulations. In 1993, the first species were designated under the regulation with additional species being added in 1996,

[496] S.M. 1989-90, c.39 C.C.S.M. c. E-111
[497] *Ibid.* Section 2.
[498] S.M. 1993, c.3.
[499] Supra note 496, section 1.

1998, 2001, 2006 and 2007.[500] There are currently 26 species legally listed as endangered or threatened in Manitoba. Of these 26, 17 are listed on Schedule I of SARA as being either endangered or threatened. The SARA list contains an additional 13 species which do not receive legal protection in Manitoba. Of particular interest was the addition of the woodland caribou to the list in 2006. The provincial government had been pressured by conservation groups, the federal government and even some members of the industrial community for several years before the Conservation Minister finally made good on his promise to list the caribou on June, 8, 2006. Some additional protection against direct harm and trafficking is offered those animal species listed under the *Wildlife Act,* C.C.S.M. c. W130, and its regulations, as "protected species".[501]

Protection against direct harm is also given to listed species under section 10 of the *Endangered Species Act.* Of perhaps greater significance is the provision contained in section 10 which makes it an offense to damage, destroy, or interfere with the habitat of an endangered, threatened or extirpated species. Moreover, this provision applies to species wherever they occur in Manitoba, including on private lands. Habitat is broadly defined under section 1 of the Act as "an area of land, water or air that contains the natural resources on which the species depends for its life and propagation". Thus, because the habitat protection afforded species under the Act is mandatory, it is in fact, more comprehensive than that provided under SARA. Indeed the provision was included in the *Report of the Endangered Species Act Review Advisory Panel* as being an example of "best practices" legislation for habitat protection.[502] Finally, Section 9 enables the Lieutenant Governor in Council to make regulations regarding the preservation of habitat or any other matter necessary to carry out the intent or purpose of the Act. It should be noted, however, that there have not been any regulations promulgated pursuant to this provision.

Recognizing the importance of stewardship initiatives in preserving habitat for endangered species, the provincial government passed the *Conservation Agreements Act,*[503] in 1997. Under the Act, a conservation interest in land may be created by agreement between private landowners and certain prescribed organizations whereby one or more restrictions on the use of the lands may be imposed for the protection and enhancement of natural ecosystems, wildlife or fisheries habitat or plant or animal species while still permitting the continued use of the land by its owner.

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[500] *Threatened, Endangered and Extirpated Species Regulation*, Man Reg. 25/98, amended by 47/2001. See also Man Reg. 124/2006 and 77/2007.
[501] *Designation of Wild Animals Regulation,* Man Reg. 3/96.
[502] Endangered Species Act Review Advisory Panel, *Recommendations for Ontario's New Endangered Species Act*, Submitted to Hon. David Ramsay, Minister of Natural Resources, August 11, 2006.
[503] S.M. 1997, c.59; C.C.S.M. c. C173

Manitoba also identifies preserves and manages habitat through the Critical Wildlife Habitat Program (CWHP). The program was initiated in 1989 and is funded on a project by project basis. It generally supports stewardship initiatives and provides assistance for land acquisition and sustainable practices. In 1996, the CWHP developed the Urban Habitat Stewardship Project in an effort to identify and inventory critical habitat areas in the capital region and to promote appropriate management and restoration techniques in an urban setting.[504]

Although there are no statutory provisions governing the recovery of listed species,[505] Manitoba does participate in recovery efforts for some listed species through various NGOs and RENEW. With the passage of SARA in 2002, public officials have recognized Manitoba's increased obligation to develop programs to monitor and ultimately recover species at risk.[506] With increased obligation, however, comes increased cost. According to one Manitoba official,

> With over 60 S[pecies] A[t] R[isk] in Manitoba, more than 80 staff are required to recover these species. We have 1 full time SAR biologist, about 6 others that can dedicate a small part of their time to SAR Recovery and 4-8 soft-funded, contract staff who can likewise dedicate a small part of their time to this. Therefore, the federal government needs to provide funding for staff to assist with this aspect of SAR programming, namely consultation with private landowners, First Nations and implementation of recovery strategies and action plans.[507]

Many of Manitoba's efforts to protect endangered species predate strong federal presence in this arena. It may be precisely because Manitoba already occupied the field with relatively strong legislation at the time that they have not expressed any specific jurisdictional apprehension regarding the development of SARA and its safety net.[508] Indeed, when asked specifically if the threat of the use of the safety net provisions would motivate the province to provide tougher legislation in an attempt to secure jurisdictional authority, one government official stated that that course of action would be unlikely since "Manitoba currently has all the protection and legislative tools to do the job".[509] For the most part government officials seem unaffected by SARA.

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504 Government of Manitoba, Wildlife Conservation, online: <http://www.gov.mb.ca/conservation/wildlife/managing/cwhp.html>

505 *Supra* note 496. Section 9 authorizes the Lieutenant Governor in Council to make regulations "respecting any matter necessary or advisable to carry out the intent and purpose of the Act; however, no regulations have been promulgated pursuant to this provision.

506 Government of Manitoba, Wildlife Conservation, online: <www.gov.mb.ca/conservation/wildlife/managing/species_at_risk.html>

507 Written response to confidential interview with Manitoba government official, Biodiversity Conservation, January 25, 2007.

508 *Ibid.*

509 *Ibid.*

In May, 2005, government officials indicated that "SARA had not reached them" and they were "not capable of developing recovery plans within the SARA framework as yet".[510] This relative lack of influence over listing, recovery plans and habitat protection was confirmed by a second interview conducted nearly two years later.[511] However, the province is currently preparing a SAR policy and procedures document which was admittedly partly spurred on by SARA, as well as the Manitoba *Endangered Species Act*. The added financial and human resources supplied by the federal government were also credited for some increased activity within the department.[512] Indeed, in 2005-2006, Manitoba's financial contributions to RENEW nearly tripled.[513] Based on all of the foregoing, it is difficult to conclude that the development of federal endangered species legislation and the safety net in the form of a potential threat to provincial jurisdiction have had a significant impact on the law and policies of Manitoba. However, the federal involvement in endangered species protection has provided some impetus in the way of funding and improved procedures for the province. Finally, major legislative amendments to the *Wildlife Act* have been proposed but have not advanced beyond that stage. The reasons for the changes are twofold: firstly, to modernize an outdated statute and secondly, to incorporate within it a revised and improved *Endangered Species Act* and *Conservation Agreements Act* which would enable the province to harmonize its law with SARA to the extent the possible.[514] Should these amendments come to pass, federal involvement in endangered species protection in the form of SARA will have contributed to improving provincial legislation by creating a standard of legal protection that has effectively established the minimum level at which the bar should be set.

Ontario

Ontario was the first province to enact legislation designed specifically to protect animal and plant species threatened with extinction. The *Endangered Species Act*[515] (ESA) was enacted in 1971, and provided protection for endangered species as well as their habitats. In May, 2007, following nearly a decade of pressure from conservation groups, the Ontario government passed what many consider

[510] Confidential Interview with Manitoba government Official, Legislative Specialist, Manitoba Conservation, May 19, 2005.
[511] *Supra* note 507.
[512] *Ibid.*
[513] Canadian Endangered Species Conservation Council, RENEW *Annual Report, 2005-2006,* Government of Canada, 2006, online: Species at Risk Public Registry, <http://www.speciesatrisk.gc.ca/publications/AbstractTemplate.cfm?lang=e&ID=32#abstract>
[514] Correspondence with Manitoba government official, Biodiversity Conservation, December 12, 2007.
[515] R.S.O. 1990, c.E-15, repealed.

to be the "best endangered species law in the country".[516] The new *Endangered Species Act, 2007*[517] (ESA, 2007) received royal assent on May 17, 2007 but will not be brought into force until June 30, 2008. Prior to reviewing the sweeping changes brought in by the new legislation, it will be instructive to examine Ontario's response to the development of the federal endangered species statute, as well as the provincial law and policy measures in place during the time period beginning with the signing of the Accord.

While Ontario supported the general principles of the National Accord when it was signed in October, 1996, government officials also recognized at that time that they faced some challenges with their existing legislation.[518] For example, although section 3 of the ESA authorized the Lieutenant Governor in Council to designate species of fauna or flora threatened with extinction in the regulations, there were no provisions in the Act for an independent advisory process. The provincial government had established the Committee on the Status of Species at Risk (COSSARO) in 1995 for precisely that purpose. As of January, 1995 all designations made under the Act were based upon the scientific and technical findings of COSSARO[519] even though it was not required by the ESA.

COSSARO evaluates the status of candidate species to determine whether they are "at risk" and then makes a recommendation to the Ontario Minister of Natural Resources as to how the species should be listed. Prior to April, 2004, COSSARO used different category names for its status designations than COSEWIC. The names were changed to match those of COSEWIC to promote consistency and eliminate confusion across jurisdictions.[520] In September, 2005 the minister proposed to update the Species at Risk in Ontario list as a result of status assessments made at the May and November 2004 COSEWIC meetings and subsequently reviewed by COSSARO. [521] A policy decision was subsequently made in January 2006 to go ahead with the proposal[522] to amend the regulations to include 3 new plant species, and to broaden the locations at which the regulations apply to a fourth.

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[516]Ecojustice, "Fighting to Maintain Victory for Ontario Species", online: Ecojustice, <http://www.ecojustice.ca/stories/test-story-2/ >
[517] S.O. 2007, c.6.
[518] Confidential Interview with Ontario government official, June 4, 2007.
[519] Ontario Ministry of Natural Resources, *Significant Wildlife Technical Guide*, (Toronto: Ontario Ministry of Natural Resources, 2000) Appendix P. As of December, 2005 there were 40 different species designated in the regulations to the ESA, 1971 and 183 species listed as being "at risk" in Ontario on the SARO list.
[520] Ontario Environmental Registry, Proposal, EBR #PB04E6008, March 4, 2004.
[521] Ontario Environmental Registry Proposal, EBR #PB05E6805, September 16, 2005. Online: Ontario Environmental Registry, <http://www.ene.gov.on.ca/envregistry/025698ep.htm>
[522] *Ibid.* Ontario Environmental Registry Proposal, EBR #PB05E6805, January 4, 2006.

It should be noted that one of the stated purposes of these two proposals was to meet Ontario's commitments under the National Accord.[523]

Currently, there are 43 plant and animal species designated in the regulations to the ESA[524]. This represents approximately 30 % of the total number of SARA listed species living in Ontario[525]. During the period beginning in 1996 with the signing of the Accord to November 2005, the provincial government designated 16 plant and animal species in the regulations. At the time, this represented 40% of the species added to the legal list. Of these 16 additions, 5 occurred during the period 1999 to 2001.[526] This correlates with the introduction of the safety net concept and the federal SARA in the form of Bill C-33. A further 11 species were listed by the provincial government in 2003-2005, following the passage and coming into force of SARA.[527] Thus, even with these additions Ontario still only protected a fraction of designated endangered and threatened species under the Act. The COSSARO list was important to the extent that it helped to increase public awareness of various species as well as provide greater understanding of the threats to their survival.

Once declared in the regulations as being threatened with extinction, a listed species and its habitat was afforded protection against direct harm. Under the ESA, Ontario was one of only four jurisdictions in Canada which provided mandatory habitat protection. Specifically, section 5 prohibits the willful killing, injury, interference, destruction or taking of any listed species or their habitat. This provision is significant in assessing equivalency under the critical habitat safety net provisions of SARA. The mandatory habitat protection established by section 5 clearly provides equivalent protection to that contained in SARA. However, there is some debate about whether in practice the rigidity of this provision has, in fact, hampered species recovery efforts.[528] That is, to the extent that species have not been included upon the legal list because of the mandatory habitat protection that subsequently follows such a listing, the provision may have had a negative effect. It is hoped that the more sophisticated habitat protection available under the new ESA will offer a solution to this problem.[529]

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[523] *Supra* note 521; and Ontario Environmental Registry Proposal, EBR#RB05E6804, June 29, 2005. Online: Ontario Environmental Registry, <http://www.ene.gov.on.ca/envregistry/025696er.htm>
[524] Of these, 34 are on Schedule I of SARA.
[525] As of January, 2008 there are 111 species native to Ontario listed on Schedule 1 of SARA (excluding aquatic species).
[526] Ontario Reg. 532/99 and Reg. 90/01
[527] Ontario Reg. 57/03, Reg. 58/03 and Reg. 94/04.
[528] *Supra* note 502 at 13.
[529] *Ibid.*

Habitat protection of threatened and endangered species is also available through those portions of the Provincial Policy Statement (PPS) issued under section 3 of the *Planning Act.*[530] The PPS was originally created in May, 1996 as a means of promoting a policy-led system of land development which recognizes that there are complex inter-relationships among environmental, economic and social factors in land use planning.[531] A new PPS came into effect on March 1, 2005, replacing and strengthening, the previous version. Section 2.1 of the PPS, prohibits development and site alteration in significant portions of the habitat of endangered and threatened species, and limits development in significant wildlife and fish habitat. Other provincial policies which recognize and offer protection for the habitat of endangered and threatened species include Wildlife Policy 6.04.01 administered under the *Crown Forest Sustainability Act*,[532] the OMNR's Natural Heritage Reference Manual, and the Ontario Parks Policy.

