A CASE FOR REINTERPRETING THE CANADIAN FEDERAL CONSTITUTIONAL POWER OVER SPECIES AT RISK

by

SARAH MAGILL YOUNG

B.Sc., The University of British Columbia, 2002

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF SCIENCE

in

THE FACULTY OF GRADUATE STUDIES

(Forestry)

THE UNIVERSITY OF BRITISH COLUMBIA

April 2007

© Sarah Magill Young, 2007
ABSTRACT

This thesis examines the potential for reinterpreting the Canadian Constitution Act, 1867 as a possible avenue for improving the effectiveness of species-at-risk protection in order to ensure that Canada meets its international commitment to the Convention on Biological Diversity. I also argue that Canada’s federalist structure, and correspondingly divided jurisdiction, currently impedes effective species-at-risk protection and change is needed.

First, the context of the issue is examined by way of a literature review. I address the role of Canada’s constitution and constitutional structure in species-at-risk protection, and the consequent impacts that a divided jurisdiction has on relevant legislation. I explain the dominant role that the provincial and territorial governments currently play in species-at-risk protection, and explain the more limited federal role. I also address the issue of constitutional interpretation, and argue that the current constitutional interpretation should reflect changing societal values and environmental circumstances. Second, is a review of the existing species-at-risk legislation on federal and provincial levels in Canada. I provide an assessment of this legislation, and show that provincial performance is deficient and that the federal government’s legislation is more comprehensive. Third, a comparative case study analysis is performed, using the case of another Commonwealth nation, Australia, to demonstrate a constitutional mechanism and justification for greater federal involvement in species-at-risk protection. The Australian case correlates well to the Canadian situation because Australia has a similar constitutional structure to Canada, and like the Provinces, the Australian States have jurisdictional control over species-at-risk.

I then use these three components to argue for increased federal jurisdiction over species-at-risk protection in Canada. There is the constitutional means for this shift to occur; there is evidence that the current constitutional interpretation is not functioning to provide effective species-at-risk protection; and there is evidence from the Australian case study that a reinterpretation of constitutional responsibilities is one way for Canada to improve species-at-risk protection and thereby meet the commitments it made under the Convention on Biological Diversity.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>ii</td>
</tr>
<tr>
<td>TABLE OF CONTENTS</td>
<td>iii</td>
</tr>
<tr>
<td>LIST OF TABLES</td>
<td>v</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>vi</td>
</tr>
<tr>
<td><strong>1.0 INTRODUCTION</strong></td>
<td>1</td>
</tr>
<tr>
<td>1.1 The Issue</td>
<td></td>
</tr>
<tr>
<td>1.2 Context</td>
<td>1</td>
</tr>
<tr>
<td>1.2.1 The Convention on Biological Diversity</td>
<td>1</td>
</tr>
<tr>
<td>1.2.2 The Importance of Biodiversity Conservation</td>
<td>2</td>
</tr>
<tr>
<td>1.2.3 Role of the Constitution and Constitutional Structure</td>
<td>5</td>
</tr>
<tr>
<td>1.2.4 Intentional Vagueness of the Constitution Act, 1867</td>
<td>7</td>
</tr>
<tr>
<td>1.2.5 Division of Powers in Canada</td>
<td>8</td>
</tr>
<tr>
<td>1.2.6 Provincial Powers Relating to the Environment</td>
<td>8</td>
</tr>
<tr>
<td>1.2.7 Federal Powers Relating to the Environment</td>
<td>9</td>
</tr>
<tr>
<td>1.2.8 The Federal Residual Power</td>
<td>11</td>
</tr>
<tr>
<td>1.2.9 Restrictions on Federal Power</td>
<td>14</td>
</tr>
<tr>
<td>1.2.10 The Accord for the Protection of Species at Risk</td>
<td>14</td>
</tr>
<tr>
<td>1.2.11 The Impacts of Divided Jurisdictional Authority over Species-at-Risk protection</td>
<td>15</td>
</tr>
<tr>
<td>1.3 Research Goals/Objectives</td>
<td>16</td>
</tr>
<tr>
<td>1.4 Thesis Outline</td>
<td>17</td>
</tr>
<tr>
<td><strong>2.0 METHODS</strong></td>
<td>18</td>
</tr>
<tr>
<td><strong>3.0 CASE STUDIES</strong></td>
<td>20</td>
</tr>
<tr>
<td>3.1 The Canadian Example</td>
<td>20</td>
</tr>
<tr>
<td>3.1.1 Overview of the evolution of Canada’s federal role in environmental policy</td>
<td>20</td>
</tr>
<tr>
<td>3.1.2 Existing federal legislation</td>
<td>21</td>
</tr>
<tr>
<td>3.1.3 The Species at Risk Act</td>
<td>22</td>
</tr>
<tr>
<td>3.1.4 Recovery of Nationally Endangered Wildlife (RENEW) Program</td>
<td>29</td>
</tr>
<tr>
<td>3.1.5 Overview of provincial legislation across Canada</td>
<td>29</td>
</tr>
<tr>
<td>3.1.6 Effectiveness of Provincial and Federal Legislation</td>
<td>43</td>
</tr>
<tr>
<td>3.1.7 Canada’s implementation of international conventions</td>
<td>46</td>
</tr>
<tr>
<td>3.2 The Australian Example</td>
<td>46</td>
</tr>
<tr>
<td>3.2.1 Constitutional structure in Australia: an Overview of the Relevant Components</td>
<td>46</td>
</tr>
<tr>
<td>3.2.2 Federal involvement over the environment</td>
<td>47</td>
</tr>
<tr>
<td>3.2.3 Commonwealth Powers of Importance to the Environment and Species-at-Risk</td>
<td>47</td>
</tr>
<tr>
<td>3.2.4 The External Affairs Power (section 51[xxix])</td>
<td>48</td>
</tr>
<tr>
<td>3.2.5 The Shift in Power from the States to the Commonwealth</td>
<td>49</td>
</tr>
<tr>
<td>3.2.6 Early Legal Cases</td>
<td>50</td>
</tr>
<tr>
<td>3.2.7 Recent Legal Cases</td>
<td>52</td>
</tr>
<tr>
<td>3.2.8 Reasons for the Shift in Power</td>
<td>62</td>
</tr>
<tr>
<td>3.2.9 What legislation exists federally to protect species at risk?</td>
<td>65</td>
</tr>
<tr>
<td>3.2.10 To what extent does Australia apply relevant international laws and conventions?</td>
<td>71</td>
</tr>
</tbody>
</table>
**LIST OF TABLES**

<table>
<thead>
<tr>
<th>Table 1</th>
<th>Summary Table of Provincial and Federal Performance against the Accord Criteria</th>
<th>45</th>
</tr>
</thead>
</table>
ACKNOWLEDGEMENTS

I would like to thank my thesis supervisor, Dr. Paul Wood, for the invaluable guidance and support he has provided to me over the course of my graduate years. I would also like to acknowledge my gratitude to my thesis committee, Drs. John Innes and Gary Bull of the Faculty of Forestry, and Dr. Tory Stevens of the Ministry of Environment, for their valuable input. I am also extremely grateful to my parents, Jenny and Larry Young, for their support in any and all ways during the past three years. Many thanks also go to my parents-in-law, Kris Sivertz and Bill Abbott, both for their support and the use of their house as my own personal office. Lastly, thank you to my fiancé, David Abbott, and my many friends and colleagues for their encouragement as I made my way to the finish line!
1.0 INTRODUCTION

1.1 The Issue
In 1992, Canada signed the Convention on Biological Diversity (CBD), and in doing so, committed to implementing the 42 articles stipulated by this convention. One of the principal goals of the CBD is the conservation of biological diversity. However, at present, Canada has not fulfilled its commitments to this international convention. Increased federal jurisdiction over biodiversity protection in general, and over species-at-risk protection more specifically, is one way that could help Canada to meet these commitments. This thesis will examine how the effectiveness of biodiversity and species-at-risk protection could be improved with greater federal jurisdiction in this arena.

1.2 Context

1.2.1 The Convention on Biological Diversity
The Convention on Biological Diversity is one of the key agreements that resulted from the Earth Summit in Rio de Janeiro. Article 1 states the overall objectives of the Convention, which are: “the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”

The most relevant section of the CBD in terms of biodiversity and species-at-risk protection is Article 8, “In-situ Conservation.” This section lists very specific responsibilities for each contracting party (see Appendix 1 for the complete text of Article 8). In brief, Article 8 states that each signatory nation shall, to as great an extent as possible, conserve its native ecosystems and the components of these ecosystems. The responsibilities listed in Article 8 can be divided into three categories of required legislation: legislation to create and manage protected areas, legislation to protect biodiversity and land outside of protected areas, and legislation to protect species at risk (Wood and Flahr 2004: 382). Accordingly, under the Convention each signatory country must develop and implement legislation for each of these three categories in order to
fulfill its commitment. At present, Canada has not sufficiently met the conditions listed in terms of species-at-risk protection. More specifically, Canada has not adequately “develop[ed] or maintain[ed] necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.” This claim will be further discussed in later chapters of this thesis. Canada’s fulfillment of the requirements for legislation regarding protected areas and the matrix of land outside protected areas will not be addressed in this thesis.

1.2.2 The Importance of Biodiversity Conservation

Defining biodiversity is a complex undertaking. Throughout the scientific community, there are many diverse definitions of biodiversity (Norton 2003: 11). Within these variations, two distinct categories of definitions can be identified. The first of these categories is ‘inventory-style definitions,’ and the second is ‘difference definitions’ (Norton 2003: 11). A standard inventory-style definition states that biodiversity is composed of genetic diversity, species diversity, and community-level diversity (Primack 1993: 23). This is currently the most prominent type of definition (Norton 2003: 11). Another example of this type states that biodiversity is composed of the variety of living organisms in an ecosystem, and the manner in which these organisms interact with this ecosystem and with each other (US Congress 1987: 313). In contrast to inventory-style definitions are difference definitions. Difference definitions “emphasize the differences and associated complexities and interrelations among biological entities,” and view biodiversity as an emergent property¹ of groups of species (Norton 2003: 12). The primary distinction between these methods of defining biodiversity can be distilled: “difference definitions emphasize differences among entities rather than inventorizing/listing entities that exemplify differences” (Norton 2003: 12).

Difference definitions illustrate the biology underpinning our understanding of biodiversity, while inventory-style definitions serve the interests of practicality and ease of communication for policy-makers (Norton 2003: 16).

¹ An emergent property is a property possessed by a system but not possessed by the individuals that compose the system.
It is widely acknowledged among scientists that species diversity and biodiversity in general should be conserved (Ehrlich and Wilson 1991: 758; Myers et al. 2000: 853; Pimm et al. 2001: 2207). In fact, the World Charter for Nature states that, "...life depends on the uninterrupted functioning of natural systems ... upon the maintenance of essential ecological processes and life support systems, and upon the diversity of life forms..." (United Nations 1982). However, a large number of species are threatened by extinction each year around the world, and these numbers are increasing (Pimm et al. 2001: 2207). Extinction rates have been estimated to be as high as 100 to 1000 times the levels they were at in pre-human times (Pimm et al. 1995: 347), and in the next fifty years, between 10% and 50% of the world’s existing biodiversity is at risk of disappearing (Thomas et al. 2004; Mace, Possingham and Leader-Williams 2007: 17).

One way to rationalize the protection of biodiversity is to outline the values that come from its conservation. Broadly, the types of values placed on biodiversity can be divided between “instrumental” and “intrinsic.” Instrumental values are those that provide a function. This function could be to provide a resource (be it economic or cultural), it could be aesthetic, or it could be to maintain an ecological condition. On the other hand, intrinsic values attempt to remove the rationale for conserving biodiversity out of the frame of reference from which humankind usually views the world: where we have “taken [ourselves] as absolute and value[d] everything else relative to [our] utility” (Rolston 2003: 484).

There are many types of instrumental values that can be assigned to biodiversity, and generally these values can be divided between “direct” values and “indirect” values (Primack 1993: 203). Direct values are analogous to the value of biological resources, and come from products of biodiversity that are harvested and used by humans (for example, logging a forest). A cultural value could also be a direct value. An example would be the value that Canada’s Aboriginal population places on a beluga whale hunt or on the salmon fishery. Indirect values are analogous to aesthetic values, and also to those that value the contribution biodiversity makes to maintain an ecological condition.
Indirect values come from benefits of biodiversity that are nonconsumptive (for example, the improved soil or water quality that comes from a healthy, diverse forest) (Primack 1993: 203). Another nonconsumptive value is called a “non-use” or “existence” value, and this value is a measure of people’s willingness to pay for the conservation of biodiversity, even if they will not gain any direct use or benefit from it (for example, a person’s willingness to pay for the conservation of a tropical forest, even without ever having visited or gained anything from one) (Groombridge 1992: 415; Pearce, Hecht, and Vorhies 2007: 40). However, these values are flawed in the sense that they find merit in the resources and services which biodiversity provides us with, rather than in biodiversity itself. An appropriate metaphor for the deficiency of these values is that this view “...mistakes one fruit for the whole plant” (Rolston 2003: 481-482), neglecting to account for the values of biodiversity not reaped or profiteered by humans.