In March, 1999 Premier Harris initiated *Ontario's Living Legacy* – a program aimed at preserving the natural heritage of the province. The program devoted much of its resources to conservation and the expansion of parks and protected areas; however, in November, 2000 the program invested $2 million specifically earmarked for protecting species at risk, augmenting the $1.5 million the provincial government spent that same year. [533] The funding was directed towards improving Ontario's recovery planning, public awareness and public participation in species at risk programs. It is interesting to note that this funding increase was coincidental with the introduction of Bill C-33 in Ottawa. In the RENEW 2002-03 Annual Report, the Ontario government contributed $1.28 million to recovery initiatives. This represents a substantial increase over the previous years' financial contributions and mirrors an increase in federal spending on recovery as well. [534]

Although the ESA made no reference to the recovery of endangered or threatened species, there were 56 active recovery teams for species at risk in Ontario in 2005.[535] An additional 14 were added by May, 2006.[536] Under the Accord, Ontario is obligated to provide for the development of recovery

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[530] R.S.O. c. P.13. The *Strong Communities (Planning Amendment) Act*, S.O. 2004, c. 18.
[531] Ontario Government, *Provincial Policy Statement*, (Toronto: 1996, as amended 1997), preamble.
[532] S.O. 1994, c. 25.
[533] Minister of Natural Resources, Fact Sheet, "Living Legacy Protecting Species at Risk" November 23, 2001.
[534] Canadian Endangered Species Conservation Council, Recovery of Nationally Endangered Wildlife, RENEW Annual Report 2003-2004 (Ottawa: Government of Canada, 2006) at 28-34. Online: Species at Risk Public Registry, < http://www.sararegistry.gc.ca/sar/publications/renew/default_e.cfm>
[535] *Ibid.*
[536] Ministry of Natural Resources, *Towards Better Protection of Species at Risk in Ontario: Discussion Paper on Proposed Species at Risk Legislation*, (Toronto: Government of Ontario, May, 2006). Online: Government of Ontario, Ministry of Natural Resources, <http://www.mnr.gov.on.ca/mnr/speciesatrisk>

plans within one year for endangered species and two years for threatened species that address the identified threats to the species and its habitat. The MNR committed to implementing the Accord and its recovery obligations in the new Ontario Biodiversity Strategy which was released in 2005.[537]

In his Annual Reports for the years 1999/2000 and 2001/02, the Environmental Commissioner of Ontario concluded that species at risk in the province were inadequately protected due to a confusing blend of outmoded and ineffective legislation and policies.[538] The MNR had committed to developing a provincial species at risk strategy by the end of 2003 and had also identified internally the need to revise the Act to harmonize with, and complement, SARA.[539] Again in 2005, the province committed publicly to amending its species at risk legislation and programs in Ontario's Biodiversity Strategy.[540] The Biodiversity Strategy specifically states that Ontario must review and update species at risk legislation to provide broader protection for species at risk and their habitats and to include requirements for recovery planning, assessment, reporting and enforcement. Moreover, the strategy required that the province implement the National Accord by working in partnership with private landowners and conservation groups.[541]

In April, 2006, the Minister of Natural Resources, David Ramsay, established the Endangered Species Act Review Advisory Panel. The panel was established as an independent expert advisory body and was tasked with formulating a new "best practices" endangered species act.[542] The appointment of the panel was followed by an extensive consultation with the public, aboriginal organizations and a wide range of stakeholder groups. During the development of the legislative proposal, the government also met with other provincial ministries and federal departments involved in the protection of species at risk. In its Discussion Paper on the proposed species at risk legislation released in May, 2006, the government outlined the purpose and principles for the legislative review. It states that "the legislation should complement the federal Species at Risk Act and other related

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[537] Fish and Wildlife Branch, Ministry of Natural Resources, Government of Ontario, *Protecting What Sustains Us, Ontario's Biodiversity Strategy, 2005.* (Toronto: Ministry of Natural Resources, 2005). Online: Government of Ontario, Ministry of Natural Resources, <http://www.mnr.gov.on.ca/mnr/pubs/biodiversity/OBS_english.pdf>

[538] Environmental Commissioner of Ontario, *Annual Report 2002-2003: Thinking Beyond the Near and Now*, (Toronto: November 23, 2003) at 139.

[539] *Ibid.*

[540] *Supra* note 537 at 32.

[541] *Ibid.* at 33.

[542] The nine member panel was comprised of representatives from scientific, legal and aboriginal communities.

provincial and federal legislation in a manner that reflects Ontario's needs".[543] SARA was thus clearly within the minds of the drafters of the proposed legislation.

According to one government official, by the year 2000 the proposed SARA was one of the most contentious issues at meetings of the Canadian Wildlife Directors.[544] Ontario had expressed concerns regarding the federal government's involvement in areas of provincial responsibility and the resulting burden which would fall on the provinces upon SARA's implementation. Furthermore, the potential implications of the safety net produced the view that there was a "need for equivalency" on the part of provincial legislation.[545] The subsequent reform of Ontario's ESA has created provincial endangered species protection that is not only equivalent to that provided under SARA, but surpasses it, as explained below. Other factors which were cited as prompting the legislative reform included provincial obligations under the National Accord, the rigidity of the old ESA, and the harmonization of political agendas between the federal and provincial liberal parties.[546]

In August, 2006, the expert advisory panel appointed by the Ontario government to review the proposals outlined in the provincial discussion paper submitted their report to the Minister of Natural Resources. The report reflected a new three pronged approach to endangered species conservation incorporating legislation, stewardship and financing and provided an independent evaluation of what a "best practices" law should look like. Most of the recommendations expressed by the panel in their report were adopted by the provincial government when it passed the new ESA in May, 2007.

The ESA, 2007 provides significantly improved protection for species at risk living within Ontario borders which are not otherwise protected by SARA. The Act legally establishes COSSARO as the scientific and independent body tasked with assessing and classifying species at risk as being extinct, extirpated, endangered, threatened or of special concern.[547] The Minister is obligated under section 7 of the Act to include, by regulation, all such species classified by COSSARO on the list of species eligible for protection. This science based, non-political listing of species replaces the multiple and confusing lists which formerly existed within the province and constitutes an important element in effective legal protection of species at risk.[548] Moreover, Ontario is now one of only two jurisdictions in Canada that makes listing decisions on a purely scientific basis, without political discretion.

543 *Supra* note 536.
544 *Supra* note 518.
545 *Ibid.*
546 *Ibid.*
547 *Supra* note 517, sections 3 and 4.
548 Boyd, *supra* note 49 at 183.

As in SARA, the listing of species under the ESA, 2007 triggers a number of provisions including protection against direct harm to species and their habitats upon listing (subject to a number of important and necessary exceptions), legally mandated recovery strategies for endangered and threatened species, and stewardship programs. The ESA, 2007 prohibits the killing, harming, harassing, or capturing of listed species as well as their possession, collection, purchase, sale, lease or trade.[549] Section 10 of the Act also prohibits the damage or destruction of habitat of listed species. Habitat is to be identified and prescribed by regulation; however if no habitat regulation is in force with respect to a species then "habitat" is broadly defined in the Act to include those areas on which the species depends, directly or indirectly to carry on its life processes.[550] Increased flexibility in implementing the habitat protection measures is provided through regulations, agreements, and permits which were unavailable in the old ESA.[551]

Recovery planning, formerly absent from Ontario's species at risk legislation, is now subject to time limits which mirror those in SARA and which are compatible with the National Accord requirements.[552] Management plans for species of special concern must also be prepared under section 12 of the Act. The ESA, 2007 also establishes a species at risk stewardship program for the purpose of promoting stewardship activities for listed species at risk.[553] Stewardship activities may encompass the preservation and rehabilitation of habitat, the implementation of recovery strategies, public education and outreach programs.[554] Previously, provisions relating to stewardship support were absent from the ESA, as was a specific fund dedicated to public efforts to protect species at risk and their habitats. In July, 2007, the Minister announced that the government would make $3 million available for the fiscal year 2007-08 to create a fund to support stewardship initiatives in the province.[555] This contribution represents only a fraction of the total $18 million the government has earmarked for stewardship activities over the next 4 years.[556] Finally, enforcement and penalty provisions are included in the new Act and specify penalties and fines which are more severe than those under SARA.

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[549] *Supra* note 517, section 9.
[550] *Ibid.* section 2
[551] *Ibid.* sections 16-19.
[552] *Ibid.* section 11.
[553] *Ibid.* section 47
[554] *Ibid.* subsection 47(2)
[555] Government of Ontario, *McGuinty Government Promoting Protection of Species at Risk: New Fund Supports Recovery and Conservation Efforts*, News Release, July 24, 2007. Online: Government of Ontario, Ministry of Natural Resources, <http://www.mnr.gov.on.ca/mnr/csb/news/2007/jul24nr_07.html>
[556] Government of Ontario, *Species at Risk Stewardship Fund Backgrounder*, Ministry of Natural Resources, December 11, 2007. Online: Ontario Government, Ministry of Natural Resources, <http://www.mnr.gov.on.ca/MNR/csb/news/2007/dec11bg_07.html>

Summarizing, the foregoing record of provincial action indicates that both the National Accord and the development of a federal statute and the safety net influenced policy and legislative decisions made by the Ontario government over the period 1994 to the present time. Beginning with the creation of COSSARO in 1995 as a likely parallel to COSEWIC's proposed role in CESPA, as described in the plain language draft released that same year, the significant increase in species listing post-SARA, increased funding in 2000 coinciding with the introduction of SARA in the House of Commons, to the passage of the forward thinking *Endangered Species Act,* designed both to complement SARA, and exceed its protections, the federal presence in endangered species protection has helped to push the Ontario government to find more effective ways of protecting species at risk living within its jurisdictional boundaries. With the ESA, 2007, not only has Ontario raised the overall standard of protection for provincial species at risk, upon its full implementation it should indeed meet the threshold of equivalency required under the safety net.

Quebec

Although Quebec participated in the meeting of federal and provincial wildlife ministers in early October, 1996 and agreed in principle to the commitments set out in the National Accord, it did not, in fact, sign the agreement. The provincial government made this decision on the basis that it could not be sure, without knowing the content of the upcoming federal endangered species bill, whether or not the principles outlined in the Accord would be respected.[557] The provincial government had also adopted its own Biodiversity Strategy and Action Plan in April, 1996 for implementing the United Nations Convention on Biological Diversity. Throughout the development of the federal legislation, Quebec advanced the view that the provinces have sole jurisdiction over protecting species at risk located within their boundaries, as well as over identification and management of critical habitat.[558] The federal intrusion was seen as all the more unnecessary given that Quebec already had legislation in place to protect endangered species and their habitat. Indeed, the province now feels that "Quebec has all the necessary legislative tools allowing it to protect species at risk and their habitat". [559] Whether or not Quebec has protection for species at risk equivalent to that afforded under SARA will be discussed.

[557] Illical, *supra* note 88 at 108. During the second reading of CESPA on April 23, 1997 Mr. Gilbert Fillion speaking on behalf of the Bloc Quebecois openly questioned the motives of the National Environment Minister regarding the introduction of Bill C-65 four short weeks after the signing of the National Accord, stating that the bill was in many respects contrary to the agreement in principle he had just obtained.
[558] *Ibid.*
[559] Written responses to confidential interview conducted by Mary Illicial provided to the author by government officials.

In 1988 and 1989, Quebec passed *An Act Respecting Threatened or Vulnerable Species*[560] and created the Centre de Donnees sur le Patrimoine Naturel du Quebec for the purpose of gathering and analyzing data related to threatened or vulnerable species within the province. Under the Act, the government may designate, by regulation, those species determined to be either threatened or vulnerable.[561] Plant species so designated are afforded protection from harm directly through the Act. Specifically, section 17 prohibits the harvest, exploitation, mutilation, destruction or transfer of a listed plant species. Upon listing, threatened or vulnerable animal species and their habitats are governed by the *Act Respecting the Conservation and Development of Wildlife.*[562] This Act establishes various prohibitions relating to the conservation of wildlife resources and sets out the rights and obligations of hunter, fishers and trappers. Under section 30, animal wildlife species listed as vulnerable or threatened may not be hunted or trapped. These terms encompass the harm, harassment, capture or killing of wildlife.

The first list of species under the Threatened or Vulnerable Species Act was published in March, 1995 and it included 9 plant species. In April, 1999, a small fish native only to Quebec known as the "copper redhorse" became the first animal to be put on Quebec's endangered species list. Currently, the number of plants listed as either threatened or vulnerable is 59, while the number of animals listed remains at 18. Quebec added species to the list in 2000, 2001 and 2002. These additions all fall within the timing of the introduction and passage of SARA. Recently, 6 new animal species and 25 new plant species were included to the threatened and vulnerable lists in 2005. While Quebec has been quite proactive in listing endangered and threatened plant species under its provincial legislation, it has not had as much success with animal species. Currently, Quebec only includes 10 of the 18 SARA listed endangered and threatened animal species in its regulation to the Act.

In 1999, when the copper redhorse was added to the list of threatened animal species in Quebec, amendments were put in place making habitat protection discretionary rather than mandatory, which it had previously been. Habitat identification and protection is now to be specified in the regulations to the Act. However, as of 2004, no provisions had been introduced by regulation to compel the government to ensure the formal protection of vulnerable or threatened species' habitats.[563] This backward step in effective protection was likely the result of Hydro Quebec's plans to build a dam

[560] R.S.Q. c.E12.01
[561] *Ibid.* section 10.
[562] R.S.Q. c.C61.1
[563] Canadian Nature Network, *Species at Risk Provincial Report 2004: Quebec*, (Canadian Nature Network, 2004).

near the spawning grounds of the copper redhorse[564] and not related in any way to federal species at risk legislative proposals. Additional wildlife habitat protection measures for public land are also available by way of regulations to the Act respecting *the Conservation and Development of Wildlife*.

The listing process under the Quebec Act is extremely complicated, involving no less than seven administrative steps and three different ministries. Following listing, recovery plans may be developed for the species. However, there are not any timelines mandated by the Act for the establishment of the plans or requirements for their content. As a matter of policy, the recovery plans adopt a multi-stakeholder approach and seek consensus on the measures necessary to re-establish the species. With the implementation of SARA, the federal government has sought collaboration with Quebec on the development of recovery plans. According to provincial officials the implementation of SARA has brought about an increased work load for Quebec government employees who are already overburdened with the application of the provincial law.[565] Following the passage of SARA, Quebec substantially increased the amount of money it devoted to recovering species at risk within its borders during the 2003-2004.[566] Similarly, in 2004-05, Quebec more than doubled its contributions to RENEW than in the previous year providing over four million dollars to recovery efforts in Quebec.[567] These huge spikes in funding are consistent with the increased recovery planning requirements mandated by SARA.

Provincial officials have recognized that if Quebec wants to take advantage of Canadian government resources and to have its protection efforts considered, it must conclude an agreement with the federal government to facilitate this process. This, however, constitutes a fundamental problem for the government of Quebec since it does not officially recognize SARA and to sign such an agreement would be interpreted as an acceptance of the federal law.[568] This is not to suggest that the province of Quebec does not seek a harmonization of efforts to protect and conserve endangered

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[564] Sierra Club of Canada, *Rio Report Canada, 1999*, online: <http://www.sierraclub.ca/national/rio/rio99.html>. See also Donna Jacobs, "Now you see it, now you don't: when Quebec added the copper redhorse to the province's endangered species list, it removed the requirement to protect its habitat", (1999) 28:4 *Nature Canada* 14 at 17.

[565] *Supra* note 559.

[566] *Supra* note 534.

[567] Canadian Endangered Species Conservation Council, Recovery of Nationally Endangered Wildlife, RENEW Annual Report 2004-2005 (Ottawa: Government of Canada, 2007) Online: Species at Risk Public Registry, < http://www.sararegistry.gc.ca/sar/publications/renew/default_e.cfm>

[568] *Ibid.*

species. In that respect, it views the National Accord as a conduit to increased federal-provincial joint efforts in this area.[569]

Negotiations between Canada and Quebec culminated in the signing of a bilateral agreement on February 14, 2007.[570] The agreement is intended to clarify the roles of each level of government, and methods by which they will coordinate their activities in protecting species at risk "of common interest" and their habitats within the province as well as to encourage the exchange of information and improve knowledge about those species.[571] This document differs from the first bilateral signed under SARA between Ottawa and BC in that it more clearly delineates federal and provincial jurisdiction over species at risk of common interest and the hierarchy of leadership which will take place in respect of those species.[572] Given Quebec's overriding and publicly expressed concern over federal interference in provincial jurisdiction this approach is not unexpected. Interestingly, the agreement also provides for the reciprocal and periodic evaluation of the effectiveness of protection and recovery activities relating to species at risk of common interest.[573]This provision appears to shift the issue of effective protection away from the existing federal oversight of provincial law and programs embodied in the safety net to one more akin to parallel monitoring. In so doing, it has optically, if not actually, reduced the threat value of the safety net.

Of perhaps greater significance for these purposes was the impact the negotiations have had on Quebec's concerns regarding the imposition of the safety net by the federal government. Specifically, some of Quebec's fears of federal intrusion into provincial jurisdiction have faded, indicating that the federal safety net may not as big a threat as it was once perceived to be.[574] The complex mechanism required to activate the safety net also may make the federal government more hesitant to intervene which has resulted in making Quebec less wary of its potential reach over provincial jurisdiction.[575]

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[569] Developpement Durable, Environnement, et Parcs, Quebec, "Protecting Threatened and Vulnerable Species in Quebec: Ten years of on-going efforts", (Quebec: Developpement Durable, Environnement, et Parcs, 1999). Online: Developpement Durable, Environnement, et Parcs, <http://www.mddep.gouv.qc.ca/biodiversite/especes/protection/index-en.htm>
[570] *Cooperation Agreement for the Protection and Recovery of Species at Risk in Quebec,* online: Species at Risk Public Registry, <http://www.sararegistry.gc.ca.>
[571] *Ibid.* clause 3.
[572] *Ibid.* clause 4.1 and cl. 4.2
[573] *Ibid.* clause 12.3
[574] *Supra* note 562.
[575] Illical, supra note 88 at 110.

Thus, while Quebec was emphatically and publicly opposed to the development and passage of federal endangered species legislation, it has, through its bilateral agreement with Ottawa, created a means of minimizing the threat of federal interference. However, in the years leading up to and following SARA's passage, Quebec undertook a number of activities to improve its protection of threatened and vulnerable species within its borders. Firstly, Quebec substantially increased the number of species listed under its legislation during the years immediately preceding and following 2002, when SARA received royal assent. Over the ten years following the introduction of the proposed federal endangered species legislation Quebec listed an unprecedented 56 species. Secondly, the dramatic increase in funding devoted to species' recovery in 2003 and 2004 coincides with the increased recovery planning necessitated by SARA. Although SARA has created some impetus on the part of the provincial government to improve its protection of species at risk, it has not yet achieved equivalent protection with that afforded under the federal Act. Specifically, listing of species remains a complicated matter of political discretion. Furthermore, despite the high number of plant species which have been listed, listing of animal species remains at just over 50% of those species listed as endangered or threatened on SARA's schedule I. Species habitat protection is not required, and to date only the habitat of one animal species is protected by law.[576] Recovery planning and implementation is not mandated by the Act and finally, penalties for harming listed species are much weaker than those contained in SARA.[577] Thus, Quebec has still has some distance to travel in providing equivalent legal protection for species at risk within its borders.

New Brunswick

Although New Brunswick was one of the first provinces to enact stand alone legislation to protect wild species at risk, it did not sign the National Accord until after SARA's coming into force in 2004. The *Endangered Species Act*[578] was initially proclaimed in 1976, and later amended in the spring of 1996 to include expanded protection for listed species and their habitats. Amendments were also introduced specifically for the purpose of enabling the Minister to issue permits for the possession of endangered species for religious, ceremonial and educational purposes. According to

[576] *Supra* note 560.
[577] R.S.Q. chapter E-12.01, s.40 and R.S.Q. chapter C-61.1, sections 171.1 and 171.2
[578] S.N.B. 1996, c.E-9.101, as amended S.N.B. 2001, c. 8, S.N.B. 2004, c. 12, s. 48, S.N.B. 2004, c. 20, s. 22

government officials, the amendments introduced in the spring of 1996 were unrelated to either the development of federal endangered species legislation or the National Accord.[579]

Following proclamation in 1976, five animal species were included in the regulations[580] as being endangered. In 1982, the first plant was added to the list and a further 11 species were added in 1996.[581] No amendments have been made to the regulations since that time and thus the province currently only protects 16 plant and animal species. This represents approximately 73% of the total number of endangered and threatened species included on Schedule I of SARA.[582] Species designated in the regulations by the Lieutenant Governor in Council may be listed as either endangered or "regionally endangered", the latter being defined as any indigenous species of fauna or flora threatened with imminent extirpation throughout all or a significant portion of its range in the province. Those species which are merely threatened or vulnerable are not eligible for protection under the Act. This represents a significant shortcoming in the New Brunswick legislation in terms of its equivalency with SARA as it leaves a significant number of species which would otherwise receive protection outside the purview of the Act.

The decision to list species is subject to ministerial discretion and there are no provisions in the Act for the establishment of a scientific advisory committee to assist the Lieutenant Governor in determining whether a particular species should be included in the regulations. However, as a matter of practice, listing decisions are only made following species population assessments and upon the advice of biologists and wildlife managers.[583] Although amendments to the listing provisions have been proposed, it is unlikely that the province will shift to a strictly scientific process. According to one government official, senior bureaucrats are not completely comfortable with a scientific listing process and would prefer to have one which mimics SARA.[584] These proposed amendments would also bring "threatened" species within the ambit of the Act which would effectively and substantially widen the provincial net of protection.

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579 Written Correspondence with government official, Department of Natural Resources, Species at Risk program, dated May 24, 2005.
580 *Endangered Species Regulation,* (N.B. Reg. 96-26)
581 The osprey was deleted from the list in 1996.
582 This total does not include aquatic species.
583 Government of New Brunswick, Department of Natural Resources, "Endangered Species Act: Legal Protection for Species", online: Government of New Brunswick <www.gnb.ca/0078/fw/species/endanger-e.asp>
584 Confidential Telephone Interview, Department of Natural Resources, Species at Risk, March 22, 2007.

Under section 3 of the Act, it is an offence to possess a member or any part of a member of an endangered or regionally endangered species. This provision is aimed at preventing ownership and trade in these species. Section 3 also prohibits the direct or attempted harm, destruction or disturbance of all listed species, their dens, nests, shelters and their critical habitat. Thus, while the protection of critical habitat for listed species is mandatory, the provision is weakened substantially by the fact that "critical habitat" is neither a defined term in the legislation, nor is there any requirement to identify it.

In 1998, the provincial government also began development of the Protected Areas Strategy in an effort to identify, and ultimately to conserve biodiversity located within, each of the various eco-regions of New Brunswick. The strategy was officially adopted in 2001, when 10 representative areas were set aside. However, this program has had little impact on protecting species at risk within the province since only 3.1% of provincial land has currently been designated as falling within the Protected Areas Strategy.

There are presently no provisions in the Act requiring the development or implementation of recovery measures for listed species; however, as a matter of policy the Department of Natural Resources has helped to initiate, and has participated in, recovery programs for 6 different endangered and regionally endangered species. Priority in recovery planning has been given to those species which are endangered both nationally and regionally.[585] Revisions to the Act are anticipated in the future to provide the tools necessary to manage the conservation and recovery of species. Those revisions will be undertaken in an effort to meet provincial obligations under the National Accord, and will take account of the recovery planning provisions in SARA.[586] Perhaps the greatest deterrents to effective recovery planning are a lack of financial resources and a small conservation community. Both are necessary elements in the implementation of successful recovery plans.[587]

New Brunswick's record of legislative and policy changes aimed at improving the effective protection of species at risk is limited in the past decade. It is therefore difficult to draw any strong conclusions about the degree to which the development of federal legislation and the safety may have influenced provincial decision making. It is worth noting, however, that the recent proposed

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[585] Government of New Brunswick, Department of Natural Resources, "Recovery Planning: A Coordinated Approach", online: Government of New Brunswick, <www.gnb.ca/0078/fw/species/recovery-e.asp>
[586] *Supra* note 579.
[587] *Supra* note 584.

legislative changes are intended to bring the provincial act "more in line with national standards".[588] National standards in this respect include the ability to provide protection for threatened as well as endangered species, obligatory recovery planning, and the identification and protection of critical habitat. The motivation for these changes is less about the imposition of the federal safety net and the threat of federal interference in provincial jurisdiction than it is simply an attempt to harmonize an outdated provincial act with its provincial and federal counterparts.[589] Government officials have indicated that they do not believe it is politically or administratively feasible for the federal government to use the federal safety net.[590] Thus, while the threat of the federal safety net has had little impact on the province, the protection regime introduced by SARA has indeed motivated the province to amend its statute in order to bring it into line with now accepted national practices and procedures.