Another type of value which addresses this issue is intrinsic value. There are at least two different interpretations of the concept. The general perception of the claim that ‘species X has intrinsic value,’ is interpreted to mean that ‘species X has value in and of itself, regardless of whatever values are placed on it by others’ (VanDeVeer and Pierce 2003: 455). This is a moral consideration. An alternate interpretation of this claim is that ‘species X has values to others, for its own sake’ (VanDeVeer and Pierce 2003: 455). This is viewing intrinsic values from the point of view of the rights of an individual. However, this interpretation of intrinsic value is therefore reliant on the existence of someone other than species X in order to possess value, and therefore species X loses its ability to be of value simply in and of itself. The concept of a species’ intrinsic value is complex, and becomes even more complicated when the intrinsic values of a compilation of species are viewed in the “holistic web” of biodiversity (Rolston 2003: 483).

In recent years, the notion of the value of biodiversity has been taken beyond these standard justifications, and it has been stated that biodiversity can be thought of as an “essential environmental condition” (Wood 2000: 40), or that biodiversity is a concept beyond being more than merely the sum of the component genes, species, and ecosystems from which it is compiled (Wood and Flahr 2004: 384). Expressed another
way, the value of a composite of individual species and ecosystems is increased in the "emergent climax" of biodiversity itself (Rolston 2003: 483). This assertion counters the conservative ethical argument that "only organisms are real, actually existing as entities, whereas ecosystems are nominal – just interacting individuals" (Rolston 2003: 480). There are many reasons and justifications for the value placed on biodiversity, and whether these reasons are instrumental or intrinsic, it is clear that the need for its conservation is real and imminent.

1.2.3 Role of the Constitution and Constitutional Structure

In a Western liberal democracy, the Constitution is the highest law of the land, whose purpose is to identify and defend national values (Hogg 2005: 1). The Constitution also articulates the division of power within a state, and protects civil rights and freedoms (Hogg 2005: 1). Unlike in most federalist nations, there is no single Canadian document that can be considered to be a constitution as it is normally defined. Instead, Canada’s Constitution consists of three components, as defined in section 52(2) of the Constitution Act, 1982: the Canada Act, 1982, an Act of the British Parliament, which includes the Constitution Act, 1982; a list of 30 Acts mostly of British origin and orders in the schedule to the Constitution Act, 1982, which includes the Constitution Act, 1867 and its amendments; and also any additional amendments which may be made in the future to the Canada Act, 1982 or to the 30 Acts and orders in the Constitution Act, 1867 (Hogg 2005: 7).

In terms of a single constitutional document, the closest approximation Canada has is the Constitution Act, 1867. This Act had its origins in 1867, when it was passed by British Parliament (the Act was previously called the British North America Act (BNA Act)) (Hogg 2005: 3). The BNA Act formed the new Dominion of Canada, but did not enact all of the constitutional regulations, and indeed did little beyond what was required to attain confederation (Hogg 2005: 3). In 1982, constitutional amendment authority was patriated from Britain to Canada, when the United Kingdom passed the Canada Act,

2 The usual definition names the Constitution as the single document containing all of a country’s constitutional law (for instance, in the case of the United States).
Accordingly, no Parliamentary Act passed in Britain after that time could extend to Canada. Also in 1982, the Canadian Charter of Rights and Freedoms was passed in order to constitutionally entrench the basic rights and freedoms of Canadian citizens. The Charter is located in Part I of the Constitution Act, 1982, which is located in Schedule 3 of the Canada Act, 1982.

The Constitution Act, 1867 assigns jurisdictional authority in Canada. During the transition to becoming the Constitution Act, 1867 (i.e., when the BNA Act was renamed), the only significant amendment related to the division of federal and provincial jurisdiction was the addition of Section 92A, which gives the provinces greater control over natural resources. However, aside from adding a taxation power, this section did not grant increased authority over the environment to the provinces, it only served to clarify their pre-existing authority (Harrison 1996: 34).

Aside from these documents, there are three other sources of Canadian constitutional law: case law, prerogatives, and conventions. Case law is the law resulting from judicial rulings (Hogg 2005: 14). Decisions made in court rulings form a set of precedents, which have the ability to influence later court decisions and interpretations of the Constitution (Hogg 2005: 14). Prerogative refers strictly to powers that are held by the federal government as a result of the common law (Hogg 2005: 16). Prerogative can also be described as the “residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown [i.e., federal government]” (Dicey in Hogg 2005: 15). Finally, conventions are “non legal-rules,” which are not directly written into the Constitution but have an important influence on constitutional law, and are influential in the application of the Constitution (Hogg 2005: 19). Conventions have the power to alter even the “supreme law” of the Constitution, and allow the Constitution to reflect changing societal values (Heard 1991: 1).

---

3 Because decisions of the court have prescribed its existence and scope, the prerogative is considered to be a division of the common law (Hogg 2005: 16).
It is also important to note that the Constitution Act, 1867 is notoriously vague with respect to the jurisdiction of environmental powers (Lucas 1986: 34). When the BNA Act was written in 1867, the environment, as we now consider it, was not of concern, and jurisdictional authority over the environment and its resources was not explicitly mentioned. As a result, both federal and provincial environmental power is derived from other fields and applied to the environment (Harrison 1996: 32), and specifics such as ‘species-at-risk protection’ are not mentioned in the Canadian constitutional documents.

1.2.4 Intentional Vagueness of the Constitution Act, 1867

The wording of the Constitution Act, 1867 is intentionally vague so as to allow for reinterpretation over time (Heard 1991: 1; Harrison 1996: 31; Hogg 2005: 415). The text of the Constitution is meant to be interpreted broadly, and to change and progress as values in society shift (Hogg 2005: 415). The words of the Constitution were not meant to be strictly interpreted the way they would have been read in 1867 when the Constitution came into force (Hogg 2005: 414). Further to this, a rigid and archaic interpretation of the Constitution has the potential to deny the Parliament and Legislatures of “necessary” powers (Hogg 2005: 416). This is especially true because constitutional amendments are rare, and adaptations to the constitution resulting from changing societal priorities are primarily left to the courts (Hogg 2005: 416). Indeed, over time, as precedents amass, judicial decisions may become more important than the original words of the Constitution (Hogg 2005: 416).

While normally these reinterpretations are referred to in social, economic, and technological terms (2005: 416), this principle can also be applied to changing environmental conditions, or to our understanding of environmental conditions (Wood 2000: 19). Environmental concerns are equally valid for constitutional reinterpretation as social, economic, or technological reasons. It is this latter type of constitutional reinterpretation that will be the emphasis of this thesis.
1.2.5 Division of Powers in Canada

Canada is a federalist country. Accordingly, legislative powers are divided between a central, federal government and the regional provincial (or state) governments (Hogg 2005: 130). In a federalist nation, federal and state or provincial governments are granted power from the same federal constitution, each with assigned areas of jurisdiction (Scruton 1982: 170). Under normal circumstances, each level of government is prohibited from intervening in affairs not under its own jurisdiction, and the state or provincial government is not a branch or subsidiary of the federal government (Scruton 1982: 170).

There are two conditions required for the formation of a federalist nation. First, there must be a collection of countries that are connected closely enough so as to be able to share a “common nationality” (Dicey 1959: 141). Second, the inhabitants of the areas proposed to unite must want to become a united nation, while at the same time have a willingness to acknowledge the sovereignty of the member states or provinces (Dicey 1959: 143).

As a federalist nation, Canada is faced with challenges not encountered by other countries with unitary systems of government. Land-use planning in Canada is multi-jurisdictional, and as a result both the federal and provincial/territorial governments have roles to play in policy-making regarding species at risk. These roles are determined by the current interpretation of the Constitution Act, 1867.

1.2.6 Provincial Powers Relating to the Environment

The provinces have extensive jurisdictional authority over the environment. This authority is expressed in both legislative as well as proprietary powers (Harrison 1996: 33). There are three sections of the Constitution Act, 1867, sections 92, 92A and 109, which assign jurisdictional control of the environment and its resources to the provinces.

Section 92 lists 17 areas where the provinces have authority to create legislation. Most significant to species-at-risk protection are sections 92(5) and 92(17), which assign
jurisdiction over “the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon,” and “Non-Renewable Natural Resources, Forestry Resources and Electrical Energy,” respectively. Accordingly, Section 92(5) grants the provinces authority to legislate with respect to provincial crown resources (Skogstad and Kopas 1992: 45; Harrison 1996: 33).

In Section 92A, the first subsection, Section 92A(1), is of the greatest relevance to species-at-risk protection. It states that the provinces have jurisdiction to make laws relating to the “exploration for non-renewable natural resources in the province,” and also the “development, conservation and management of non-renewable resources, natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom.” Accordingly, this power extends to most species and their habitats.

Finally, in Section 109, explicit ownership of all public lands, mines and minerals within provincial boundaries (aside from federally-owned land) is bestowed on the provinces, as is the authority to conserve these resources (Harrison 1996: 33). This section gives the provinces even more extensive power over species’ habitats.

History also plays a role in the breadth of provincial power in the environmental arena. From the outset, the provinces have played a greater role in environmental policy-making than has the federal government. By the late 1960s, when the federal government first expressed an interest in environmental policy-making, the provinces had already created a collection of provincial legislation with a deep-seated constitutional base, and as a result, the federal government has had to accommodate this existing body of legislation relating to the environment (Morton 1996: 41).

1.2.7 Federal Powers Relating to the Environment

Jurisdictional power over the environment generally resides with the provinces, but this power is not without constraints. Since the 1970s there have been several Supreme Court
rulings that imply increased willingness of the Court to allow federal jurisdictional infringement over provincial rights to Crown resources, and several more recent cases provide confirmation of this trend (Harrison 1996: 33). In addition, it is commonly accepted that matters that are essentially local to the provinces should be dealt with as such, and those that are national or international in scope dealt with by the federal government (Lucas 1986: 33; Skogstad and Kopas 1992: 46). Additionally, the provinces are restricted from passing laws that focus on extra-provincial interests (Harrison 1996: 35), and the Constitution Act, 1867 stipulates that such matters are under the jurisdiction of the federal government (s 92(10)(a)). It is also important to note that provinces are prohibited from creating legislation in areas of federal jurisdiction (and vice versa). To do so would be considered ultra vires, which refers to an infringement on the jurisdictional power of another body, or an action that is “beyond those powers conferred by law” (Scruton 1982: 473). There are exceptions to this rule which will be discussed further in a later section of this thesis, including the case of the federal residual power, which includes the national concern and provincial inability tests.

In addition to the restrictions placed on provincial power, there are also powers explicitly granted to the federal government. The legislative powers of the federal government are listed in Section 91 of the Constitution Act, 1867. These powers are not explicitly related to species-at-risk protection, but rather are broader and affect the entire environmental arena. The federal government has explicit authority over federal lands, and s 91(1a) provides the federal government jurisdiction to create legislation affecting these resources. Most of the land base in Canada is not federally owned, however, and most of the land under federal jurisdiction is located in the territories and offshore. There is federal land within the provinces (e.g., national parks, Indian reserves, military reserves), but because it is somewhat scattered, federal ownership of this land does not form a strong enough base to support conservation efforts (Harrison 1996: 36).

---

4 For example, the Oldman Dam case (Friends of the Oldman River Society v. Canada, 1992 [1 S.C.R. 3]) and the Rafferty-Alameda case (Canadian Wildlife Federation Inc. v. Minister of the Environment, 1989) [3 F.C. 309 (T.D.)].
There are also sections of the constitution that have indirect impacts on federal jurisdiction over the environment. These include the federal trade and commerce power (s 91(2)), which can affect provincial regulation in mining and land use. There is also federal power over shipping and navigation, which could be used to control or restrict the construction of dams, bridges or other developments which could potentially (if somewhat indirectly) impact the environment (Campbell 2000: 25), and section 91(12) grants federal authority over seacoast and inland fisheries. While it is doubtful that the original responsibilities of the federal fisheries power included conservation efforts, in recent years federal legislation to prevent the degradation and pollution of fish habitat has been endorsed in the courts as legitimate (Morton 1996: 44). It is also possible for the federal government to enter into international agreements relating to the environment (Skogstad and Kopas 1992: 44). However, it should be noted that if the legislation required under the international agreement is under provincial jurisdiction, the agreement of the provinces must be obtained first (Morton 1996: 44).