Nova Scotia

Nova Scotia's *Endangered Species Act*,[591] was first introduced in December 1996. The draft legislation was intended to complement the proposed federal Endangered Species Protection Act and was consistent with the Accord which had been accepted in principle only two months earlier.[592] The bill subsequently died on the order paper but was revived in the form of Bill 65 in November, 1998. Although, federal legislation governing species at risk was still not yet in place at that time, it is clear that the proposed content of CESPA, as well as the jurisdiction of the federal government over endangered species, was considered by the drafters of Bill 65.[593] The Act also specifically recognizes the commitment of the provincial government under the Accord to a national and co-operative approach to the conservation of species at risk.[594]

Unlike any other Canadian jurisdiction except Ontario, species to be listed under the Act are determined strictly by reference to scientific information and traditional knowledge, as determined

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[588] Department of Natural Resources, *Province asks for public input for Endangered Species Act Amendment*, News Release, December 18, 2006. Online: <http://www.gnb.ca/cnb/news/nr/2006e1574nr.htm>
[589] *Supra* note 584.
[590] *Ibid.*
[591] S.N.S. 1998, c.11
[592] Department of Natural Resources, *Endangered Species Legislation Introduced,* Press Release, (CNS 963) Dec 18, 1996. Online: <www.gov.ns.ca/cmns/nsrv/nr-1996/nr96-12/96121803.htm>
[593] Nova Scotia, Legislative Assembly, *Hansard*, First Session (November 12, 1998) at 3683-4 (Howard Epstein).
[594] *Supra* note 591, section 2.

by an independent listing body.[595] Section 9 of the Act establishes the creation of the Species at Risk Working Group which consists of five scientific experts appointed by the minister and one chair person representing government. The Group must provide the Minister with a categorized list of species at risk in the province and annually advise of any additions or deletions, including any changes in status of listed species. The Act establishes five broad listing categories which are in accord with both COSEWIC and SARA, subject to one exception. The category of species of special concern has been replaced with the term "vulnerable" but in all other respects is the same. In Nova Scotia there are presently 18 species listed as endangered and 6 species listed as threatened. Extinct, extirpated and vulnerable species are also included in the regulation to the Act. The list has been consistently updated with additions being made in 2001, 2002, 2003, 2006 and again in 2007. Furthermore, Nova Scotia is the only province required by law to list all native species which have been listed nationally as being at risk by COSEWIC.[596]

The Act prohibits the killing, injury, possession, taking or interference of an endangered or threatened species, as well as the destruction or disturbance of its specific dwelling place or an area it habitually occupies.[597] It should be noted that this concept of habitat is similar to the concept of "residence" used in SARA. Trade in listed species, or their parts, is also prohibited.[598] Nova Scotia is one of only three jurisdictions which legally mandate definitive timelines for the appointment of recovery teams and the creation of recovery plans for each listed species.[599] In its Annual Report for 2002-03, RENEW states that the Nova Scotia government contributed the equivalent of $225,000 to recovery efforts. This represents a significant increase from the preceding three years, and has not been matched since.[600] Indeed, according to one government official, SARA certainly "stepped up the bar" in terms of provincial recovery planning.[601]

Recovery plans must also identify the short and long term habitat needs of endangered or threatened species, drawing a distinction between the land, water or air where the species presently lives and the specific areas of habitat, defined as "core habitat", that are essential for its ultimate survival and recovery.[602] Habitat protection is not however mandatory and it is only through the implementation

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[595] *Ibid.* section 10
[596] *Ibid.*
[597] *Ibid.* section 13.
[598] *Ibid.*
[599] *Ibid.* section 15. The other provinces are Ontario, under its new ESA, 2007 and Newfoundland
[600] *Supra* note 513. Nova Scotia is not included as a financial contributor to recovery efforts in RENEW's 2005/06 Annual Report.
[601] Telephone interview with Sherman Boates, Manager, Biodiversity, June 2, 2005.
[602] *Supra* note 591, sections 3 and 15.

of the recovery plans that identified core habit may be protected either through ministerial designation in the regulations or through stewardship agreements with private landowners.[603] Although this provision enables the provincial government to set aside private land as protected "core habitat", to date, no such regulations have in fact been passed. Moreover, due to the high percentage of land in the province being privately owned, habitat protection for species at risk in Nova Scotia has to date been severely restricted.

Some general protection of wildlife habitat is also provided by the *Wilderness Areas Protection Act.*[604] This statute was introduced at the same time as Bill 65 and was recognized as an important means of preserving biodiversity within the province.[605] Additions to Wilderness Areas designated in the regulations were made in 2004 and 2005. Rare plants have been protected in several of these areas and the Tobeatic Wilderness Area remains a haven for the province's endangered moose population and the threatened Blanding's Turtle.[606]

There is no question that the development of federal legislation played a significant role in the creation of the provincial *Endangered Species Act*. This is borne out by both the language and the structure adopted in the statute and by statements made in the legislative assembly at the time. Although the debate surrounding CESPA did include discussions regarding the federal interference in matters of provincial jurisdiction, the safety net was first introduced in the fall of 1998 and then formally in Bill C-33 in April, 2000. It is therefore unlikely that the concept of a safety net as it is presently formulated in SARA motivated Nova Scotia to enact its legislation. It also appears to have had little impact on the province's subsequent actions under the Act, particularly in the area of habitat. That being said, the impact of CESPA and the National Accord in producing improved provincial legislation should not be downplayed; legislation, which in many respects is equivalent, if not, better than SARA itself.

Prince Edward Island

In June, 1998, PEI endorsed its commitment under the National Accord to protect endangered species, as well as their habitats, and passed the *Wildlife Conservation Act.*[607] The Act applies to all

[603] *Ibid.* sections 16 and 18.
[604] S.N.S. 1998, c.27
[605] *Supra* note 593.
[606] Nova Scotia Public Lands Coalition, *Proposed Additions to the Tobeatic Wilderness Area*, online: <http://www.publicland.ca/tobeatic.html>
[607] R.S.P.E.I. 1988, c. W-4.1

wildlife, including all species of animals, invertebrates, plants, fungi, algae, and bacteria; however, to be eligible for protection, species must be listed, at the discretion of the Minister, as being either endangered, threatened or of special concern. The last of these three categories was added to the Act in December, 2004.[608] Amendments made at the time were specifically drafted to bring the terminology in line with SARA.[609]Upon listing, wildlife species and their habitat are protected against direct harm under section 7 of the Act.[610]

The Minister may establish an advisory committee to provide advice on the creation of a list of species eligible for protection under the Act based on biological and scientific information.[611] In February, 2003, the Species at Risk Advisory Committee was established in an effort to better fulfill the province's national obligations.[612] The Committee is presently comprised of scientific experts, and representatives from environmental organizations, tourism and industry. Although the PEI government has promised to put COSEWIC species at risk on its legal list, no regulations designating species under the Act have in fact been passed.

The Committee is also required to make recommendations to the Minister regarding the conservation of wildlife habitat. Although the Act provides mandatory habitat protection for listed species, the identification of that habitat is left to ministerial discretion.[613] Furthermore, since over 90% of the land in Prince Edward Island is owned privately, preserving habitat requires high levels of public participation. Consequently, the Minister is authorized to acquire land and to make agreements with landowner and conservation groups for the protection and recovery of endangered and threatened species.[614] There are not, however, any specific requirements in the legislation for the creation or content of recovery strategies nor are there any timelines for implementing them. PEI presently participates in the recovery plan created by the federal government for the Piping Plover through the Nature Trust.

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608 S.P.E.I. 2004, c. 23.
609 Prince Edward Island, Legislative Assembly, *Hansard*, December 14, 2004 at 927 (Ballem).
610 *Supra* note 607. "Wildlife habitat" is broadly defined in section 1 of the Act as including "breeding, nursery, feeding and migration areas and includes areas that provide food, cover and water on which wildlife depend, directly or indirectly, in order to carry out their life processes".
611 *Supra* note 607, section 8.
612 Government of PEI, Department of Fisheries, Aquaculture and Environment, Press Release, February 10, 2003.
613 *Supra* note 607, subsections 7(4)(c) and 16(3)(e).
614 *Ibid.* section 8.

The conclusions drawn from the legislative action taken by Nova Scotia can in many respects be applied to PEI. The introduction of the provincial statute in 1998 followed the development of CESPA and the signing of the National Accord. Both provinces can be characterized as being somewhat proactive in fulfilling their obligations under the Accord as well as cooperative with the federal government in the development of their respective statutes. Although the safety net was likely not in the minds of the drafters, the proposed federal Act and the problems inherent with it, probably motivated both PEI and Nova Scotia to attempt to provide protection for species at risk at the provincial level. In doing so, the government was better able to adapt the legislation to the particular circumstances of the province and its constituents and thereby assume greater control over the protection of species at risk as well as the management of natural resources within its boundaries. The 2004 amendments to the Act also demonstrate provincial recognition of the need to have corresponding legislation with SARA to enable better protection of species at risk. Moreover, despite the fact it is "widely viewed that the safety net will never be used", the government remains aware of its threat value, noting that its effectiveness is based on the political embarrassment which would result from its application.[615] However, at this point in time, PEI is not providing effective protection for species at risk within its borders if for no other reason that none are listed under the regulations to the Act. Until that happens, the province is unable to enforce any of the protection measures within the Act, and the Piping Plover and the 6 other species COSEWIC listed species remain vulnerable to extinction.

Newfoundland

Recognizing that there was inadequate protection for endangered species, and that Newfoundland had committed through the National Accord to ensure that species would not go extinct as a result of human intervention, the government gave its approval to proceed with the development of an Endangered Species Act in 1997.[616] In October of that year, Kevin Aylward, the Minister responsible for developing the Act, identified the government's intention to ensure that the new legislation fully reflected Newfoundland's commitments made under the National Accord.[617] Government officials have confirmed this position, noting that the passage of the Act was not

[615] Confidential Telephone Interview with provincial government official, Species at Risk, February 1, 2007.
[616] Kevin Aylward, Minister of Forest Resources and Agrifoods Newfoundland, Press Release, Dec 1, 1998. Online: <http://www.releases.gov.nl.ca/releases/1998/forest/1201n03.htm>
[617] Kevin Aylward, Minister of Forest Resources & Agrifoods Newfoundland, Press Release, October 1, 1997.

associated with the then proposed federal Endangered Species Protection Act.[618]However, there is some evidence which suggests that the federal bill did, in fact, influence the content of the Newfoundland Act. Following a lengthy public consultation on the contents of the proposed legislation, the new Act was modeled after the endangered species statutes of five other provinces.[619] The Newfoundland government also considered the language and content of the then proposed federal Endangered Species Act (CESPA), prior to introducing its own bill to ensure that the two statutes would be complementary.[620] On December 16, 2001, Newfoundland's *Endangered Species Act*[621] came into force.

Prior to that date, the provincial *Wildlife Act*[622] and Regulations provided general protection for wild animals, but it did not, however include plants. The new legislation applies to all species that are wild by nature but does not include ocean fish or bacteria and viruses. A species is determined to be "at risk" when it is designated by the minister in the regulations as being vulnerable, threatened, endangered, extirpated or extinct. The minister may make such designation upon the release of an assessment of the status of a species by COSEWIC or on the recommendation of an advisory committee.

Section 6 of the Act authorizes the establishment of the Species Status Advisory Committee. The qualifications of the advisory committee are specified in the regulations,[623] and the SSAC must base its decisions on the best scientific knowledge available to it and on traditional and local ecological knowledge about a species. In August, 2002, the minister designated 20 species to be at risk, following the recommendations of COSEWIC. An additional 3 species were added in January, 2005 following the assessments of both COSEWIC and SSAC.[624] The provisions in section 8 of the Act regarding listing timelines mirror those contained in section 27 of SARA. That is, the government must respond to new COSEWIC assessments within 90 days and must provide reasons to the public where the listing recommendations are not followed. Newfoundland is the only province to include

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[618] Written response to interview questions prepared by Joe Brazil, Department of Environment and Conservation, Endangered Species and Biodiversity Section, June 5, 2007.

[619]Newfoundland,Legislative Assembly, *Hansard*, November 28, 2001(Kevin Aylward, Minister of Forest Resources and Agrifoods).

[620] Kevin Aylward, Public Consultation Paper Regarding an Endangered Species Act for the Province of Newfoundland and Labrador, December 1997, online: <http://www.releases.gov.nl.ca/releases/1997/forest/species.htm> See also: *supra* note 616.

[621] S.N. 2001, c. E-10.1, amended: S.N.L. 2004, c.36, s. 11.

[622] R.S.N.L. 1990, c. W-8.

[623] N.L.R. 94-01

[624] Government of Newfoundland, Energy and Conservation, Press Release, "Three New Species to be Protected under *Endangered Species* Act", January 6, 2005.

such a requirement, like that contained in SARA, in its legislation Timelines are also in place for recovery plans.

Once a species is listed, the minister must establish a recovery plan within one year if they are designated as endangered, and within two years if they are threatened. The minister must release a management plan within three years if the species is considered vulnerable. Habitat protection is also available to listed species upon an exercise of ministerial discretion under section 28 of the Act. Finally, direct harm to, or destruction of, a threatened, endangered and extirpated species, or its residence, is prohibited by section 16.

The use of the term "residence" in the Act is also uncommon in similar provincial legislation. Residence is defined in SARA to mean a dwelling place, such as a den, nest or other similar area or a place that is occupied or habitually occupied by one or more individuals during all or part of their lifecycles, including breeding, rearing, staging, wintering, feeding or hibernating. Due to its uncommon usage, from both a scientific and a legislative perspective, it is clear that the word "residence" was specifically chosen by the drafters of the Newfoundland Act to parallel the language in SARA.

Efforts to harmonize the preservation of species at risk across jurisdictions are also reflected in section 26 of the Act which require the Minister, when preparing recovery or management plans for species, to consult with other governments which share jurisdiction for the management of that species. To eliminate duplication, the minister may also release the recovery or management plan of another jurisdiction under the auspices of the Newfoundland Act for that species. Finally, where a recovery team is established by the government of another province, territory, or of Canada for a listed species, the minister is not required to appoint a second recovery team if it has a member who represents Newfoundland. These provisions, as well as the minister's ability to enter into agreements with a provincial, territorial or national government for the conservation of species, underscore the cooperative approach adopted under both the National Accord and SARA.

A cooperative approach between the Newfoundland government and its citizenry towards preserving habitat for endangered species has also been pursued. Under section 29 of the Act, the minister may enter into conservation agreements with a landowner within an area set aside as recovery habitat or critical habitat. On October 9, 2002, Julie Bettney, Minister of Tourism, Culture and Recreation, announced the signing of three stewardship agreements as part of the Limestone Barrens Stewardship Program, which is funded through the Government of Canada's Habitat Stewardship

Program for Species at Risk.[625] Several municipalities through the Eastern Habitat Joint Venture have entered into an agreement with government which sees them supporting a variety of stewardship initiatives aimed at habitat conservation.[626]

Newfoundland has one of the most recently enacted endangered species statutes in Canada. It has generally been modeled after and is consistent with the federal legislation. From that standpoint, it can be said to be equivalent to SARA in providing protection to provincial species at risk. Without question, Newfoundland was both motivated by and cognizant of SARA and its provisions during the development of its own statute. Through public consultation, the government was able to adapt the legislation to the particular circumstances of the province yet maintain consistency with SARA .

Yukon

In September, 1998, the Yukon government signed the revised National Accord and in doing so committed to enacting legislation to protect species at risk living within the territory. Earlier that year, the Yukon government had been working with the federal government in developing national endangered species legislation.[627] At that time, species at risk within the province had little protection under the existing *Wildlife Act*[628] and the development of more effective territorial legislation was within the mandate of the Department of Renewable Resources. The Minister, however, did not wish to initiate the legislative process until such time as the federal act had been introduced. Once the Yukon Government had an opportunity to review and understand the content of the federal bill, it would be better equipped to put forward compatible territorial legislation.[629]

Bill C-33 was not introduced in the House of Commons until April, 2000 and the Yukon government did not, in the interim period, amend its *Wildlife Act* to include provisions for the protection of endangered species. Concern over the apparent reach of the proposed federal legislation was raised again and the Yukon government began work on a draft bilateral agreement with the federal

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[625] Government of Newfoundland, Tourism, Culture and Recreation, Press release, "Stewardship Agreements to be signed for Conservation of Limestone Barrens Habitat and Species at Risk" October 9, 2002. Online: <http://www.releases.gov.nl.ca/releases/2002/tcr/1009n04.htm>
[626] Kevin Aylward, Minister of Forest Resources and Agrifoods, Press Release, "National Wildlife Week – Provincial Habitat Conservation Measures", April 12, 2000. Online: <http://www.releases.gov.nl.ca/releases/2000/forest/0412n03.htm>
[627] Government of Yukon, Legislative Assembly, Hansard, May 4, 1998 (Minister of Renewable Resources, Hon. Mr. Fairclough).
[628] R.S.Y. 1986, c.178
[629] *Supra* note 627.

government in an attempt to clearly define the respective roles and responsibilities of the two jurisdictions in implementing the National Accord.[630]

The concerns raised over the ambit of the then proposed SARA revolved squarely around the federal safety net mechanism which was originally introduced in Bill C-33. The dual prospect of the application of the safety net by the federal government to territorial lands, and the consequential restriction of economic development, clearly motivated the Yukon government to begin public consultation on amendments to the *Wildlife Act* in 2002.[631] These concerns were reiterated in the spring of 2003, following the passage of SARA. The need to prevent federal interference with local resource management pushed the Yukon government to introduce its own species at risk legislation.[632] The Yukon Fish and Wildlife Management Board have also recognized the need for complementary legislation in order to enable the provision of coordinated information and advice to COSEWIC.[633] In this case, SARA's influence over the Yukon's proposed legislative action, although somewhat delayed, is clear.

The proposed amendments were the subject of public comment and consultation. Although the legislation and program were fully developed, a change in government has delayed its introduction to the territorial legislature. The changes were drafted having regard to both SARA and the Yukon's commitments under the National Accord.[634] Under the proposed amendments the Yukon government will rely on COSEWIC and the federal government to continue to assess and list species at risk. The new legislation will focus on recovery strategies and management plans for federally listed species.[635] Following listing, it is proposed that representatives from each of the federal and territorial governments will determine the roles each will play in the development and implementation of the recovery strategy of management plan. The timelines proposed for the preparation of recovery strategies and management plans are slightly longer than those mandated by SARA.[636] The new Act will apply to all wild species including invertebrates and plants. The definitions for both "habitat" and "critical habitat" will closely mirror SARA and will be utilized in the protection of habitat for species at risk and the identification of critical habitat in recovery plans.

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[630] Government of Yukon, Legislative Assembly, Hansard, May 3, 2001
[631] *Ibid.*
[632] Government of Yukon, Legislative Assembly, Hansard, April 15, 2003.
[633] Yukon Fish and Wildlife Management Board, online: <http://www.yfwmb.yk.ca/legrev/species.html>
[634] Department of the Environment, Government of Yukon Proposed Wildlife Act Amendments for Species at Risk, at 1. Online: < http://www.environmentyukon.gov.yk.ca/pdf/SpeciesatRisk.pdf>
[635] *Ibid.* at 2.
[636] *Ibid.* at 4.

It should be noted, that the final decision regarding the protection of critical habitat will rest with the Yukon Cabinet.[637]

Thus, SARA and the potential reach of the federal government to restrict local resource management have provided the Yukon with the impetus to begin the process of improving its endangered species law. The proposed legislation will be designed to complement SARA and will, once enacted, strengthen the level of protection currently available to the Yukon's species at risk. However, until the new legislation is passed, the Yukon does not meet the minimum standards of protection required under SARA.

Northwest Territories

The Northwest Territories does not presently have species at risk legislation. The *Wildlife Act*[638] was created over twenty years ago and has been recognized by the territorial government as inappropriate for protecting endangered species. Previous amendments to the *Wildlife Act* have been unrelated to species at risk. In January, 2003, the government released a proposal introducing the framework for a new territorial Species at Risk Act. The proposed legislation follows several years of public consultation, which formally began in 1999. Authorities began drafting the legislation in June, 2003;[639] however, the present government is currently reviewing the process by which the new statute should continue to be developed. It is hoped that the new legislation will be passed in 2008.[640]

The proposed Act is intended to reflect the spirit of the Accord and is an attempt to establish complementary legislation which will provide effective protection of species at risk.[641] In that respect, the suggested framework of the Act closely parallels SARA and its basic structure of assessment, listing, protection against direct harm and for critical habitat, recovery, stewardship and compensation. A Species at Risk Committee (SARC) will be established under the new Act to assess the biological status of species in the Northwest Territories. Like COSEWIC assessed species, assessments are intended to be based upon scientific and traditional knowledge only. Following a review of SARC recommendations, and taking into account the comments of the

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[637] *Ibid.*
[638] RS.N.W.T. 1988, c.W-4
[639] Northwest Territories, Legislative Assembly, Hansard, June 4, 2003 at 719.
[640] Confidential Interview with government official, Wildlife Management, GNWT, February 23, 2007
[641] Government of Northwest Territories, Environment and Natural Resources, *Northwest Territories Biodiversity Action Plan, First Report*, 2005 at 23. Online: <http://www.nwtwildlife.rwed.gov.nt.ca>

appropriate wildlife management boards, aboriginal governments and territorial agencies, the Minister of Resources, Wildlife and Economic Development will advise Cabinet on species listing. It should be noted that in making his decision the Minister is entitled to consider both the biological and socio-economic consequences of listing a particular species. Upon listing, vertebrate and invertebrate species, alike, will receive protection from direct harm and harassment.[642] Damage or destruction of their dens, nest or home would also be prohibited. It is worth noting that this prohibition is intended to apply equally to Aboriginal harvesters.[643]

Critical habitat of listed species will be primarily protected through the development of conservation areas, management plans and land use plans, as well as through the NWT Protected Areas Strategy. Assistance from the federal government has also been suggested as an important factor in providing adequate habitat protection and the development of a bi-lateral agreement will be required to facilitate federal involvement. Other proposed sections which closely follow SARA's example include those related to recovery planning, emergency listing, compliance, stewardship and compensation.[644] The identification of habitat would occur, where possible and appropriate in recovery strategies. When such habitat is identified it would receive protection against damage and destruction, subject to consultation with landowners.[645]

Although the Northwest Territories agreed to the principles of the Accord in 1996, the government did not sign when it was modified in September, 1998 to emphasize the significance of stewardship in providing effective protection for species at risk. A few short months later, the government began the consultation process to initiate the development of its new legislation. There is no question that SARA has had a significant impact on the territorial government's approach to protecting endangered species. The biodiversity strategy for the NWT specifically recognizes the importance of increased coordination, effective work on common goals, and a reduction of barriers to sharing

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[642] The new legislation would not, however, apply to fish or marine plants or birds protected under the *Migratory Birds Convention Act*. See Government of Northwest Territories, Resources, Wildlife and Economic Development, *Management of Species at Risk in the Northwest Territories: Proposed Legislation*, (Yellowknife: Government of NWT: 2006) at 4 [NWT, 2006].

[643] Northwest Territories Resources, Wildlife and Economic Development, *Drafting a New Wildlife Act for the Northwest Territories: A Progress Report,* 2003 at 3.

[644] Department of Resources, Wildlife and Economic Development, Protecting NWT Species at Risk: A Progress Report, January, 2003 at 4-6. Online: <http://www.nwtwildlife.rwed.gov.nt.ca/legislation/legislation.htm>. See also NWT, 2006 *supra* note 642 at 13.

[645] NWT, 2006, *ibid.*

human and financial resources in promoting conservation.[646] The parallel nature of the proposed species at risk act to SARA will go at least part way towards achieving that objective.

The proposed legislation will meet most of the commitments of the NWT under the Accord and government officials note that any elements which are not addressed directly by the new Act will be met through programs and policy.[647] One territorial official has stated that the "commitment to develop species at risk legislation for the NWT was a direct result of the proposed legislation and the requirement for complementary legislation under the Accord".[648] The territory's jurisdictional concerns which had been raised throughout the development of the federal endangered species law were heightened with the introduction of the safety net. Specifically, with respect to the boreal caribou, "there was a concern that the federal government would attempt to take over management of this species if the NWT did not have specific laws protecting the species".[649] The situation in NWT thus provides a very clear example of the effect of SARA and the safety net on territorial protection of species at risk. Indeed, the similarity of the proposed Act with the federal statute was necessitated by the "implementation of SARA and the requirements to meet the federal test with respect to the safety net".[650] There is no question that the presence of the federal legislation and the threat over the ability of the territories' ability to manage its own resources will, upon the passage of the proposed Act produce more effective protection for species at risk within the NWT.

Nunavut

In April, 2002, two years after adopting the *Wildlife Act*[651] of the Northwest Territories, Nunavut began a public consultation to develop a new statute governing the management and conservation of wildlife which would more accurately reflect the needs and ideals of the Nunavummiut. The new legislation was intended to be consistent with the wildlife provisions of the Nunavut Land Claims Agreement, to incorporate Inuit philosophy about human interaction with, and responsibility for, the environment, and to adopt the principles contained in national and international agreements on the protection of biodiversity, species at risk and habitat.[652] Less than a year after SARA was passed by

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[646] *Supra* note 641.
[647] *Supra* note 640.
[648] *Ibid.*
[649] *Ibid.*
[650] *Ibid.*
[651] *Supra* note 638.
[652] Government of Nunavut, Press Release "Community Consultations get underway for New Wildlife Act", April 12, 2002 [Nunavut, 2002], Government of Nunavut, Press Release, December 5, 2005.

the federal government, the Nunavut *Wildlife Act*[653] was introduced. It came into force on July 9, 2005; however, regulations facilitating the implementation of the Act have not yet been passed.