1.2.8 The Federal Residual Power

Section 91 provides the potential power for the federal government to influence the environment on a greater scale. Most broadly, this section of the Constitution Act, 1867 states that “any matter which does not come within a provincial head of power must be within the power of the federal Parliament” (Hogg 2005: 442). Section 91 designates the federal parliament with the residual power to create laws for the ‘Peace, Order and good Government of Canada’ (the POGG clause). The opening paragraph of section 91 of the Constitution Act, 1867 states:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated.
The extent of the POGG power and its potential effects on the environment are notoriously contentious, and a source of debate (Harrison 1996: 42; Morton 1996: 45). There are two specific interpretations, or branches, of this power. First is the ‘emergency doctrine,’ which provides the federal government with temporarily extensive power (including in areas normally of provincial jurisdiction) during a crisis of national or international proportions. The designation of POGG power for an environmental emergency is not a common occurrence, and the courts must approve any instigation of this power (Harrison 1996: 43). The second interpretation of this power is the ‘national concern’ branch, which allows the courts to provide federal authority over matters not officially designated under any jurisdiction, but that reach beyond local or provincial concerns (Harrison 1996: 43; Hogg 2005: 452).

The national concern test is the interpretation with the greatest potential to expand the application of federal jurisdiction over matters including environmental protection. However, the degree to which this branch of POGG can provide the opportunity for increased federal involvement in the environmental arena has been extensively debated over the past several decades. The main reason for this debate is that it has been very difficult to ascertain exactly what constitutes a matter of concern to the nation as whole in order to qualify under the national concern test (Hogg 2005: 452). It is clear that to be considered a matter of national concern, the matter must be important or relevant to Canada as a whole, but defining the boundaries of this subjective concept is a difficult task. Two Supreme Court of Canada cases, Johannesson\(^5\) and Munro\(^6\), could have potentially provided clarification on the matter. However, the only useful conclusion to be drawn from these cases is an impression that the test for the level of national concern perceived in an issue is largely determined by its level of nation-wide significance (Hogg 2005: 452).

The Foreign Affairs section of the Constitution (s 132) has also generated interest with respect to the POGG power. The implementation of international agreements has some potential applicability under the POGG clause (Harrison 1996: 43), and the fact that an

\(^5\) Johannesson v. West St. Paul, 1952 (1 SCR 292)
\(^6\) Munro v. National Capital Comm., 1966 (SCR 663)
international treaty exists on a subject should be taken as evidence that it is a matter of national concern (Gibson 1973: 84). A Supreme Court decision in the Crown Zellerbach case\(^7\) indirectly supports this argument (Harrison 1996: 43), and indicates the court’s willingness to explore the limits of federal authority over the environment. In this case, a pulp and paper company was dumping waste into provincially controlled sea waters, and the Crown petitioned for the application of the national concern branch of POGG to uphold the federal Ocean Dumping Control Act (Morton 1996: 46). This motion was accepted, and as a result, conferred “a prima facie\(^8\) legitimacy” on federal influence in nearly any environmental matter considered to be a subject of national concern (Morton 1996: 46).

The ‘provincial inability’ test was established out of this ruling as a new criterion for the national concern test. The provincial inability test declares that if an intraprovincial matter is not sufficiently dealt with, and the consequences could be extraprovincial in nature, the matter could qualify for the national concern test. In other words, there is a situation of provincial inability when “the failure of one province to act would injure the residents of the other (cooperating) provinces” (Hogg 2005: 453).

The Oldman Dam case\(^9\) also questioned the relevance of federal or provincial jurisdiction over the environment. In this case, it was confirmed by the court that “the environment” is too broad a subject matter to determine precisely whether it is under the jurisdiction of either the federal or provincial government (Harrison 1996: 49), and also bestowed upon the federal government authority over areas considered up to that point to be strictly under provincial jurisdiction (Morton 1996: 49).

---

\(^7\) R. v. Crown Zellerbach, 1988 (1 SCR 401)

\(^8\) *Prima facie* literally translates to “at first appearance,” and in context, means “unless the contrary is shown” (Clapp 2000: 340).

\(^9\) *Friends of the Oldman River Society v. Canada* (Minister of Transport), 1992 (1 SCR 3)
These cases and their outcomes could have implications in the arena of biodiversity protection, as Canada has ratified several international treaties of relevance to this field, and could be of great importance in determining the extent to which the federal government should be involved in environmental protection (Harrison 1996: 44).

1.2.9 Restrictions on Federal Power
The general lack of clarity over the use of the POGG power, as well as the uncertainty about the extent of federal jurisdiction over the environment as prescribed by the Constitution, present an overall constraint on federal power (Campbell 2000: 27). The courts have also generally restricted the use of the national concern test to relatively contained and non-controversial matters (Morton 1996: 46), and because environmental legislation issues, including species-at-risk policy matters, could be considered controversial, this potentially reduces the usefulness of the POGG clause.

1.2.10 The Accord for the Protection of Species at Risk
To ensure the implementation of sufficient species-at-risk legislation by each province and territory as agreed to by Canada under the CBD, in 1996 the federal government initiated an agreement between the federal and provincial/territorial governments, called the Accord for the Protection of Species at Risk. The Accord is not legally binding. Under the Accord, the wildlife ministers for the federal, provincial, and territorial governments committed to a “national approach for the protection of species at risk” (Government of Canada 2003). The provinces and territories agreed to create legislation for the protection and recovery of species at risk in their respective jurisdictions. There are 15 specific requirements for the legislation created out of the Accord, which are listed in Appendix 2.

---

10 For example, the Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Kyoto Protocol, the RAMSAR Convention, the Montreal Process (Santiago Declaration).
1.2.11 The Impacts of Divided Jurisdictional Authority over Species-at-Risk protection

As outlined above, the provinces maintain most of the authority over land-use and environmental resources. This jurisdictional division has created obstacles to effective species-at-risk protection in Canada. The Accord stipulates what the provinces and territories are required to do, and indeed agreed to do, in order to fulfill their constitutional responsibility to protect species at risk and biodiversity, but there is evidence that the provinces have either failed to enact sufficient legislation, or have failed to implement the relevant legislation. Because responsibilities concerning international treaty implementation are constitutionally unclear, the federal government has undertaken this role thus far (Government of Canada 2002). This leaves the federal government in a position of neglect concerning an international treaty. This position, however, is in great part due to negligence on behalf of the provinces and territories. If the federal government had greater constitutional authority over its ability to implement its international obligations for the protection of species at risk, then Canada would be able to fulfill its obligations under the Convention on Biological Diversity.

These facts suggest that if a limiting factor in the protection and recovery of species at risk in Canada is the federal government’s limited jurisdiction in this arena, then constitutional reinterpretation to grant the federal government greater jurisdiction over species at risk may be one way to improve the effectiveness of biodiversity protection in Canada. A necessary first step is to determine if a shift in jurisdiction over environmental matters from the provinces to the federal government is possible. To explore the feasibility of this shift, in this thesis, I compare Canadian and Australian constitutional law as it pertains to the environment. I will examine how Australia has shifted toward greater federal involvement in environmental matters because of past negligence by the States to take action in this area despite their constitutional responsibility.

11 While section 132 of the Constitution Act, 1867 gives the federal government power to apply international treaties signed by Britain for Canada, it does not give the federal government authority to apply international treaties Canada has signed independently (Campbell 2000: 28). This is due to the fact that the framers of the Constitution did not anticipate Canada gaining independence from Britain.
1.3 Research Goals/Objectives

There have been many attempts made in the related literature to determine ways to improve the effectiveness of species-at-risk legislation in Canada, and this thesis also addresses this problem. The main questions to be answered by way of this study are:

- Is increased federal constitutional power possible\(^{12}\) as a means for Canada to fulfill its commitments under the Convention on Biological Diversity?
- If increased federal constitutional power is determined to be a possible means, then should the Canadian federal government assume greater federal jurisdiction?

To answer these questions, I explore four specific research objectives:

1. To describe the species-at-risk problem in Canada and how it relates to the current interpretation of the *Constitution Act, 1867*.
2. To explain and critically evaluate the recent evolution of Australian jurisprudence over environmental law.
3. Using the Australian case as an example and guide, to determine the theoretical feasibility of reinterpreting the Canadian constitutional division of powers so as to enable the federal government to assume greater jurisdiction over the protection of species at risk.
4. To examine the extent to which an increase in federal jurisdiction for species-at-risk protection can be justified by way of a reinterpretation of the *Constitution Act, 1867*.

\(^{12}\) The term “possible” in this context refers to one of three alethic modalities (i.e., necessary/possible/impossible) used in the analysis of norms (Sumner 1987: 22). It does not refer to possibility or impossibility in the physical sense. In other words, it refers to whether it would be possible to reinterpret the constitution given the current norms governing constitutional law.
1.4 Thesis Outline

To address these research questions, this thesis proceeds in an additional four chapters. In Chapter 2, I outline the Methods used in the analysis portion of this thesis, including a theoretical framework for this study. I outline the methods used for the comparative case study analysis of Canada and Australia, and explain the steps of my research. Chapter 3 focuses on the case studies themselves. Starting with Canada, I outline the evolution of Canada’s federal role in environmental policy, its existing federal and provincial legislation and policies for the protection of species at risk, and explain why comprehensive legislation is important for the conservation of species at risk. Canada’s implementation of international conventions will also be addressed. I then complete a similar analysis for the Australian example, also noting the level of involvement on a federal level in species-at-risk protection. Chapter 4 responds to many of the initial objectives of this thesis. I start by answering the central question of whether Canada’s federal jurisdiction over species at risk could be reinterpreted and extended. To answer this question, the insight gained from the case studies is integrated into my own analysis. Finally, the steps that could be taken in order to provide the federal government with increased power will be outlined. Chapter 5 provides a summary as well as recommendations for further research in this area.
2.0 METHODS

This study explores the extent to which the Canadian federal government could potentially extend its jurisdictional power over species-at-risk protection. The first and most substantial component of this research is a comparative policy analysis based on case studies of species-at-risk legislation in two federalist nations, Canada and Australia.

This study can be classified as a multi-site, instrumental case study (Creswell 1998: 61-62). Two programs, or cases, are studied, with the intention of using one case, the Australian case, to illuminate issues in the second case, the Canadian case. As is prescribed in accordance with case study methodology, many sources of information were drawn upon (Creswell 1998: 62). These include a literature review of peer-reviewed works, a survey of governmental documents, and an extensive and in-depth analysis of numerous relevant legal cases. There was adequate information used in both case studies to present an exhaustive picture of each situation. The selection of Canada and Australia as the two case studies was an obvious decision, as the two are comparable on many levels. There were no other cases that presented as ideal a match as these two, which is why the case study is limited to two.

The next component of my research is the comparative analysis of the case studies. There are many challenges associated with a comparative policy analysis. Boundaries of methodology and subject matter are blurred in comparison with the specific and clear boundaries encountered in most academic disciplines (Cyr and deLyon 1975: 376). This fact makes it difficult to specifically outline data limitations and methodological procedures. However, despite the "intellectual thicket" encountered in comparative policy analysis, this discipline raises the potential of gaining "specific insights" from the study of comparable programs in other countries (Cyr and deLyon 1975: 382). For these reasons, this approach is useful for this thesis, because one of the principal aims of this work is to use the experiences of Australia to aid Canada in making choices about future species-at-risk policy in this country.
The first step in this research was to perform a systematic series of literature reviews in several different categories. The first literature review was done to assess the existing species-at-risk legislation in Canada, the Canadian provinces, and Australia (on the federal level only). The second was performed to explore and define the structure of a federalist nation, and how this structure applies to and exists in Canada and Australia. The primary goal of this segment of the literature review was to assess the importance of governmental structure to species-at-risk protection, and to determine the effects of a federalist structure on the implementation of species-at-risk legislation. The next portion of the literature review involved analysis of legal cases in Australia to determine the driving forces behind the shift in power over species-at-risk legislation that has occurred recently there. The data gathered from the literature reviews of peer-reviewed papers and government documents, and the legal case searches was analyzed and compiled, and used to propose reasons that Canada could use to follow the path of Australia toward greater federal involvement in species-at-risk protection.
3.0 CASE STUDIES

3.1 The Canadian Example

3.1.1 Overview of the evolution of Canada's federal role in environmental policy

Over the past several decades there have been two distinct periods of increased federal activity in the environmental arena, known as ‘green waves’ (Campbell 2000: 33). The first wave occurred from 1969 to 1972, when the government passed nine pieces of environmental legislation, (e.g., *Canada Water Act* 1910, *Clean Air Act* 1971) and also formed the Department of the Environment. This green wave was cultivated by an increased public awareness of environmental issues on the national level (Harrison 1996: 55). Between 1973 and 1985 the federal role in environmental matters was less involved, and public interest in these matters waned. It was at this point that section 92A was added to the Constitution. However, the motivation behind this constitutional addition was questionable, and more in the spirit of financial profit from natural resources rather than in the protection of these resources (Harrison 1996: 91).