One of the goals of the new legislation governing the management and preservation of wildlife in Nunavut is to ensure consistency with national and international agreements on the protection of biodiversity, species at risk and habitat.[654] The Act was also clearly drafted having regard to many of the principles in SARA. Moreover, in a document released to the public summarizing the main provisions of the Act, it states that SARA required the Government of Nunavut to enact legislation to protect species within the territory that are endangered, threatened or of special concern.[655] The Deputy Commissioner of Nunavut recognized that the government's commitment to protecting biodiversity necessitated that the Act ensure that all species, no matter how important for economic or social purposes, remain healthy and abundant.[656]

The framework of the provisions concerning species at risk in the Act parallels those contained in SARA. The Act establishes an independent Species at Risk Committee comprised of individuals with scientific and traditional knowledge to advise the Nunavut Wildlife Management Board (NWMB) on which species to designate under the Act as being endangered, threatened or of special concern. The Minister must implement all the listing decisions of the NWMB on species at risk. [657]

Once listed, species are protected against direct harm, harassment and interference. Trafficking in or possession of, listed species is also prohibited. Recovery plans must be prepared within two years of a species being designated as either endangered or threatened, and management plans must be prepared within 3 years for species of special concern. Similar to recovery provisions in SARA, the Act specifies that recovery plans must identify the needs of and threats to species, as well as threats to habitat, identify the species' critical habitat and activities that are likely to result in its destruction, and the action necessary to implement the recovery plan.

It is an offence under s. 65 of the Act to damage or destroy habitat which includes land upon which a species directly or indirectly depends to carry out its life processes. Similarly, the contravention of any regulation prohibiting activities in any critical habitat, wildlife sanctuary or special management

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[653] S. Nu. 2003, c. 26.
[654] Nunavut, 2002, *supra* note 652.
[655] Lena Metuq, Deputy Commissioner of Nunavut, "Creating a New Nunavut Wildlife Act", 2002 at 3. Online: <http: //www. nunavutwildlifeact.ca/ images/newWildlife Act_eng.pdf>
[656] *Ibid.*
[657] *Supra* note 653 ss. 129-131, 159.

area is prohibited. Critical habitat may be designated in the regulations by the Commissioner to implement a recovery plan or where it is necessary to protect a listed species.[658]

Although Nunavut was not a separate signatory to the Accord in either 1996 or 1998, the government has adopted many of the principles contained within it as the guiding values embodied in the new legislation.[659] The introduction and passage of the species at risk provisions in the Act follow SARA and they clearly reflect its structure and content. From the timing and content of the Act, as well as statements made by local officials, it is possible to conclude that the Government of Nunavut was motivated by the federal act to create legislation that was designed to meet the unique needs of the territory, thereby occupying the field from a jurisdictional standpoint, as well as to promote a consistent and collaborative approach to protecting species at risk with the federal government.

Conclusion

The passage of SARA involved extensive debate and provincial opposition regarding federal constitutional authority over the environment, species at risk, and ultimately, over the land and resources upon which they rely for their very survival. The development of the federal endangered species legislation in this respect parallels many of the other environmental statutes discussed in this paper. Early indications by the federal government that it would legislate over the protection of endangered species were met with suspicion and opposition by the provinces. As a means of providing some structure to the federal role and in an attempt to engender cooperation between both levels of government, the National Accord for the Protection of Species at Risk was agreed to in October, 1996.

With the signing of the Accord, the federal and provincial governments committed to establishing complementary legislation and programs to provide effective protection for species at risk. The signing of the Accord ushered in nearly a decade of consultation, debate and legislative change at both the provincial and federal levels of government. The forces that ultimately brought about the creation of legislation and policy to protect endangered species and their habitats are not uniform across the country and likely no one factor can be considered to be the sole impetus for change.

[658] *Ibid.* s. 139.
[659] *Ibid.* For example section 1 notes that the precautionary principle shall govern decision making under the Act and recognizes the intrinsic value of the territories' biodiversity and the importance of the sustainable use of its wildlife resources.

However, this paper has examined the influence of three factors upon the development of provincial endangered species law and policies. These factors were first introduced in chapter 1 and described more fully in chapter 2 as being the initiation and development of the federal endangered legislation in the form of SARA during the years 1994 to 2002, the provincial obligations to establish complementary legislation and programs for the effective protection of species at risk arising under the National Accord in 1996, and finally, the passage and implementation of SARA and its safety net from 2002 to the present day. In particular, the paper evaluates the degree to which these three factors have spurred on the statutory and policy changes undertaken by the provinces during the time periods in question. The paper also addresses whether or not these changes have raised the overall standard of endangered species protection in terms of listing, protection, habitat protection and recovery planning, and perhaps more importantly, if the provinces have met the standard of "effective protection" required by SARA's safety nets.
The review of changes in provincial legislation and policies reveals that in a space of less than ten years since the announcement of the federal intent to legislate, all of the provinces and territories have either adopted or are developing improved endangered species protection. It is unlikely that this nation-wide legislative movement would have been accomplished as quickly solely on the back of the National Accord and the demands of the electorate. It is argued that, in fact, the threat of federal involvement in matters of provincial jurisdiction, embodied initially in the development of federal legislation, and ultimately in SARA and its safety net, increased the urgency of the provinces to make legislative and policy improvements in protecting species at risk in order to secure their jurisdictional interests over wildlife and, more broadly, over natural resource use and development.

Chapter 4 examines the extent to which these three factors have motivated the provincial governments and what follows is a summary of those findings. The conclusions to be drawn regarding the impact of these factors on the level of protection afforded provincial species at risk will focus around the time periods previously mentioned – namely, 1994 to 2002, having particular regard to the signing of the National Accord in October, 1996, and 2002 to the present day.

This paper has attempted to establish that the threat of federal interference in provincial jurisdiction prompted the provinces to enact or amend existing legislation to protect species at risk while at the same time colonizing their jurisdiction over wildlife and its habitats. Due to the overlap in timing between the introduction and subsequent impact of the federal endangered species legislation, and the signing of the National Accord, it is difficult to isolate the impact of either on provincial behaviour. For this reason, it will be useful to draw some conclusions around the motivating influence of the National Accord on the provincial governments' development of improved endangered species protection first.

Most provinces cite the National Accord as one of the primary reasons for the introduction or development of provisions and policies aimed at protecting species at risk, including Alberta, Saskatchewan, Ontario, New Brunswick, Nova Scotia, Newfoundland, the Yukon and Northwest Territories, and Nunavut. For other provinces, such as PEI, the timing of new programs and legislation followed closely behind the signing of the 1996 Accord, suggesting a linkage. British Columbia has indicated that legislation along the lines of Bill 51 was contemplated by the province for some time prior to the arrival of SARA, and that the amendments form part of the gradual implementation of a made-in B.C. Strategy.[660] Even Quebec, although not a signatory to the Accord, has acknowledged its importance as a conduit to increased federal-provincial joint efforts in the conservation of endangered species[661]. The implementation of the National Accord by the provinces is also consistent with the jurisdictional federalism and intergovernmental cooperation that has characterized environmental protection in Canada.[662] The influence of the National Accord in motivating the provinces to introduce legislation and policies aimed at protecting species at risk cannot be overlooked. However, the review of the timing and nature of the changes in provincial endangered species law and policy suggests that it is not the only factor. Rather, the entry of the federal government into what was traditionally viewed as a provincial matter also contributed to provincial legislative reform.

Beginning in 1994 with the creation of the federal Task Force on Endangered Species Conservation and publication of the plain language legislative proposal for the *Canadian Endangered Species Protection Act* in 1995, the federal government first announced its intention to fulfill its commitments under the Rio Convention. Consistent with the prevailing harmonization initiatives that had characterized intergovernmental relations over the preceding few years, the federal government also committed to developing a "national approach" to endangered species conservation.[663] It sought the cooperation of provincial and territorial governments and wildlife

[660] Confidential Letter from Policy and Legislation Branch, B.C. Ministry of Water, Land and Air Protection, May 9, 2005.
[661] *Supra* note 559.
[662] Kathryn Harrison, "The Origins of National Standards: Comparing Federal Government Involvement in Environmental Policy in Canada and the United States", in Patrick C. Fafard and Kathryn Harrison eds., *Managing the Environmental Union: Relations and Environmental Policy in* Canada, (Kingston, Ontario: School of Policy Studies, Queen's University, 2000) at 62 and 75.
[663] *Ibid.* See also Harrison 2003, *supra* note 74.

management boards in developing Canada's endangered species legislation. However, Ottawa's first legislative attempt at fulfilling both its international and domestic obligations to protect species at risk in the form of CESPA in October, 1996 met with unanimous opposition by the provinces and territories. Its breadth of application was viewed as being too expansive as a result of the transboundary provisions which enabled the federal government to protect all listed species which traveled across an international border. Like, CEPA, the bill also included an equivalency clause which made the federal protection of transboundary species mandatory unless equivalent provincial regulations safeguarded the wildlife. The provinces generally viewed the transboundary provisions as an incursion on provincial jurisdiction.

The clause was subsequently dropped from the federal government's second attempt at legislation in April, 2000. Bill C-33 replaced the transboundary provisions with the federal "safety net" which was broader in scope but weaker in application. The safety net concept was first introduced in 1998 at a meeting of the Canadian Wildlife Ministers. The safety net provisions were included in the final version of the bill and continue to represent the nub of the threat of federal interference in provincial jurisdiction over wildlife and their habitat. As discussed in Chapter 2, the provinces continued to oppose the potential interference in provincial jurisdiction by the federal government which lay at the heart of the safety net in Bill C-33. Consequently, in passing SARA, the federal government opted to be as deferential to provincial interests as possible and restricted its application to species at risk found on federal land, aquatic species or migratory birds. This deference ultimately manifested itself in the federal government's decision to support a cooperative approach to the protection and conservation of species at risk. The safety net was created specifically for the purpose of implementing "the policy intention of working cooperatively with the provinces" before the government asserts its unilateral power to bring in a general prohibition.[664] It was intended to "invite provinces and territories to act in a responsible manner".[665] As Chapter 4 revealed, it is an invitation that several provinces accepted.

The safety net is intended to be an "iron fist in a velvet glove" and it is clear that the ability of the federal government to act unilaterally to apply SARA's provisions when the provinces fail to protect species at risk and their habitats constitutes a coercive rather than a cooperative policy instrument. It is this coercive aspect that provides the safety net with its true strength as a policy instrument. The threat of federal action gives the safety net a unique ability to alter provincial and territorial

[664] Near, *supra* note 152.
[665] Redman, *supra* note 153.

behaviour and ultimately to bring about the creation of improved endangered species protection measures. As Harrison and others have suggested, neither a cooperative nor coercive approach to intergovernmental relations is preferable in all cases, but rather which one is more effective as a policy instrument at resolving the problem in question.[666] In the case of SARA, it appears that the mere potential for coercive action on the part of the federal government has assisted in the development of better protection for species at risk throughout Canada.

Summarizing provincial actions during the time period beginning 1994 to 2002, it is evident that the proposed introduction of federal legislation in the form of CESPA and Bill C-33 influenced many of the new acts, amendments and policies brought forward by the provinces. Concerns regarding the possible intrusion of federal law into perceived provincial jurisdiction over the ability to manage endangered species and their habitats were raised by several provinces. For example, in 1998, when Nova Scotia brought its proposed *Endangered Species Protection Act* before the legislative assembly for second reading, it was noted that one of the effects of the legislation would be the provincial assertion of constitutional jurisdiction over the subject matter.[667] Similarly, the substantial increase in funding for species at risk programs in Alberta in April, 2000, was fully intended by Minister Mar to be a demonstration of financial, if not ultimate, power over wildlife management.[668]

The amendments to the Alberta *Wildlife Act* to expand protection to all wildlife species were introduced following the initial announcement of the federal government of its intent to legislate but prior to the signing of the National Accord in October, 1996. It is therefore possible to conclude that the amendments were prompted by the proposed introduction of federal legislation alone. The provinces which introduced or amended existing species at risk legislation and protection during the period 1994-2002 include BC, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, PEI and Newfoundland. Those jurisdictions which publicly recognized the shortcomings of their existing statutes and regulations in light of the development of the federal legislation during this same time period included Ontario, New Brunswick, BC, the Yukon and the Northwest Territories.

The influence of the introduction of Bill C-65 is particularly noticeable in the language used by the more recent species at risk statutes. The Nova Scotia legislation was first introduced in 1996, and subsequently reintroduced in 1998 and clearly reflects the language and structure used in CESPA.[669]

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[666] Harrison, 2000 *supra* note 158 at 3. See also Pal, *supra* note 161 at 3.
[667] *Supra* note 593.
[668] *Supra* note 464.
[669] *Supra* note 593.

Similarly, the Newfoundland government considered the language and content of the proposed CESPA prior to introducing its own bill to ensure that the two statutes would be complementary.