Between 1985 and 1995 a second ‘green wave’ emerged. A diversity of issues had become increasingly relevant by this point, including issues on a global scale (e.g., tropical forest destruction) and also on a local scale (e.g., preservation of wilderness areas) (Skogstad 1996: 103). Public salience of environmental issues once again increased, and both federal and provincial governments showed increased interest in this arena by passing new legislation (Harrison 1996: 120). The most noteworthy piece of new legislation was the *Canadian Environmental Protection Act* of 1988, which was likely the federal government’s strongest environmental scheme to date (Harrison 1996: 129). Canada signed the Convention on Biological Diversity in 1992, alerting Canadians to the importance of biodiversity conservation on a global scale. It was also during these years that the federal government employed the POGG power regarding the control of toxic substances, declaring this problem an area of nation concern (Harrison 1996: 130). In more recent years, the federal government has taken significant initiatives in environmental matters, especially with respect to species-at-risk conservation, by passing the *Species at Risk Act* in 2002.
3.1.2 Existing federal legislation

The *Canada National Parks Act* has been enacted in Canada for over a century, and serves the purpose of conserving parks, with the maintenance of ecological integrity as the primary mandate. As a part of this Act, the Governor in Council has the authority to create regulations regarding the management and conservation of national parks, the protection of wildlife within the park, the removal of superabundant species, and the management of fish and their waterways. All species of flora and fauna found within the boundaries of a national park are protected under this Act. The Act also designates a large monetary fine as well as other penalties for the poaching of species within national park boundaries.

Another Act of relevance is the *Fisheries Act*. This Act can be used to protect fish species that are used by humans. What precisely defines “usefulness” can fall under several categories, including recreational uses, commercial uses, or in some cases, scientific uses or values. Some species that meet these criteria may be threatened or at-risk, and are thereby affected by this Act. There are two sections of this Act that are particularly powerful, and could be directly used to protect an at-risk species and/or its habitat. Section 35(1) states that, “no person shall carry out any work or undertaking that results in the harmful alteration, disruption, or destruction of fish habitat,” and section 36(3) “prohibits the deposition of a deleterious substance into water frequented by fish.” Violating either of these sections constitutes a criminal offence. However, prosecutions are rare, and this section tends to function best as a deterrent. This Act allows the Governor in Council to control all matters in relation to fisheries, and this includes the conservation and protection of fish and their habitats.

The *Canada Wildlife Act* of 1973 has a dual mandate to initiate wildlife research and also to enable the federal government to collaborate with the provinces regarding conservation and recreation activities that could affect wildlife. In 1994 this Act was amended to include all land species, as well as any species found within 200 nautical miles of Canada’s coastlines. This Act also serves to protect the habitats of these species. The Minister of the Environment is permitted under this Act to acquire lands for the purposes
of conservation, interpretation, and research activities. The Minister may also form agreements with any province to use its land for any of these activities. National Wildlife Areas are made and managed according to regulations included in this Act.

The *Migratory Birds Convention Act, 1994* enacts the treaty signed in 1916 by the United States and Canada, which states that both nations agree to protect migratory birds from harvesting and destruction. This Act restricts the killing of migratory birds, the collection of their eggs, and also places limits on the hunting of these birds (in terms of which species may be hunted, the length of hunting season, etc.). The federal government can, as per this Act, designate either federal or provincial lands as migratory bird sanctuaries to be used as nesting grounds or as part of a “fly-way” to allow the birds safe areas through which to transit. This Act set a precedent in Canada for the federal government to intervene on provincial jurisdiction for the purpose of protecting wildlife. The rationale for this intervention was that the control of hunting activities, and also the protection of migratory species, can be better served by a unified federal act (Wagner and Thompson 1993). This will be discussed in greater detail in section 4.0.

### 3.1.3 The Species at Risk Act

The *Species at Risk Act* (SARA) was passed by parliament in 2002 with the primary purpose of protecting species at risk in Canada, and the legislation was proclaimed in 2003. SARA is the result of the government’s commitments made under the 1996 Accord for the Protection of Species at Risk and its corresponding Canadian Biodiversity Strategy. The primary goals of SARA are straightforward in principle: to prevent species at risk from becoming extinct; to recover species that are already extirpated, endangered or threatened; and to prevent species of special concern from being up-listed to threatened or endangered status (Government of Canada 2005c: v). As stated in the SARA Public Registry, there are also several more specific goals of SARA:

---

13 The Canadian Biodiversity Strategy (CBS) was started when Canada ratified the Convention on Biological Diversity in 1992. The purpose of the CBS is to determine the steps necessary to fulfill Canada’s commitments under the CBD, and to try to enhance biodiversity protection coordination on a national scale (Environment Canada 2000).
1. To establish the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) as an independent body of experts responsible for assessing and identifying species at risk.
2. To require that the best available scientific knowledge be used to define the short/long term objectives in a recovery strategy/action plan.
3. To create prohibitions to protect listed threatened/endangered species and their critical habitat.
4. To recognize that compensation may be required to ensure fairness following imposition of critical habitat provisions.
5. To create a public registry to assist in making documents under the Act more accessible to the public.
6. To be consistent with Aboriginal and treaty rights, and respect the authority of other federal ministers and provincial governments (Government of Canada 2006).

Three federal ministers have authority to make decisions regarding SARA: the Minister of the Environment, who makes decisions regarding most federal lands; the Minister of Fisheries and Oceans, who makes decisions regarding aquatic areas; and the Minister of Canadian Heritage, who makes decisions regarding national parks, historic sites, and protected areas via the Parks Agency. There are also several themes that are consistent throughout the Act, and part of SARA’s mandate. These themes are: cooperation between governments (federal and provincial), a focus on consultation (amongst those impacted by SARA), and an emphasis on stewardship activities (Government of Canada 2005c).

Species Protection under SARA

Two of the most important sections of SARA are sections 32 and 33. These sections offer immediate protection to any species listed under SARA. These sections stipulate that no person shall:

1. Kill, harm, harass, capture, or take an individual of a wildlife species that is listed as extirpated, endangered, or threatened.
2. Possess, collect, buy, sell or trade an individual of a wildlife species that is listed as extirpated, endangered, or threatened.
3. Damage or destroy the residence of an individual of a wildlife species that is listed as extirpated, endangered, or threatened.
Critical Habitat Provision

Under SARA, critical habitat is defined in section 2 as "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species’ critical habitat in the recovery strategy or in an action plan for the species."

Section 58(1) of SARA states that it is prohibited for any person to destroy any part of the critical habitat for a listed endangered, threatened, or extirpated species, if this habitat is located on federal land, if the species is aquatic, or if it is a migratory bird protected under the Migratory Birds Convention Act, 1994. SARA states that once critical habitat has been identified in a finalized recovery strategy or action plan, 180 days are given in order to arrange for the protection of said critical habitat using either stewardship methods or another piece of legislation, or a combination of these strategies (Government of Canada 2005c). In the case that critical habitat is located on private or provincial lands, and is not offered protection by any means, such as stewardship agreements, or provincial laws, then the federal Minister must make a recommendation to designate it as an offense to destroy this critical habitat in the relevant province or territory, as per sections 58(4) and (5) of the Act (Government of Canada 2005c).

Safety Net Provision

The land on which SARA applies is composed of federally owned lands, including national parks, Indian reserves and military reserves. However, SARA does contain "safety net" provisions, which permit the federal government to supersede provincial authority on provincial land if the federal government believes the province to be insufficiently protecting a nationally threatened or endangered species. Section 61(4) of SARA states that the Minister must make this type of recommendation if, after consultation with the relevant provincial or territorial minister, there are no other provisions, laws or measures under SARA or any other Act that protect this area of critical habitat, and there are no laws in the province or territory to provide protection.

14 This is true for extirpated species if the reintroduction of this species to the wild in Canada has been recommended by a recovery strategy.
Another aspect of the safety net provision applies to federally-listed species located on provincial or private land (i.e., not those species located on federal land, listed aquatic species, or migratory birds). This provision states that while provinces and territories are given the first opportunity to protect these species and their residences using their own legislation, if they fail to do so effectively, the Governor in Council, on the recommendation of the Minister of the Environment, may order that the regulations from sections 32 and 33\(^{15}\) apply to the relevant species in a province or territory (Government of Canada 2005c). The safety net has never been enacted, most likely because the federal government does not want to fracture the “generally positive” relationship it has formed with the provinces and territories regarding species-at-risk protection by way of the Accord (Stratos Inc. 2006: 17).

**Emergency Listings and Orders Procedures**

There is a provision under SARA providing the government with a way to list species on an emergency basis. If the Minister of the Environment who determines a non-listed species is faced with an impending threat to its survival, he or she must make a recommendation to the Governor in Council that the species be added to the list of endangered species on the Wildlife Species at Risk list under SARA. All three relevant Federal ministers must agree to add the species, and if the species is added, COSEWIC must compile a status report for the species within one year.

The government also has the power to regulate activities that have the potential to affect species in an emergency situation (Government of Canada 2005c), a provision which falls under section 80 of the Act. If the competent minister determines the survival or recovery of a listed species to be imminently threatened, he or she must recommend to the Governor in Council that an emergency order be issued in order to ban activities that could negatively impact the species or its habitat.

\(^{15}\) Section 32 prohibits the killing, harming, harassing, possession, or collection of a wildlife species listed as endangered, threatened, or extirpated under SARA. Section 33 prohibits the damage or destruction of a residence of a species listed under SARA as endangered or threatened (or extirpated if a recovery strategy has recommended the reintroduction of the species into Canada).
Stewardship Efforts under SARA

SARA strongly encourages active, voluntary participation by the public in Canada’s effort to conserve biodiversity. Stewardship activities include observing and monitoring the health of wildlife species populations, cleaning up habitat areas, and educating other members of the public about SARA, and conservation in general. Under SARA, there are many players that contribute to the effectiveness of stewardship activities, including government agencies, non-governmental organizations, and academic institutions. Each player is encouraged to provide resources (such as finances, expertise, etc.) to help the public initiate stewardship efforts. In 2000, the federal government created the Habitat Stewardship Program for Species at Risk as part of its stewardship initiatives, and up to $10 million is provided annually to help in the creation and maintenance of stewardship projects (Government of Canada 2005c).

The Role of the Committee on the Status of Endangered Wildlife in Canada

The Committee on the Status of Endangered Wildlife in Canada (COSEWIC) is identified as one of the key components of SARA, and is made a legal entity by this Act. A species at risk on the national level is defined as extirpated, endangered, threatened, or of special concern by COSEWIC. SARA directs COSEWIC to “use the best available scientific, Aboriginal and community knowledge to assess the status of species that may be at risk of disappearing from Canada” (Government of Canada 2005a). Eligible species are issued status reports by COSEWIC and are officially designated in one of the categories listed above. The criteria system used by COSEWIC is an adaptation of the system used by the World Conservation Union (IUCN).16

Species are eligible for listing under the COSEWIC process if they meet a discriminating set of criteria. The first criterion for eligibility is taxonomic validity. COSEWIC will, under normal circumstances, only consider species and subspecies that have “been established as valid in published taxonomic works or in peer reviewed communications.

---

16 The IUCN is an international conservation organization with 181 member countries. Their goal is to provide assistance to countries around the world in the global effort to protect biodiversity and promote sustainable development (IUCN 2006).
from taxonomic specialists" (Government of Canada 2005b). Unless other designatable
units can be proven genetically distinct from any other recognized species, or are
separated by large differences in range, or are biogeographically distinct, they will not
normally be considered. A species must also be native to, and regularly occurring in,
Canada to be considered for listing by COSEWIC. Species must also be year-round
residents or else require Canadian habitat as part of their life cycle (e.g., breeding
grounds). In extenuating circumstances, such as imminent extinction, COSEWIC may
consider a species that does not meet all the eligibility criteria listed above, but this is not
a common occurrence.

In terms of the listing process, once COSEWIC has formed recommendations for listing
species, it provides the list to the Minister of the Environment and the Canadian
Endangered Species Conservation Council (CESCC).\(^{17}\) The Minister then has 90 days to
respond to a COSEWIC assessment. The Governor in Council decides within nine
months of receiving the COSEWIC assessment whether to add the species to the list of
Wildlife Species at Risk, and if no action is taken the species is added automatically
(Government of Canada 2005c). After being listed, a species and its residence has
immediate protection on federal lands, and also if it is an aquatic species or migratory
bird (Government of Canada 2005c). All other listed species in the provinces or
territories are eligible for protection through the safety net process described above,
which is to say that they do not receive immediate legal protection on provincial and
territorial or private land unless they are a migratory bird or aquatic species (Government
of Canada 2005c). Once a species is listed as endangered, threatened or extirpated, an
action plan (or a management plan, in the case of species of special concern) is created.

Recovery Procedures
After a species has been listed under SARA, a recovery strategy must be created within
one year for an endangered species and within two years for a threatened or extirpated

\(^{17}\) This council is composed of federal, provincial, and territorial wildlife ministers, and was created in 1996
when the Accord was implemented. The CESCC manages and coordinates federal and
provincial/territorial activities for the conservation of species at risk, and provides COSEWIC with general
guidance (Government of Canada 2005c).
species. After a recovery strategy has been posted on the SARA Public Registry for 60 days, the strategy is finalized. The competent Minister is responsible for the preparation and assembling of recovery strategies, with guidance and help from other groups, including the Canadian Endangered Species Conservation Council, wildlife management boards, and Aboriginal groups. Recovery strategies aim to outline the major threats to a species and ways to circumvent or ameliorate these threats, to set a species’ target population, to identify critical habitat, and to set timelines for recovery (Government of Canada 2005c). Information compiled by COSEWIC is used in the preparation of recovery strategies (Government of Canada 2005c). Action plans implement recovery strategies, and there may be more than one action plan per recovery strategy. The goals of an action plan are to identify methods to achieve the population goals for the species, to identify activities that could negatively impact the species’ critical habitat, to find ways to conserve critical habitat that has yet to be protected, and to monitor the species and its recovery progress (Government of Canada 2005c). Five years after the implementation of an action plan, the competent minister is responsible for updating the species’ progress and reviewing the plan’s implementation success (Government of Canada 2005c).

Action plans are also developed in a cooperative manner, and take into consideration input from many stakeholders. Like recovery strategies, they are published on the Public Registry for 60 days to allow time for public feedback regarding the plan. Recovery strategies and action plans must include the identification of critical habitat whenever possible (Government of Canada 2005c).

For species of special concern, management plans are used in lieu of recovery strategies and action plans. The structure of and process for creating a management plan is much the same as for a recovery strategy or action plan. Management plans must be created within three years of a species being listed as of special concern (Government of Canada 2005c).
3.1.4 Recovery of Nationally Endangered Wildlife (RENEW) Program

RENEW was established in 1988 and is the national recovery program for species at risk in Canada. This program is under the general direction of the CESCC, and there are representative participants from all provinces and territories, as well as three federal departments (Environment Canada, Fisheries and Oceans Canada, and the Parks Canada Agency). All species listed by COSEWIC as endangered, threatened or extirpated are evaluated by RENEW, and recovery teams and strategies are created under this program. Recovery teams are created to formulate recovery strategies for at-risk species, which are reviewed every five years until COSEWIC down-lists the species.

3.1.5 Overview of provincial legislation across Canada

Under the current interpretation of the Constitution, the provinces have a constitutional obligation to protect species at risk. Further to this, as previously indicated, under the Accord for the Protection of Species at Risk, the provinces and territories are responsible for creating and implementing their own legislation to protect species at risk. In the Accord, each province and territory agreed to participate in the Canadian Endangered Species Conservation Council to assist in the coordination of conservation activities, to recognise COSEWIC as an independent body to provide advice on species’ status nationwide, and to establish “complementary legislation and programs” to effectively protect species at risk across the country (Government of Canada 2003). The legislation created and implemented by each province and territory is required to fulfill a set of 15 criteria, to ensure the comprehensiveness and effectiveness of the legislation. A complete list of these criteria can be found in Appendix 2.

In this section, I use these criteria to assess the legislation and species-at-risk programs that are in effect in each province and territory. In Appendix 3, a table detailing each province or territory’s performance according to the 15 criteria laid out by the Accord is provided, and a similar table assessing the federal government against these same criteria is also provided. A summary table of the province and territories’ performances according to these criteria is provided in Appendix 4.
An important criterion to clarify is the distinction between a “legal” listing of a species at risk, and a “scientific” listing. There are two types of species-at-risk lists. The “scientific” type of list “serve[s] to inform” (Wood and Flahr 2004: 387). This type of list could be created by a variety of entities, including provincial governments, NGOs, and scientists. This list serves no legal purpose, and it does not provide any type of protection to the species on its list (Wood and Flahr 2004: 387). The “legal” type of list has the function of providing legal protection to a species that is included, and makes protection of these species obligatory (Wood and Flahr 2004: 387).

Finally, it is also important to note that participation in the RENEW program is not the same as an independent provincial recovery process. Most provinces and territories participate in RENEW, whereas most do not have independent recovery programs.

British Columbia

British Columbia contains a vast amount of biodiversity: in fact, it is the most biologically diverse province in Canada (Wood and Flahr 2004: 382). However, BC is second only to Ontario for the greatest number of species at risk in Canada (Environment Canada 2006a). There are currently two pieces of legislation that function to provide some protection for species at risk in BC. First, is the 1980 *Wildlife Act*, and the 2004 amendment to this Act, Bill 51. The second important piece of legislation is the *Forest Range and Practices Act* (FRPA), which contains the Identified Wildlife Management Strategy (IWMS).

The statutory decision-making power for legally listing species under the *Wildlife Act* lies with the Cabinet, and for the IWMS it is with the Minister of Environment. The Minister can also make decisions under the *Wildlife Act* in terms of designating land for critical wildlife areas.

Protection for individuals is provided by section 6 of the *Wildlife Act* amendment. Currently under the *Wildlife Act*, four species\(^\text{18}\) are offered a degree of protection. The list of species protected by the *Wildlife Act* has not been amended since its inception in

---

\(^{18}\) The Sea Otter (*Enhydra lutris*), American White Pelican (*Pelecanus erythrorhynchos*), Vancouver Island Marmot (*Marmota vancouverensis*), and Burrowing Owl (*Athene cunicularia*).
The IWMS does not address protection for individuals. As of June 2006, the IWMS has compiled Species Accounts for 85 species and plant communities (Ministry of the Environment 2006). However, it is important to note that only certain categories of species are offered protection under this legislation. To qualify for protection, species must be threatened by forest or range-management activities on Crown land, and inadequately protected by other measures or legislation (Ministry of Environment 2001). There are 178 species listed by COSEWIC in BC (Environment Canada 2006b).

Habitat protection under the *Wildlife Act* is provided by section 7 for critical wildlife areas, but what defines these areas is not specified. Protection for species’ residences is provided by section 6 of the amendment to this Act. Under the IWMS, habitat is protected by wildlife habitat areas (WHA), which contain habitat critical for the survival of a listed species, and also by general wildlife measures (which may be inside or outside of a WHA), which specify the allowable forest and range activities, if any, that can take place within the WHA (Ministry of Environment 2004). However, wildlife habitat areas and their accompanying general wildlife measures are implemented only if their total impact on timber supply is less than or equal to 1% of the annual allowable cut of each forest district (Wood and Flahr 2004: 394).

Recovery plans are not mentioned in either piece of legislation.

The scientific listing authority in BC is the BC Conservation Data Centre (BC CDC), which is part of the Ministry of Environment. The BC CDC provides a comprehensive list of species at risk, categorized according to threat level (species can be red-listed, blue-listed, or yellow-listed). While this list is supported by scientific research, it is not legally binding, and as such is only available for use as a guide for legally listing species under the *Wildlife Act* or the IWMS. However, the use of the information provided by the BC CDC is not mandatory under the *Wildlife Act* or the IWMS. The IWMS does list COSEWIC-listed forest- and range-dependent species, and plans to list non-federally

---

19 It is important to note that the CDC ranks every species of most taxa while COSEWIC ranks only those species that have had a status report prepared.
listed red- and blue-listed species affected by these activities in the "near future" (Ministry of Water, Land and Air Protection 2004: 2).

**Alberta**

Alberta does not have a stand-alone piece of legislation specifically for species-at-risk protection. At present, the *Wildlife Act* is the principal legislation employed for this purpose. There is one regulation associated with the Act, the "Wildlife Regulation." Schedule 6 of the Regulation lists "endangered animals" as prescribed by this Act. The Minister of Sustainable Resource Development is the statutory decision-maker for legally listing species at risk under this Act.

Protection for individuals of a species at risk is not mentioned in the Act itself, but in Species Assessments, which are prepared for listed species, it is stated that it is illegal to harm the species in question. Recent amendments to the *Wildlife Act* have expanded its definition of "species" to include all plant and animal endangered or threatened species, which is an important step toward increased protection (Nature Canada 2005).

Under the Act there are no provisions for the protection of species' habitats, with the exception of the dens and nests (section 36). Critical habitat is not mentioned in the Act.

Once a species is legally designated under the *Wildlife Act*, the formation of a recovery plan is required. While this is not mentioned in the *Wildlife Act* itself (recovery plans are mentioned only in section 6, and they are never designated as a requirement), the Government of Alberta claims this to be true (Government of Alberta 2006d). As stated by the Alberta government, "one of the important components of Alberta's species-at-risk conservation program is the development and implementation of recovery plans for some species at risk" (Government of Alberta 2006b). However, the government also states that "implementation [of recovery plans] will be subject to the identification of sufficient resources, from within and outside government," (Government of Alberta 2006d) thereby compromising the effectiveness of this requirement.

There is a scientific advisory group named in the Act, the Endangered Species Conservation Committee (ESCC), which is established in section 6. The roles of the
ESCC, and in particular its scientific branch, the “Scientific Subcommittee,” are to provide guidance and to make science-based recommendations for listing species to the Minister, although the recommendations are not legally binding (according to section 6).

Thirteen species are currently designated as “threatened” or “endangered” under the Act (Government of Alberta 2006b). However, COSEWIC has listed 58 species at risk in Alberta (Environment Canada 2006c).

There are some stewardship efforts in place in Alberta, most notably the collaborative MULTISAR program, which coordinates the efforts of government officials, scientists, conservation organizations, and local landowners with the goal of preserving the native habitats of Alberta’s wildlife (Government of Alberta 2005).

Saskatchewan

Saskatchewan uses its 1998 *Wildlife Act* as its primary legislation for the protection of species at risk. There is a regulation associated with this Act entitled, “Open Seasons Game Regulations.” The statutory decision-making power for legally designating species at risk lies with the cabinet.

Protection for individuals is provided under this Act by section 51, and fifteen species are listed. The review of an additional 35 species is currently underway, but none of these species has legal protection at the present time (Government of Saskatchewan 2000). There are currently 55 species listed by COSEWIC for Saskatchewan (the 15 species listed under the *Wildlife Act* are included) (Environment Canada 2006b).

Habitat protection is limited under this Act. Section 83 of the Act states that the cabinet may make regulations regarding habitat protection, and section 50 states that recovery plans may include provisions for habitat protection of listed species. Bird nests of species listed under this Act or under the federal *Migratory Birds Convention Act, 1994* are protected by section 32 of the Act.

Recovery plans may be prepared and implemented by the Minister, but they are not required (section 50).
The province uses the same listing categories as COSEWIC, and a scientific body, the “Scientific Working Group,” assesses species for scientific listing. Saskatchewan’s ranking scheme for species at risk is the same as is used by the Nature Conservancy (Nature Canada 2005). The Minister may ask the advice of the Scientific Working Group when classifying species, but is not required to do so (section 48).

Stewardship efforts include an Endangered Species Advisory Committee, comprised of various stakeholder groups, to encourage public participation in the scientific species assessment process.

Manitoba

Manitoba has stand-alone legislation for the protection of species at risk, called the 1990 *Endangered Species Act*. There is a Regulation enabled under this Act, entitled the “Threatened, Endangered and Extirpated Species Regulation.” This regulation lists species legally protected in Manitoba. The statutory decision-making power for legally listing species at risk under this Act is with the Cabinet.

Protection for individuals is provided by the Act as per sections 8 and 10. Currently there are 28 species listed for protection (Government of Manitoba 2002). The Act applies to any plant or animal species in the province, and is enforced on all lands in the province, including private land (Government of Manitoba 2006b). There are 56 species listed by COSEWIC for Manitoba (Environment Canada 2006b).

In terms of habitat protection, the Act forbids destroying, disturbing, or interfering with the habitat a listed species, or any natural resource required by a listed species for survival (section 10). Critical habitat is not mentioned specifically.

Recovery plans are not mandatory under the Act.

Under section 6 of the Act, there is a provision for a scientific advisory committee, called the Endangered Species Advisory Committee. This committee advises the Minister with respect to the status of listed species, and also on potential candidates for listing (Government of Manitoba 2006b).
There are some stewardship efforts in the province. Manitoba also has a Critical Wildlife Habitat Program, which works to preserve remaining habitat areas in the province that may be crucial to species at risk, such as the mixed grass prairie areas. This initiative is jointly run by the Manitoba government and local and international conservation organizations (e.g., Manitoba Naturalists Society, World Wildlife Fund) (Government of Manitoba 2006a). Major projects include private and municipal land stewardship programs, land acquisition, and land management (Government of Manitoba 2006a).

Ontario

Ontario has a large proportion of Canada’s biodiversity, and a significant number of these species are at-risk. Ontario has stand-alone species-at-risk protection legislation, in the form of the *Endangered Species Act*. This Act dates from 1971, with some amendments made in recent years. There is one associated regulation, the “Endangered Species Regulation,” which lists designated species. The cabinet has statutory decision-making power for legally listing species.