The addition of endangered and threatened species to the various provincial legal lists is also a good barometer for the expansion of protective measures at the provincial level. In the years following 1994, there is a flurry of activity that is consistent with both provincial and territorial obligations under the Accord and the presence of proposed federal legislation. While the issue of provincial listing will be discussed more thoroughly later in this section, for these purposes it is worth noting that in the period between 1996 and 2000, there are significant increases in both listings of species at risk and the monies spent to protect them across the country. Indeed, all of the provinces, except PEI, added species to their legal lists during this time period, a greater proportion of which occurred following 2000 and the introduction of Bill C-33 and the safety net. By 2000, the reality of federal endangered species legislation was becoming increasingly clear.

Other developments included the creation of several provincial independent advisory bodies which were intended to provide scientific information to assist in the listing decisions. Examples include COSSARO in Ontario, the ESCC in Alberta, the Endangered Species Advisory Committee in Saskatchewan, as well as the Species at Risk Working and Advisory Groups in Nova Scotia and PEI, respectively. During this time period, some jurisdictions, including Saskatchewan, Nova Scotia, PEI and Newfoundland, also introduced recovery planning measures into their provincial statutes.

Thus, the development and passage of federal endangered species legislation followed the typical pattern exhibited by other environmental statutes explored in chapter 3 - namely, the assertion of federal authority to legislate, followed by provincial opposition and a federal retreat in the form of reassurances that unilateral action would be used only as a matter of last resort What is of greater significance, is the degree to which the initial threat of federal interference carried in Ottawa's intent to legislate affected the provinces. The provincial response to the development of SARA echoes the response to other federal statutes in the environmental context demonstrated in chapter 3. The tremendous provincial opposition to the introduction of *Canada's Water Act* was primarily due to the potential federal interference in provincial jurisdiction over water as a natural resource. According to both Thompson and Saunders, the provincial governments responded to the threat of federal unilateralism by adopting their own legislative initiatives aimed at water management and control.

Perhaps the greatest provincial opposition to the federal environmental legislation discussed in chapter 3 arose following the introduction of CEAA in June, 1990. Although CEAA contains provisions which address the concurrency of federal and provincial jurisdiction over environmental assessment, the perceived threat of federal interference in provincial authority over economic development brought heavy opposition from the provinces. In an attempt to colonize their jurisdiction over environmental assessment, several of the provinces responded to the development and passage of CEAA by introducing or improving their own legislation. For example, the eventual passage of Alberta's *Environmental Protection and Enhancement* Act in 1992 resulted in the emergence of one of the most stringent EA process in Canada at the time.[670] BC and Quebec also improved the stringency of their EA process in the years following the passage of CEAA.[671]

The review of provincial legislation in Chapter 4 revealed that the development and passage of the federal endangered species legislation in the form of CESPA and SARA resulted in a provincial legislative response that parallels that seen in other environmental contexts such as that described above. Specifically, the threat of federal interference in provincial jurisdiction provided the provinces with increased impetus, over and above their obligations under the National Accord, to improve their own legislation. During the time period from 1994-2002, there was a substantial improvement in the overall standard of protection available to provincial species at risk that is not attributable solely to provincial obligations under the Accord. The influence of SARA upon the level of provincial endangered species protection continued after its passage in 2002 and its coming into force in 2004.

Following 2002, a second wave of legislative activity occurred at the provincial level. Several jurisdictions, including BC, Ontario, PEI, the Yukon and the Northwest Territories, either introduced or proposed amendments to their endangered species legislation during the period beginning in 2002 and extending to the present day. After the passage of SARA, it is apparent that the potential invocation of the safety net by the federal government has played an important role in shaping the actions undertaken by the provinces. The introduction of the amendments included in BC's Bill 51, which extend the legal designation of, and protection against harm to, plants and invertebrates were influenced by the implementation of SARA and the coming into force of the safety net.[672] By enacting complementary legislation, the province reasoned that it was more likely to be viewed as

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[670] *Supra* note 385.
[671] *Ibid.*
[672] Confidential Interview with government official, BC Ministry of Water, Land and Air Protection, email correspondence, May 9, 2005.

providing effective protection for species at risk and therefore not subject to the possible operation of the federal safety net.[673] Other provinces including Saskatchewan, Manitoba, and New Brunswick have responded to SARA through legislative amendments, policies or proposed amendments aimed at increasing complementarity between legislation. For example, New Brunswick has recently proposed changes to its legislation "to bring the statute into line with national standards"[674] and Saskatchewan has begun to explore the possibility of reciprocal listing with the federal government's listings under SARA[675]. Unquestionably, the most significant provincial endangered species legislative initiative has been pursued by Ontario. It has now developed Canada's most progressive and comprehensive species at risk statute. The need to draft legislation equivalent to SARA has been cited as one of the factors contributing to its development. The presence of the safety net's underlying assessment of equivalent protection has thus fuelled many of the changes contemplated by the provincial governments.

Legislation was also in the early stages of development in both the Yukon and Northwest Territories following the passage of SARA. The development of a revised *Wildlife Act* in the Yukon Territory was delayed by the introduction of SARA in order for the territorial government to be better equipped to put forward a compatible bill. Concerns regarding federal interference with local resource management were also noted as one of the reasons for the introduction of the Yukon's draft species at risk legislation in 2003.[676] Correspondingly, the proposed legislation in the NWT is considered to be a direct result of SARA and the need to meet the federal test with respect to the safety net.[677]

In addition, the provinces have increased efforts directed towards recovery and listing as a result of the mandatory timelines instituted by SARA. Many jurisdictions have noted the importance of SARA in expanding provincial recovery efforts. According to an official in Nova Scotia, "SARA has certainly stepped up the bar in terms of provincial recovery planning".[678] Similarly, in Alberta, wildlife officials have commented on the fact that "SARA has engendered clearer thinking about recovery planning generally and has helped to produce the necessary infrastructure of documents,

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673 *Ibid.*
674 Confidential Interview with New Brunswick Government official from Department of Natural Resources, Species at Risk, March 22, 2007
675 *Supra* note 477.
676 *Supra* note 632.
677 *Supra* note 640.
678 *Supra* note 601.

protocols and working groups".[679] BC, Manitoba and Quebec have also increased recovery efforts following SARA's implementation.

The effects of the foregoing have been the strengthening of the overall level of endangered species protection as provincial and territorial governments move toward, and in some cases exceed, the standard set by SARA. The impact of the proposed federal legislation is evident in the changes prior to 2002 and the passage of SARA, following which, the threat of the application of the safety net appears to have continued to influence provincial behaviour. Having established the strong correlation between the threat of federal interference and provincial initiatives, it is possible to assess the overall quality of species protection that has been achieved. Specifically, the statutory and policy changes which have occurred over the past 10 years regarding listing, protection from harm for species (and their residences), habitat identification and protection, and finally, recovery planning have all contributed to a higher standard of protection for species at risk throughout Canada.

The question which therefore remains to be answered is whether or not the threat of federal interference in the form of SARA and its safety net has resulted in enough provincial legislative reform that species at risk can rely upon the seamless web of protection throughout Canada envisioned by SARA's creators. The safety net was conceived and included within SARA in order to achieve this purpose. Although cooperation with the provinces is the foundation upon which the Act is built, there is no denying that the federal government reserved itself the authority to act unilaterally when the provinces have not provided effective protection for species at risk. The definition of "effective protection" therefore becomes crucial to the ultimate success of the Act – namely, the degree to which it is able to fulfill its objective of preventing the extinction (and extirpation) of species. As discussed in Chapter 2, this term is not defined in SARA. Consequently, it is necessary to infer from the Act itself, its legislative history and from the literature what this term is intended to encompass.

The development of clear criteria for determining what constitutes "effective protection" has not yet been established between federal and provincial governments. The federal government has, however, indicated that it will consider all provincial "measures and mechanisms" which can reasonably be expected to protect critical habitat and species' residences in assessing effective protection.[680] This means that it will take into account all provincial laws and policies which serve to

[679] *Supra* note 453.
[680] Environment Canada, *Federal Policy Discussion Paper: Critical Habitat, Ottawa, February 2004* at 16.

protect critical habitat and residences in its determination of effective protection. Criteria for the critical habitat safety net suggested by members of the Committee on Environment and Sustainable Development included consideration of equivalent prohibitions, and effective enforcement of the relevant provincial and territorial laws. While explaining the nature of SARA's direct harm safety net to Committee members, the Assistant Deputy Minister noted that "we will have ... to look at the wording in the federal legislation and ensure that there are equivalent provisions in the provincial legislation".[681] Thus, in order to assess whether or not the legislative changes introduced by the provinces and territories over the last ten years have met the standard of effective protection set by SARA's safety nets, it is necessary to evaluate whether provincial laws and policies provide protection to species and their habits equivalent to that provided under SARA. While a more thorough analysis would also encompass provincial enforcement activities, having regard to the scope of this paper, and due to the fact that federal identification of critical habitat in recovery strategies has been limited to date, I will restrict my review to the provisions themselves.

Turning to the question of equivalency in respect of the direct harm safety net, it must be recalled that listing under SARA acts as a gatekeeper for protection. Similarly, in order for a species at risk that does not fall within SARA's application to benefit from protection against direct harm, it must first be listed under the relevant provincial statute. Therefore, whether or not a particular province or territory has achieved effective protection for species at risk and its residence against direct harm depends on two criteria – namely, listing and a legal prohibition. In fact, the Senate Committee studying Bill C-5 clearly directed the Minister of the Environment to consider provincial failure to list a COSEWIC listed species as an early warning sign of inaction necessitating the invocation of the safety net provisions.[682]

If listing is viewed as an indication of provincial failure to provide effective protection as suggested by the Senate Committee, it is clear that many provincial species at risk are being left unprotected. Only Nova Scotia's *Endangered Species Act* and Ontario's new ESA require science based listing in their legislation. However, until the new listing requirements come into force in Ontario's Act in June, 2008, roughly 70% of SARA schedule I endangered and threatened species do not receive legal protection in the province. Listing percentages in most of the other provinces and territories are below the 50% mark and in the nearly ten years since it introduced endangered species

[681] Karen Brown, Evidence before the Standing Committee on Environment and Sustainable Development, March 22, 2001, at 1050.
[682] *Supra* note 54.

legislation, PEI has failed to list a single species under its Act. Quebec, New Brunswick and Manitoba all have listing percentages below 75%. On this basis alone, it is impossible to conclude that the provinces have provided effective protection for species at risk living within their borders.

Regarding the issue of whether or not the provincial governments have legal prohibitions in place which are equivalent to the protection from direct harm provided to species at risk and their residences under SARA, there is better news. When CESPA was first introduced only 4 provinces had legislation in place which was specifically designed to protect endangered and threatened species from direct harm. Today all jurisdictions, except the Northwest Territories and the Yukon have either created or amended prior legislation to provide some measure of protection from harm for species at risk and their residences. Additionally, new laws have been proposed in both of the territories. While these provisions are not entirely uniform across Canada, there is no doubt that the number of jurisdictions which provide protection for endangered species against direct harm has increased dramatically since the federal government first introduced its endangered species legislation. Thus, while the threat of federal intervention in provincial jurisdiction has generally expanded the scope of protection for species at risk,[683] the implementation of SARA and the potential threat of the invocation of the safety net have not carried through to the number of species listed. Consequently, effective protection has not been achieved at the provincial level to the extent that the number of species listed provincially as being endangered or threatened, and consequently, in need of protection, is still too low.

The application of the safety net for critical habitat protection in SARA requires that a similar "effective protection" analysis be undertaken with respect to provincial habitat protection. In particular, the question which needs to be addressed is whether or not the threat value inherent in the potential application of SARA's safety net for critical habitat has been sufficient to motivate the provinces to provide equivalent habitat protection for species at risk. Under SARA, the protection of species' critical habitat does not occur upon listing but rather only when it has been identified in a recovery strategy or an action plan that has been filed in the public registry.[684] The identification of critical habitat in a recovery plan is therefore pivotal to the analysis of effective protection. That is, if the critical habitat has not yet been identified, the prohibition against destruction under section 58

[683] Many jurisdictions provide protection to endangered species through their Wildlife Acts, which traditionally have only applied to vertebrate species. The review of provincial and territorial legislation in chapter 4 discusses in detail the steps taken by the provinces to expand the scope of this protection against direct harm to include all wildlife species, including plants and invertebrates.
[684] *Supra* note 1, sections 41 and 58.

is not operable. Section 58 of SARA prohibits the destruction of the critical habitat of any listed species provided it is located on federal lands, or if the listed species is an aquatic species or a migratory bird protected under the MBCA.[685] The safety net contained in section 61 enables the federal government to act unilaterally to extend this protection to listed species in a province or territory that is not part of federal lands where, following consultation with the appropriate provincial government, the Minister is of the opinion that the laws of the province do not effectively protect the critical habitat.[686]

Thus, the issue of whether or not the provinces have provided effective protection for habitat requires both a legal and a factual analysis. The review of provincial legislation in Chapter 4 revealed that there remains a wide range of habitat protection afforded species at risk across Canada. In order to draw a distinction between the impacts of the general threat of federal interference in provincial jurisdiction associated with the development of SARA versus the threat embodied in its critical habitat safety net, the timing of the provincial legislative changes with respect to habitat protection needs to be mapped. The two issues to be addressed are: do the provinces have legislation in place which would either provide mandatory or discretionary habitat protection for species at risk; and has the threat of federal interference resulting from the potential application of the safety net pushed the provinces into providing effective habitat protection?