Section 5 of the Act provides protection for individuals. As of January 2006, 43 species were listed and protected accordingly under the *Endangered Species Act* (Government of Ontario 2006a). However, COSEWIC lists 186 species under at-risk categories in Ontario, which leaves a significant number of species without protection on the provincial level (Environment Canada 2006b).

Section 5 also provides protection for the “habitat” of listed species, but what defines habitat is not specified.

There are no specific provisions for provincial recovery plans in the Act, but according to the Ontario government, recovery planning for species under provincial jurisdiction is coordinated by the Species at Risk Unit of the Ministry for Natural Resources (Government of Ontario 2006b).

The province has a scientific authority called the Committee on the Status of Species at Risk in Ontario (COSSARO). This committee functions to review the COSEWIC status reports of Ontario species and to then make recommendations to the Minister for listing.
under provincial legislation (Government of Ontario 2006c). In December 2005, there were 177 species on COSSARO’s total list (Government of Ontario 2006c). Those species listed as “endangered (regulated)” on the list are protected by the Endangered Species Act, and this includes 43 of these 177 species as of January 2006 (Government of Ontario 2006a).

While the Endangered Species Act provides the greatest protection for species at risk in Ontario, there are other pieces of legislation that make a contribution. These include the Planning Act, which provides guidance to municipal land-use planners for protecting endangered and threatened species (Government of Ontario 2006a). The Fish and Wildlife Conservation Act also provides a degree of protection to some “specially protected wildlife” species (Government of Ontario 2006a). However, these pieces of legislation are not as comprehensive as the Endangered Species Act, and enforcement of these acts is not diligent (Nature Canada 2005).

Quebec

The principal legislation for the protection of species at risk in Quebec is the Act Respecting Threatened or Vulnerable Species, which was passed in 1989. There are nine associated regulations, and the relevant regulations are discussed in the following paragraph. The Minister of the Environment and the Minister of Natural Resources, Wildlife, and Parks determine which species require listing, but the “Government” (presumably the cabinet) designates these species, as per section 10 of the Act.

There is no independent scientific advisory body mentioned in the Act. According to the provincial website, in this province, there are currently 76 animal species and 374 plant species designated as threatened or vulnerable (Government of Quebec 2002). The source of this information is unclear. This information contradicts what is listed under the Act Respecting Threatened or Vulnerable Species, where, according to the “Regulation respecting threatened or vulnerable species and their habitats,” there are seven threatened and 11 vulnerable wildlife species listed, and under the “Regulation respecting threatened or vulnerable plant species and their habitats,” there are 29 threatened and five vulnerable species listed. Regardless of the exact numbers, while all
of these species are considered to be eligible for protection, only 19 plant species are actually legally protected under the Act, and one wildlife species is legally protected (Government of Quebec 2002). COSEWIC lists 78 species as at-risk in Quebec (Environment Canada 2006).

In terms of habitat protection, despite provisions within the Act for protective measures, there are no requirements in the corresponding regulations to automatically protect the habitats of threatened or vulnerable species (Nature Canada 2005). The habitat of only one species is legally protected under this Act (Nature Canada 2005). One other minor provision for habitat protection exists under Quebec’s environmental assessment process, which requires that the presence of threatened or vulnerable species be accounted for at the commencement of a new project (this includes those species not officially designated, but with the potential to be listed in the near future) (Nature Canada 2005). This piece of information could not be corroborated.

Recovery plans are not specifically mentioned in the Act, but sections 6 and 7 mention programs to increase the chances of survival of listed species, including habitat protection and restoration.

Nova Scotia

Nova Scotia has stand-alone legislation for the protection of at-risk species entitled the Endangered Species Act of 1998. There is one associated regulation, the “Species at Risk List Regulations.” The statutory decision-maker for this Act is the Minister of Natural Resources.

The Act provides protection for individuals by forbidding the killing, injuring, possessing, disturbing, taking, or interfering with an endangered or threatened species (section 13). Currently, there are 36 species listed under the Act (Government of Nova Scotia 2006). COSEWIC lists 41 species in at-risk categories for Nova Scotia (Environment Canada 2006).

The Act also provides some habitat protection, restricting the destruction, disturbance, or interference with the “specific dwelling place or area occupied or habitually occupied by
one or more individuals or populations of an endangered or threatened species, including
the nest, nest shelter, hibernaculum or den” (section 13). Section 17 offers additional
habitat protection, in the form of “core habitat” designation.

Recovery teams and plans are also mandatory under section 15 of the Act (within one
year for endangered species and two years for threatened species). It is the responsibility
of the Minister to appoint the recovery teams and develop the recovery plan.

The scientific listing body, the Species-at-Risk Working Group, is chiefly responsible for
the designation of species at risk (as per sections 9 and 10). The Working Group consists
of six members who are appointed by the Minister, and who are scientific experts in the
fields of biology and ecology. The Working Group provides the Minister with a list of
species considered to be at-risk, and also makes recommendations regarding the recovery
plan process. The list provided by the Working Group, and any emergency listings made
by the Minister, determine the legally protected species in Nova Scotia (Nature Canada
2005).

Newfoundland/Labrador

Newfoundland’s Endangered Species Act was put into force in 2001. There are two sets
of regulations associated with this Act. The first is the “Endangered Species List
Regulations,” which lists all species protected by the Act. The second is the “Species
Status Advisory Committee Regulations,” which designates the qualifications of anyone
who is to be acceptable as a member of this committee. The cabinet holds the statutory
decision-making power for legally listing species.

Protection for individuals is provided in section 16 of this Act, which states that a person
is not permitted to disturb, harass, injure, or kill a species designated as threatened,
endangered, or extirpated. To date there are 21 species listed under the Act (Government
of Newfoundland and Labrador 2006a), while COSEWIC has listed 26 for the province
(Environment Canada 2006b).

Under the section 16 of the Act, a person is not permitted to disturb or destroy the
residence of an individual of a species designated as threatened, endangered or extirpated.
Section 28 also provides the opportunity for more extensive habitat protection for species listed as vulnerable, threatened, endangered, or extirpated. This section allows (but does not require) the Minister to set aside lands for critical habitat or recovery habitat of listed species.

Provisions for recovery plans are written into the Act in sections 13, 14, and 15. Recovery plans are required for endangered species within one year of their designation, for threatened species within two years, and for vulnerable or extirpated species within three years. Section 23 outlines the requirements for recovery plans in specific detail.

The Act establishes a Species Status Advisory Committee (SSAC), which functions to make recommendations to the Minister of Environment and Conservation about the listing of species (Government of Newfoundland and Labrador 2006a). The Committee must use the best available scientific information, as well as local and traditional knowledge, to make its recommendations. The Minister, with the approval of cabinet, is responsible for listing species on the basis of either recommendations from the SSAC or based on an assessment from COSEWIC (as per section 7). If the Minister does not approve a listing recommended by the SSAC, section 8 of the Act states that he or she then has 90 days to release to the public the reason for the rejection of the recommendation.

New Brunswick

The relevant legislation for species at risk in New Brunswick is the *Endangered Species Act*, which was enacted in 1976. A new *Endangered Species Act* came into force in 1996, providing increased protection (Government of New Brunswick 2005). There is one regulation associated with this Act, entitled the “Endangered Species Regulation,” which lists the species covered by this Act. The statutory decision-making power for legally listing species resides with the cabinet.

The Act protects two categories of species: endangered and regionally endangered. Endangered species are those that “are at risk of disappearing from a large part of their range, including New Brunswick” (Government of New Brunswick 2005), while regionally endangered species are those that are “in danger of disappearing from New
Brunswick, although they may have healthy populations elsewhere” (Government of New Brunswick 2005). Section 3 of the Act provides protection for individuals of listed species. Currently 16 species are protected in New Brunswick (Government of New Brunswick 2006), while COSEWIC lists 36 species as being at-risk (Environment Canada 2006b).

Section 3 of the Act prohibits the disturbance, harassment or harming of a listed species or their residence and critical habitat.

There are no provisions for recovery plans explicitly cited in the Act. Despite this, the Fish and Wildlife Branch of the Department of Natural Resources has a program in place for recovery efforts of endangered and regionally endangered species (Government of New Brunswick 2006).

There are no scientific advisory bodies referred to in the Act.

**Prince Edward Island**

The relevant legislation for Prince Edward Island is the *Wildlife Conservation Act*. There are nine enabled regulations under this Act, none of which is relevant to this discussion. Cabinet holds the statutory decision-making power for the Act (as per section 7).

Protection for individuals is provided by section 7, which prohibits the killing, injuring, possessing, disturbing, taking, or interfering with an endangered or threatened species. COSEWIC lists 11 species as being at-risk in PEI (Environment Canada 2006b). It is unclear how many species are protected under the *Wildlife Conservation Act*, as this information was not located on the provincial government’s website or any other available source. According to Nature Canada, as of 2004, no species were legally protected by the Act (Nature Canada 2005).

The destruction, disturbance, or interference with the wildlife habitat belonging to an endangered or threatened species is also prohibited under section 7 of the Act. There is no specific requirement under the Act for critical habitat to be designated for an at-risk species.
There are no provisions for recovery planning in this Act, however, as per section 6, the Minister must “monitor the state of wildlife” once per decade, including an inventory of wildlife habitat, an overview of wildlife initiatives in recent years, and an assessment of the state of at-risk species.

The Minister can establish an advisory committee with several possible functions, including advising the Minister on the species for listing (based on biological and scientific information), assessing the state of wildlife, and also analyzing the effect of land use and environmental activities on wildlife species (section 8). However, this provision is discretionary. A species-at-risk advisory committee has been appointed by the PEI government as of June 2003 (Environment Canada 2003a). However, no detailed report of recent work by this committee could be found.

**Yukon**

The relevant legislation for species at risk in the Yukon is the *Wildlife Act*. There are nine regulations associated with the Act, none of which impacts species at risk. This Act does not list species as endangered or threatened, but rather as “specially protected species.” The Commissioner in Executive Council has statutory decision-making power to legally list species under this Act.

Protection for individuals is provided by section 8 of the Act, which states that no person (with the exception of an Inuit person who is hunting or trapping in accordance with section 207 of the Act) shall: hunt, trap, or possess specially protected wildlife. At present, seven species are listed as specially protected under the Act (Government of the Yukon 2006), while COSEWIC lists 13 species as being at-risk (Environment Canada 2006a).

In terms of habitat protection, Section 17 prohibits people from taking the nest or eggs of any wild species (unless issued a permit to do so). Section 91 also provides weak protection for species’ habitat, as it prohibits the damaging of a dam, den, nest, or lair of any wildlife species. However, this section does not apply to private land, and anyone is permitted to damage a den, nest or lair for the purposes of road construction, agricultural use or any “similar purpose.” Section 187 permits the Commissioner in Executive
Council to designate an area to be a Habitat Protection Area if he or she deems this necessary to protect a species from disturbance in a sensitive area.

There are no provisions for recovery planning under the Act, and also no provisions for a scientific listing body. The *Wildlife Act* does not list the all of the same species as COSEWIC. There are several species which overlap between the COSEWIC list and the *Wildlife Act* list, but there are differences.

**Nunavut**

The primary species-at-risk legislation in Nunavut is the 2003 *Wildlife Act*. The Minister of the Department of the Environment is responsible for administering this Act, and also has statutory decision-making power for legally listing species at risk.

Protection for individuals is provided in Sections 62 and 63 of this Act, which protect listed species from being harvested, harmed, harassed, disturbed, or interfered with. The number of species protected by the Act could not be ascertained; however, COSEWIC has designated 20 species in at-risk categories for Nunavut (Environment Canada 2006b).

Section 65 provides habitat protection for listed species, including protection for critical habitat, wildlife sanctuaries, and special management areas. Section 139 allows the Commissioner in Executive Council to designate critical habitat, in order to apply a recovery policy, or for another reason relating to a listed species (other than a species of special concern). Section 141 allows the Superintendent to designate an area as a special management area where it is deemed necessary to protect biodiversity

Recovery plans are required by section 134 of the Act. Section 134 requires that a Recovery Policy for any species listed as endangered or threatened be prepared within two years of being designated, at which time it will be submitted it to the NWMB for approval. Management Plans for each species listed as “of special concern” must be prepared within three years of this designation and must also be approved by the NWMB (section 136).

There is a scientific listing body for the Act, called the Nunavut Species at Risk Committee (NSRC). The NSRC is composed of independent scientific experts, and
makes recommendations to the Nunavut Wildlife Management Board (NWMB) regarding species listing and de-listing (section 129). The NWMB determines which species should be protected by the Act, and the Minister establishes a list of species to be designated based on this list. The Minister must include all species "determined by an accepted decision of the NWMB" on the legal species-at-risk list (section 131). COSEWIC may also request amendments to the list of designated species (as per section 130).