For the most part, the answer to the first of these two questions is a qualified yes. Ontario, New Brunswick, Manitoba and Quebec all have had mandatory habitat protection for listed species in place since before 1996. It should be noted, however, that Quebec amended its legislation in 1999 for reasons unrelated to the then proposed federal legislation to make habitat protection discretionary rather than mandatory. Habitat identification and protection is now specified in the regulations to the Quebec statute and only one regulation, regarding caribou habitat, has been passed to date. Therefore, in these four jurisdictions, there is no evidence to suggest that either the development of the federal legislation in the form of SARA or the possible application of its safety net for habitat created legislative change. The situation is somewhat different in the remaining jurisdictions.

Although when PEI introduced mandatory habitat protection in its *Endangered Species Act* in 1998, the concept of the safety net was not fully developed, the Act was clearly drafted with CESPA in

685 Habitat protection for MBCA birds is restricted to federal land and migratory bird sanctuaries.
686 This provision does not apply to aquatic species or the critical habitat of migratory birds that is referred to in subsection 58(5.1).

mind and the threat of federal interference in provincial jurisdiction which accompanied the introduction of the proposed legislation did not go unnoticed. This situation parallels that of Nova Scotia. Newfoundland passed its Act following the introduction of Bill C-33 and adopted a habitat protection regime similar to that found in SARA. While the Act provides for the identification of the habitat needs of listed species in recovery plans, the ultimate protection of the critical habitat so identified is left up to ministerial discretion.[687]

In Saskatchewan, habitat protection remains discretionary. The provisions enabling the Minister to identify the habitat needs of listed species in recovery plans were included in the *Wildlife Act* [688]in 1998 and can be linked to provincial obligations under the National Accord, as well as the introduction of the federal endangered species legislation. The Alberta *Wildlife Act* also does not contain any statutory requirements with respect to habitat protection; however, recovery plans may include population goals and the identification of critical habitat. These measures were introduced in May, 1996 and were recognized at the time as being "complementary to the national approach to endangered species conservation by other jurisdictions across Canada."[689] Habitat protection measures were introduced in British Columbia in May, 2004 when the Minister issued an order enabling the wildlife management provisions of the *Forest and Range Practices Act* to be used to protect habitat for species listed under the *IWMS.*[690] Thus, although there is some habitat protection afforded species protected under the *IWMS* in BC, it is limited to the 1% cap on its impact on the provincial timber supply. The proposed legislation in both the Yukon and the Northwest Territories will adopt an approach to habitat identification and protection that mirrors that found in SARA.

While the foregoing review demonstrates that the statutory provisions governing habitat protection vary substantially across Canada, nearly all jurisdictions enable the provinces to provide some form of habitat protection for species at risk. Moreover, many of the provinces included habitat identification and protection in their endangered species legislation following the introduction of the federal endangered species legislation. It is possible to conclude, therefore, that the potential threat of federal interference in provincial jurisdiction likely provided some impetus into the creation of improved provincial legislation. However, this threat, as it is now embodied in SARA's safety net has not been sufficient to bring about effective habitat protection at the provincial level.

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[687] *Endangered Species Act,* S.N.L. 2001, c.E10.1, s.28; *Endangered Species Act*, S.N.S.1998, c. 11, s.16.
[688] S.S. 1998, c.-W13.12, s.50.
[689]Alberta, Legislative Assembly, *Hansard,* May 14, 1996 at 4:30 (Amery).
[690]Government of British Columbia, Ministry of Water, Land, and Air Protection, online: <http://wlapwww.gov.bc.ca/wld/recoveryplans/rcvry1.htm>

Since provincial habitat protection, for the most part, remains subject to political discretion whether or not a province will provide effective habitat protection depends on how the legislation is implemented. Even where habitat protection is mandatory, effective protection is not necessarily assured. For example, since over 90% of PEI's land is owned privately, and the legislation applies only to Crown land, the majority of habitat protection measures undertaken in the province are strictly voluntary.[691] Similar problems exist in Nova Scotia. Accordingly, a determination of whether or not the provinces have met the standard of effective protection of critical habitat for listed species turns on the degree to which habitat has in fact been both identified and protected. What must be considered, however, is that the current threat value of the safety net has been severely restricted by the federal government's failure to identify critical habitat in most recovery plans posted on the public registry. Indeed, as of June, 2007 the federal government has only identified critical habitat in 16 of 228 recovery strategies.[692] and has only partially identified critical habitat in an additional 10. Consequently, the utility of the safety net as a threat instrument capable of motivating the provinces to act is questionable at the present time.

Due to the limited amount of critical habitat actually identified by the federal government, it is premature to answer the question of whether or not the provinces have provided effective habitat protection efforts on a species by species basis. What can be said is that provincial habitat protection is not particularly well implemented to date. No regulations setting aside habitat for species at risk have been passed in Alberta. As previously noted only one similar regulation has been utilized in Quebec. It was reported by the Canadian Nature Network in 2004, that the quantum of protected land set aside by Manitoba had actually diminished since 2000.[693] Habitat protection is restricted by private land ownership in PEI and Nova Scotia and by the 1% cap on timber sales in British Columbia. Thus, it is evident that the federal implementation of SARA and its safety net for critical habitat have simply not pushed all of the provinces far enough toward providing equivalent, let alone, effective protection for the habitat of endangered species.

While there has been support across Canada for legislation aimed at preserving biodiversity,[694] the political will for such action has clearly been stronger in some regions than others. Some jurisdictions, such as Alberta and British Columbia, have been much slower in adopting programs

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691 *Supra* note 615.
692 Office of the Auditor General of Canada, *2008 March Status Report of the Commissioner of the Environment and Sustainable Development*, (Ottawa, 2008) at 18. Online: < http://www.oag-bvg.gc.ca/internet/English/aud_parl_cesd_200803_e_30125.html>
693 Canadian Nature Network, *Species at Risk: Provincial Report 2004 (Manitoba)*, 2004 at 2.
694 Amos, *supra* note 26 at 145.

and legislation for protecting endangered species. It is worth noting that it is precisely in these two jurisdictions that intergovernmental conflict over the protection of species at risk has been at its peak, as ENGOs have petitioned the federal government to act unilaterally to protect species at risk in both of these jurisdictions. May and Burby's conclusion that cooperative measures may be insufficient to motivate lagging jurisdictions is borne out in the case of Alberta and BC.

In many ways, however, the full impact of federal legislation and the safety net is yet to be seen. The threat of federal involvement in provincial jurisdiction over wildlife species and their habitats which accompanied the development and passage of SARA was enough to bring about some legislative and policy changes at the provincial level. This threat was crystallized in the safety net provisions of SARA. The uncertainty surrounding how the safety net would be interpreted and applied created sufficient fear to motivate the provinces into action. How the federal government chooses to implement the safety net now will likely have a similar impact on how much further the provinces will go in achieving effective protection for species at risk. Most of the provincial officials interviewed revealed that they did not think the federal government would apply the safety net within their jurisdictions over the next five or ten years.[695] It was also suggested that the "feds rely too much on the provinces to invoke the safety net".[696] Thus, the fragility of both the implementation of SARA and the relationship between federal and provincial bureaucrats make the political and practical consequences of invoking the safety net too high. However, this is not to suggest that the safety net has lost its threat value entirely. More specifically, several provinces, including Ontario, Alberta, Saskatchewan, New Brunswick and PEI, noted that the safety net serves as a useful tool for provincial bureaucrats to get species at risk upon the political agenda and to justify law and policy to industry. For example, the safety net has been cited by provincial officials as "part of the sales pitch"[697] to government, or the "pinpoint of blame" for protective measures which cut against development or industrial activities.[698] From this standpoint, it appears that the speculative threat of federal intervention serves to motivate at the political level and has become a tool for provincial bureaucrats as well as federal ones. Finally, those provinces with limited financial capacity suggested that they may welcome the financial and technical expertise that would

[695]NWT, Ontario, Manitoba, BC, Alberta, Saskatchewan, New Brunswick, PEI and Newfoundland all shared this view.
[696] *Supra* note 584.
[697] *Supra* note 640.
[698] Confidential Interview with Ontario government official, June 4, 2007

accompany a safety net application and would in certain circumstances consider requesting federal action on a species by species basis.[699]

Thus, the threat of unilateral action has been shown to be a valuable tool to motivate the provinces to act. However, over time and as a result of the lack of clarity surrounding the federal government's implementation of SARA generally and the safety net in particular, the effectiveness of this threat as a policy instrument has diminished. Given the political consequences associated with an actual invocation of the safety net, many provinces no longer view the safety net as a credible threat. However, international pressure in the form of the CEC's call for a factual inquiry into the federal government's failure to enforce SARA may go some distance toward moving Ottawa into reasserting its authority to protect species throughout Canada where the provinces have failed to do so. The federal government could reinvigorate the threat value inherent in the safety net by establishing clear criteria as to the circumstances in which it would be invoked, as was proposed by both the House and Senate Committees that reviewed SARA. This step would lend certainty and accountability to provincial governments and the public alike as to what precisely will constitute effective protection and upon which federal and provincial actions may be judged.

The historical evidence raised in chapter 3 on the use of similar safety net provisions supports the position shared by provincial officials that the safety net will not likely be used by the federal government. The federal government has only taken the step of applying the safety nets canvassed in chapter 3 once. Specifically, in 2003, when the federal government finally utilized the safety net contained in section 46 of CEAA and referred one project to a review panel to examine its transboundary effects, the six month delay in initiating the review resulted in the federal court rejecting the panel's findings on the basis that the project was no longer a proposed facility. The federal government never exercised its authority over water management and resources in the *Canada Water Act*. And although the federal government threatened Ontario with the invocation of CEPA's transboundary air pollution safety net, it never took the step of actually undertaking unilateral action to resolve the NOX emissions which put Canada in danger of breaching its agreement with the U.S. over controlling ground level ozone and smog. For the most part the federal government has chosen to negotiate with the provinces to resolve environmental issues rather than taking the more politically costly step of acting unilaterally to protect the environment. Moreover, these negotiated solutions are often arrived at with little or no accountability to the public. In the two cases where the federal government has in fact threatened to use unilateral action during

[699] Manitoba, Saskatchewan, and Northwest Territories indicated that they may make this type of request.

negotiations – namely, in respect of Ontario's NOx emissions and BC's spotted owl, the offending provinces have responded by developing policies to resolve the problem. But in both cases, the measures offered were suboptimal. It is argued therefore that although the threat of unilateral action has provided the impetus to bring about some improvements in provincial environmental protection, it has not been sufficient to create the kind of change necessary to meet the shortfall. The actual use by the federal government of its unilateral powers may go some distance towards breaching the gap. SARA is one of Canada's most recent and important pieces of federal environmental legislation. Its development, passage and implementation to date have been more than ten years in the making. Within its political and constitutional framework lies the threat of federal interference in provincial jurisdiction over the management of wildlife and natural resources. Similar threats to provincial jurisdiction have been operative in several other environmental contexts and generally arise with the federal intent to legislate. In each case, the result has, for the most part, been the same. Provincial opposition to federal interference has resulted in the federal government adopting a cooperative, if not deferential, approach to environmental protection and conservation. However, the threat persists, most often within the existence of a federal safety net device. The provinces have generally responded to both the initial threat and that embodied in the safety net provisions of the particular statute by improving their own law and policies in an attempt to protect and maintain their jurisdiction over environmental matters, and more importantly, the natural resources upon which they usually rest.

In SARA's case, this threat first became apparent in 1994 with the federal government's announcement that it would produce national endangered species legislation. This threat had the effect of motivating the provinces to make legislative and policy improvements to better protect endangered species within their borders, and in so doing, colonize their jurisdictional interests over wildlife and their habitats. The changes undertaken by the provinces over the last ten years have resulted in increased listing, wider protections against direct harm, improved habitat protection and the development of more recovery plans. All of these efforts have contributed to a higher standard of protection for species at risk across Canada. These changes are all at least partially attributable to the development, passage and implementation of SARA. However, the threat value of federal interference present in the safety net has diminished over time as the federal government has struggled to implement SARA generally and the safety net in particular. Moreover, to the extent that the federal government does not exercise this threat, its ability as a policy instrument to achieve the objective of providing effective protection for species at risk may be compromised. To date, the effective protection required by SARA's safety nets has not been achieved. Provincial listing remains substantially below the number of endangered and threatened species included on SARA's schedule I. This means that without federal intervention many species are continuing to fall between the cracks in provincial and federal legislation. Indeed, if Canada is to save the spotted owl, the woodland caribou, the tiny cryptanthe, the small flowering sand verbena and other species on the brink of extinction, the federal government may have to do more than simply shake its gloved fist at provincial inaction.

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