Northwest Territories

The primary legislation for species at risk in the Northwest Territories (NWT) is the *Wildlife Act*. However, this Act is mostly unrelated to species at risk, and is focused on hunting and trapping. In 2003, the NWT government committed to creating species-at-risk legislation in a progress report (Government of the Northwest Territories 2006b) but has not yet done so. Plans for the proposed legislation appear to be promising. COSEWIC currently lists 20 species as at-risk in the NWT (Environment Canada 2006b).

3.1.6 Effectiveness of Provincial and Federal Legislation

There is a paucity of literature regarding the existence and implementation of provincial and territorial species-at-risk legislation. There has not been any significant academic, peer-reviewed literature published on this subject, with the exception of the 2004 Wood and Flahr paper in *Canadian Public Policy* assessing British Columbia’s legislation. A thorough assessment has not been performed for the other provinces and territories. There have been several analyses on the subject done by non-governmental organizations, including Environmental Defense Canada and Nature Canada, which indicate that provincial performance is lacking. However, these sources may not be entirely credible, and so while they do provide an indication of the general trend in provincial legislation, they do not form the basis for the assessment of legislation provided in this thesis. Rather, I perform my own analysis of provincial and territorial legislation against the criteria laid out in the 1996 Accord, and form my conclusions regarding the sufficiency and effectiveness of this legislation from this research (again, see Appendices 3 and 4 for complete tables).
When the existing provincial and territorial legislation is considered in terms of the criteria laid out by the Accord, it is clear that there is no single province or territory that is meeting the 15 specific commitments that were agreed to by signing the Accord. In fact, in July 2006, it was noted in a report evaluating federal species-at-risk programs\(^{20}\) that no province or territory “has yet to fully meet all the commitments of the Accord” (Stratos Inc. 2006: 16). In addition, it was noted in the same report that the federal government’s ability to provide protection under SARA for those species under the primary or joint authority of the provinces and territories has been hindered by the “slow and protracted” performance by these jurisdictions to provide protection (Stratos Inc. 2006: 16-17).

According to my own analysis across all the provinces and territories, a mere 26% of Accord criteria are fulfilled completely, and another 10% are fulfilled in a limited sense\(^{21}\) (see Appendix 3). A similar conclusion was drawn by Environmental Defense Canada in 2004 when they found that no province or territory is meeting every criteria, and few are fulfilling even half (Environmental Defense 2004: 3). Only Nova Scotia and Nunavut have completely fulfilled more than half of the 15 criteria (nine and eight, respectively). The other eleven provinces and territories have completely fulfilled one third or less of the criteria. If criteria that are filled to a limited degree are included, Newfoundland and Prince Edward Island have fulfilled seven and six criteria, respectively. An additional point of concern is that in 2004, only 36% of COSEWIC-listed species at risk were legally protected by the provinces and territories (Environmental Defense 2004: 3).

The comparative charts provided in Appendix 3 are a useful tool for assessing which level of government is better-equipped to fulfill Canada’s commitment to the CBD. The federal *Species at Risk Act* completely fulfills 13 Accord criteria, and fulfills the remaining two criteria to a limited level. When federal performance is assessed in comparison to provincial performance, it is clear that the federal government has met more of the Accord criteria, and thereby has gone further toward fulfilling its

\(^{20}\) This report was prepared by Stratos, Inc., an Ottawa-based sustainability consultation company, and was prepared for Environment Canada, Parks Canada, and Fisheries and Oceans Canada.

\(^{21}\) Criteria fulfilled in a “limited” sense are those criteria that have been either partially or weakly met by existing legislation.
commitments to the CBD, even though it is largely the responsibility of the provinces and territories to do so. Table 1 provides a comprehensive assessment of provincial, territorial, and federal performance against the Accord criteria (which can be found in Appendix 2).

Table 1. Summary Table of Provincial and Federal Performance against the Accord Criteria

<table>
<thead>
<tr>
<th>Accord Criteria</th>
<th>British Columbia</th>
<th>Alberta</th>
<th>Saskatchewan</th>
<th>Manitoba</th>
<th>Ontario</th>
<th>Quebec</th>
<th>Newfoundland &amp; Labrador</th>
<th>New Brunswick</th>
<th>Prince Edward Island</th>
<th>Yukon</th>
<th>Nunavut</th>
<th>Northwest Territories</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>L</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>2</td>
<td>NR</td>
<td>Y</td>
<td>NR</td>
<td>Y</td>
<td>NL</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>NR</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>3</td>
<td>L</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>NR</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>4</td>
<td>L</td>
<td>U</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>5</td>
<td>L</td>
<td>L</td>
<td>L</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>NR</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>6</td>
<td>N</td>
<td>L</td>
<td>NR</td>
<td>N</td>
<td>NL</td>
<td>Y</td>
<td>Y</td>
<td>NL</td>
<td>N</td>
<td>N</td>
<td>L</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>N</td>
<td>NR</td>
<td>NA</td>
<td>N</td>
<td>NA</td>
<td>Y</td>
<td>Y</td>
<td>NA</td>
<td>NA</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>8</td>
<td>NR</td>
<td>N</td>
<td>NR</td>
<td>N</td>
<td>NR</td>
<td>U</td>
<td>N</td>
<td>NL</td>
<td>Y</td>
<td>NR</td>
<td>Y</td>
<td>U</td>
<td>N</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>U</td>
<td>N</td>
<td>NA</td>
<td>NA</td>
<td>Y</td>
<td>U</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>U</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>Y</td>
<td>Y</td>
<td>NL</td>
<td>Y</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
<td>Y</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NR</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
<td>Y</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>Y/NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NR</td>
<td>L</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td>15</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>N</td>
<td>L</td>
<td>Y</td>
<td>L</td>
<td>N</td>
<td>L</td>
<td>L</td>
<td>Y</td>
<td>N</td>
</tr>
</tbody>
</table>

Legend
N= No
Y= Yes
L= Limited
NA= Not Applicable
NL= No Legislation
NR= Not Required
U= Unknown or unclear
3.1.7 Canada’s implementation of international conventions

As mentioned in an earlier section of this thesis, the *Constitution Act, 1867* does not explicitly grant constitutional authority to implement international conventions (Government of Canada 2002). The implementation of international treaties is therefore influenced by the normal constitutional division of powers (Morton 1996: 45). Despite unclear boundaries in this area, the federal parliament has entered into and ratified many international conventions, and over time this responsibility has been accepted and undertaken by this level of government (Government of Canada 2002). However, the federal government does not always have the authority to implement treaties in every province and territory, and in fact can only do so if the legislation relevant to the international treaty is directly within its jurisdictional realm (Campbell 2000: 28). It is for this reason that in some cases the federal government must rely on the provinces and territories to implement legislation (such as the case with the Convention on Biological Diversity).

3.2 The Australian Example

3.2.1 Constitutional structure in Australia: an Overview of the Relevant Components

Like Canada, Australia is a federalist nation, composed of a federal government and state governments. The Commonwealth of Australia was formed in 1901 from what had been six self-governing British colonies. The division of powers between the federal (hereafter referred to as “Commonwealth”) and state governments is based on the United States constitutional model, with the constitution delineating approximately 40 specific federal powers to the Commonwealth (in section 51), and leaving residual powers to the states (as per section 107). In a manner similar to the *British North America Act*, when the Australian constitution was written in the 1890s, management of the environment was not a consideration, and as a result is not explicitly mentioned in any part of the constitution, with the exception of a single clause in section 100 referring to the restriction placed on Commonwealth power to pass laws limiting “the reasonable use of waters of rivers for conservation or irrigation” (Commonwealth of Australia 2003a: 2).
3.2.2 Federal involvement over the environment

While neither the environment and its associated resources nor species at risk are expressly mentioned in the Australian Constitution, these areas are generally regarded under the original document to be under state jurisdiction. Indeed, “on the face of the Constitution ... the environment is a state responsibility” (Saunders 1996: 57). This designation is partially by default because, as mentioned above, any powers not explicitly assigned to the Commonwealth are left to the States. Some Commonwealth powers can, however, be exercised for purposes related to the environment, and the Commonwealth does have power over land which it is explicitly designated to legislate, such as national parks (Bates 1983: 19). Matters over which the Commonwealth has jurisdictional control are listed in section 51 of the Constitution. The States can also exercise nearly all of these powers, but in the event of inconsistency, Commonwealth law prevails (according to s 109). The Commonwealth government also has the constitutional power to legislate on all matters, including the environment, in any Australian territory without self-government, and to supersede legislation in any territory, should the need to do so arise.

3.2.3 Commonwealth Powers of Importance to the Environment and Species-at-Risk

There are several important powers bestowed upon the Commonwealth with relevance to the environment. Section 96 allows the Commonwealth to provide financial grants to the States, potentially for environmental initiatives. These initiatives could include purchasing state land for conservation purposes, or providing financial support for conservation research (Bates 1983: 20; Saunders 1996: 68). Similarly, sections 81-83 can allow the Commonwealth to designate funds for environmental initiatives on a federal level.

Section 51 includes some of the most important Commonwealth powers. Section 51[i] permits the Commonwealth to regulate and partake in trade and commerce within Australia and also internationally. This section has ramifications for the environment because it can provide the Commonwealth with control over the trade of environmentally

---

22 The Australian Capital Territory, Northern Territory, and Norfolk Island are the only territories with self-government, and there are seven territories without.
sensitive goods. Section 51[ii], the taxation power, is useful because it can potentially be used to provide incentives, in particular to industry, for pro-environmental changes in the form of tax cuts. For example, it can be used as an incentive for a company to use environmentally sustainable industrial equipment, or to conserve energy (Bates 1983: 20). Each of these sections has the power to impact species at risk in a variety of (if indirect) ways. Additionally, the corporations power (section 51[xx]) may also be important for environmental conservation, but in terms of species-at-risk protection its applicability is limited, and for this reason will not be discussed further as part of this thesis. For species at risk, the external affairs (section 51[xxix]) power has the greatest applicability.

3.2.4 The External Affairs Power (section 51[xxix])

The external affairs power allows the Commonwealth to pass legislation regarding matters whose realm extends beyond the boundaries of the Australian nation. There are several important implications for this power. First is its use to create Commonwealth Acts dealing with the environment. A significant number of acts dealing exclusively with the environment were enacted under section 51[xxix] between 1976 and 199123 (Crawford 1991: 21). The second implication is how this power impacts the application and implementation of international conventions and treaties to which Australia is party (Blackshield et al. 1996: 442). This is of relevance because many international conventions, such as the 1992 Convention on Biological Diversity, and the 1974 World Heritage Convention, have regulations regarding biodiversity loss and the protection of species at risk and their habitats. Additionally, it has been stated by Chief Justice Gibbs that the external affairs power is of the utmost importance to Commonwealth power because it has the “capacity for almost unlimited expansion” (Gibbs 1983).

The use of this power is still somewhat contentious, however. For environmental matters, the external affairs power has often been used to legislate on issues that appear to

---

be of relevance solely within Australia, which has led to debate over the significance of such issues at an international level (Blackshield et al. 1996: 442). However, these concerns can be addressed when the intrinsic nature of many of these problems, such as species at risk, can be shown to be of international relevance and concern (Crawford 1991: 22). Indeed, defining what legitimately constitutes an “external affair” has been a source of debate amongst environmentalists, scientists, and the courts in recent decades, and it was not until several important decisions were made in the Australian High Court that a precedent was set for this definition. These court rulings will be discussed in detail below.

3.2.5 The Shift in Power from the States to the Commonwealth

The Australian Constitution is intended to change and evolve as society does (Zines 1984: 291), and accordingly, political and constitutional evolution have caused the face of federalism in Australia to change over time (Blackshield et al. 1996: 232). Officially, the general constitutional division of powers has not changed significantly since 1901, with the exception of the Commonwealth’s acquisition of some state land as territories, giving the Commonwealth plenary power in these areas (Saunders 1996: 55-56). Actual amendments to the text have rarely occurred. Despite this, the Commonwealth has acquired considerable power over many areas once considered to be under state jurisdiction, including the environment (Saunders 1996: 55; Bates 1983: 19), and potentially species-at-risk protection.

While the Constitution does not expressly grant the Commonwealth power to make laws relating to the environment (Bates 1983: 19; Martin 1996: 73), as the Australian Senate Committee on the Environment, Recreation, Community and the Arts notes, “the Commonwealth government has [gained] the Constitutional power to regulate, including by legislation, most, if not all, matters of major environmental significance anywhere within the territory of Australia” (Commonwealth of Australia 2003a: 5). It is now widely accepted that the Commonwealth is able to exert influence over most environmental matters (Saunders 1996: 56).
One of the most important factors in the broad shift of power from the states to the Commonwealth has been judicial rulings in the Australian High Court (Zines 1984: 278; Lee and Winterton 1992: 91; Blackshield et al. 1996: 232; Saunders 1996: 60). In recent years there has been a decisive trend within the Australian government toward an increase in Commonwealth power, both in general (Hanks 1986: 107; Sawer 1988: 98; Wiltshire 1990: 5; Detmold 1991: 31), and with respect to jurisdiction over the environment (Saunders 1996: 56). There have been many important judgments that have impacted the division of power over the environment between the States and the Commonwealth governments. The decisions of High Court judges influence the way in which the Constitution is interpreted and applied in the future.

After a brief summary and discussion of three important earlier cases, three of the most significant cases of more recent years will be more thoroughly summarized. Following these summaries, there will be a discussion of the implications each of these three cases has had on the shift in power over the environment.

3.2.6 Early Legal Cases

Jumbunna Coal Mine, No Liability v Victorian Coal Miners’ Assoc., 1908 [6 CLR 309]
The first important case in terms of the broad shift of power from the states to the Commonwealth is Jumbunna. While the ruling in this case did not involve the external affairs power or the environment, it did involve subsection 51[xxxv]. This subsection deals with conciliation and arbitration issues in relation to issues extending beyond one state.

In this case, the constitutionality of the ‘registration provisions’ of the Conciliation and Arbitration Act, 1904, were challenged (Shaw 2001: 218). The aims of the Conciliation and Arbitration Act are listed in section 2 of the Act, with the primary objective being to

---

“constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes,” and the ‘registration provisions’ are a key feature of this Act. These provisions permit associations to be registered and to represent the interests of their members in industrial conflicts (Shaw 2001: 217). It was claimed that the Commonwealth had out-stepped its constitutional bounds by enacting these provisions, as they bestow upon registered associations the same status as corporations (Shaw 2001: 218). Additionally, it was claimed that because these provisions were a component of the Conciliation and Arbitration Act as a whole, that this document in its entirety was unconstitutional (Shaw 2001: 218). However, the High Court upheld the validity of the Act, including the registration provisions, because it was decided that these provisions were linked to the Commonwealth’s power under section 51[xxxv] of the Constitution. With respect to the beginnings of the power shift from the States to the Commonwealth that occurred in this case, Justice O’Connor stated the following in his ruling (1908):

...it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve. For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its objective and purpose.

Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd., 1920 [28 CLR 129]
The trend toward increased federal power gathered significant momentum with the ruling in the Engineers case (Zines 1984: 277; Hanks 1986: 107; Saunders 1996: 60). It was in this case that the High Court declared that Commonwealth powers should be interpreted “literally and given plenary effect” (Saunders 1996: 60), and the ruling on the case had the effect of escalating national power (Zines 1984: 277).

The case started from a claim submitted by the Amalgamated Society of Engineers. The Society was seeking a Commonwealth grant of damages (referred to as an “award”) from 844 employers across the country, and three of these employers were from the State Government of Western Australia (WA). The workers in the Society were performing
government as well as private work, and the question debated in court was whether the Commonwealth could issue an award for these State employees, or whether this action would infringe on State jurisdiction. The court determined the extent of Commonwealth authority in the area of conciliation and arbitration, and whether the Commonwealth could make an award binding those three state employers under the “conciliation and arbitration” power of the Constitution [section 51[xxxv]] (Knox et al. 1920). Five out of six of the presiding judges upheld the Commonwealth’s power in this arena, primarily on the basis that in section 51 of the Constitution, Parliament is granted power “to make laws for the peace, order, and good government of the Commonwealth with respect to ... [c]conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State” (Higgins 1920; Knox et al. 1920).

R v Burgess. Ex parte Henry. 1936 [55 CLR 608]
The first case to consider the breadth of the external affairs power in the High Court was R v Burgess (Parliament of Australia 2003). This case involved a pilot who had his aviation license suspended in Australia, but flew an airplane in Commonwealth airspace regardless of this suspension, against the Air Navigation Regulations. The pilot, Mr. Henry, disputed the constitutional validity of these regulations, which were under the Aircraft Navigation Act of 1920, an Act which gave effect to the international Convention for the Regulation of Aerial Navigation. Mr. Henry claimed that creating legislation regarding air navigation was not constitutionally valid because the Constitution does not specifically mention aviation. However, the majority of the High Court took a broad view of the external affairs power, and it was ruled that despite the Commonwealth’s lack of direct constitutional power to rule over aviation regulations, it could exercise this level of power if it were implementing an international treaty, as was the case in this circumstance (Parliament of Australia 2003).

3.2.7 Recent Legal Cases
The first, and arguably most significant, of these more recent cases is the Tasmanian Dams case. This case was the first in the Australian High Court to define what
constitutes an international or external affair in terms of the environment and environmental protection.

Tasmanian Dams
Case name: Commonwealth v Tasmania, 1983 (158 CLR 1)
Judicial panel: Chief Justice Harry Gibbs, Justices Anthony Mason, Lionel K. Murphy, Ronald Wilson, Gerard Brennan, William Deane and Daryl Dawson

In 1974, Australia ratified the Convention for the Protection of the World Cultural and Natural Heritage. As part of this convention, properties of particular significance are listed on the World Heritage List. More specifically, Article 11 of the Convention identifies an area that qualifies for listing as “forming part of the cultural heritage and natural heritage” and also as having “outstanding universal value.” In 1981, the State Government of Tasmania put forward a request to the Commonwealth government that the Western Tasmania Wilderness National Parks area be added to the World Heritage List. This protected area includes the Franklin River, and other areas of natural and archaeological importance (Gibbs 1983). In 1981 this area was submitted to the World Heritage Committee for consideration, and in December, 1982, it was added to the List. A succeeding government of Tasmania then authorized the construction of a dam near the junction between the Gordon and Franklin Rivers, within the area on the World Heritage List, by passing the 1982 State Act, The Gordon River Hydro-Electric Power Development Act. Construction on this dam began that same year. The dam was intended to provide low-cost electricity to the state of Tasmania, thereby improving the state economy and providing jobs to state residents (Gibbs 1983). The government of Tasmania also declared that the dam would only impact 9500 acres of the park (less than 1.5% of the total area), and would therefore not significantly alter the integrity of the park as a whole (Gibbs 1983). In March, 1983 the Commonwealth government created the World Heritage (Western Tasmania Wilderness) Regulations, and also passed the World Heritage Properties Conservation Act, both of which had the potential to bar
further construction on the dam without permission from a Commonwealth Minister (Parliament of Australia 2003: sec. 5.3.2).

The validity of this Commonwealth Act and set of Regulations was challenged by the State of Tasmania, and this question of validity was brought to the Australian High Court in 1983. The question presented in court was not to decide whether the preservation of the Parks or the economic gains of Tasmania was more important, but rather to determine whether the instigation of the Act and Regulations was within the Commonwealth’s constitutional power (Gibbs 1983; Murphy 1983). Were it to be proven in court that these actions were within Commonwealth power, then according to section 109 of the Constitution, the Commonwealth laws barring the construction of the dam would prevail over the state law which instigated this construction (Murphy 1983).

The Commonwealth relied upon both its international obligation to the Convention for the Protection of the World Cultural and Natural Heritage, and upon the external affairs power (section 51[xxix]) of the Constitution to uphold the validity of its Act and Regulations (Gibbs 1983). The first aspect of the Commonwealth argument is rooted in section 4 of the Convention for the Protection of the World Cultural and Natural Heritage text. This section states that a nation that is party to this convention must ensure the “identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage.” Section 5(d) expands on this obligation, stating that each Party shall endeavour, “to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.” Justices Mason, Murphy and Brennan all declared that “it was enough that by entering into a genuine international treaty Australia had assumed an international obligation to enact domestic laws” (Mason 1983). However, the State of Tasmania argued that the Convention imposed no official legal obligation on Australia, and it merely set objectives that would be ideal to attain (Brennan 1983). Determining the enforceability of

---

25 These regulations were implemented under the National Parks and Wildlife Conservation Act, 1975.
international law is a subject that has been debated among legal experts, and no firm answers have yet been established. Indeed, differentiating between “pronouncements of political intent” and “declarations giving rise to legal obligations” is often not possible in the case of international treaties (O’Connell 1970: 246).

While the minority of the Court asserted that there were no provisions contained in the Convention which imposed legal obligation on Australia to protect the Parks from damages (Gibbs 1983), Justice Brennan referred to Article 26 of the Vienna Convention on the Law of Treaties to refute this claim (Brennan 1983). Article 26 states that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” This Article expresses the rule of *pacta sunt servanda,* which, as the preamble to the Vienna Convention on the Law of Treaties states, is recognized universally (Brennan 1983). Justice Brennan turned again to the Vienna Convention to further support this argument (1983), as Article 31 of this convention also supports the notion that a treaty must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.” This facet of the argument leads into the Commonwealth’s second area of defense in support of its Act and Regulations: the concept of what defines a matter as being of “international concern,” and related to this concept, the use of the external affairs power.

There was debate among the presiding Judges in this case as to whether the issue of the Franklin River Dam constituted an external affair. The previous year, in *Koowarta v Bjelke-Petersen* (153 CLR 168), Justice Stephen stated that:

... the quality of being of international concern remains, no less than ever, a valid criterion of whether a particular subject-matter forms part of a nation’s ‘external affairs.’ A subject-matter of international concern necessarily possesses the capacity to affect a

---

26 Section 109 states that in the instance that a State law is in conflict with a Commonwealth law, the Commonwealth law will prevail, and the State law will be invalid (to the extent with which it conflicts with the Commonwealth law).
28 This concept implies “an actual enforceability of international law which is lacking in general” (Fienberg 2003).
29 This case revolved around the Commonwealth *Racial Discrimination Act* of 1975, and whether certain provisions of this Act, which were passed as a result of the International Convention on the Elimination of All Forms of Racial Discrimination, could be upheld by the external affairs power (the Court ruled in favour of upholding the provisions).
country's relations with other nations and this quality is itself enough to make a subject-
matter part of a nation's 'external affairs.'

Justice Brennan found this to be true for the *Tasmanian Dams* case as well, stating that by signing an international treaty on a subject, it "stamps" the subject as a matter of international concern and as an external affair (Brennan 1983). Justice Murphy also observed that while the foundation of Tasmania's argument against the validity of the Act and Regulations was that they were based on "internal" rather than "external" affairs, some internal affairs also qualify as external affairs, including issues such as the "preservation of endangered species" (Murphy 1983). Murphy also noted that the cultural and natural heritage of the world is by nature a component of Australia's external affairs, and that in this instance, "as soon as it is accepted that the Tasmanian wilderness area is part of the world heritage, it follows that its preservation as well as being an internal affair, is part of Australia's external affairs" (Murphy 1983). Justices Mason and Deane also agreed with this assessment, declaring that section 51[xxix] grants the Commonwealth the legislative power required to put the Convention into effect, including the power to create laws within Australia to enact the clauses under the Convention (Deane 1983; Mason 1983).

The majority of the court, including Justices Mason, Murphy, Deane and Brennan, took the broad view of the external affairs power, and ruled in favour of the Commonwealth government. It was decided that the Commonwealth Parliament has the authority to implement and give effect to the Convention for the Protection of the World Cultural and Natural Heritage, and that it is for Parliament to decide how a treaty such as this will be implemented (Mason and Brennan 1988: section 18). The minority of the court, including Chief Justice Gibbs, and Justices Wilson and Dawson ruled against the Commonwealth government.

To summarize, the main questions the court was asked to decide on were:

- Does the Convention for the Protection of the World Cultural and Natural Heritage compel Australia to fulfill any obligations of relevance to this case?
• If this is so, do these obligations warrant the intervention of the Commonwealth government to act for the “peace, order and good government” of Australia by enacting the external affairs power (Wilson 1988: section 4)?

The court ruled in the affirmative for both of these questions. It was ruled that the domestic legislation enacted to support the implementation of an international treaty was permissible under the external affairs power, because the internal or domestic law was found to be external in character.

The *Tasmanian Dams* case is of particular importance to the shift in power from the States to the Commonwealth, especially in terms of the environment. The ruling in this case opened the door for the Commonwealth to use its external affairs power (section 51[xxix]) on a broader scale than they had been used previously. Accordingly, Commonwealth influence over the environment emerged as more powerful than previously acknowledged. Because the Commonwealth had not previously exerted significant power over an environmental issue, it may have been assumed that these powers did not exist (Crawford 1991: 13). However, the use of these now-broadly interpreted powers emerged “very clearly” from the Tasmanian Dams case (Crawford 1991: 13).

**The Lemonthyme Forest Case**

Case name: *Richardson v Forestry Commission*, 1988 (164 CLR 261)

Judicial panel: Chief Justice Anthony Mason, Justices Ronald Wilson, Gerard Brennan, William Deane, Daryl Dawson, John L. Toohey, Mary G. Gauldron

In 1983, the Lemonthyme and Southern Forests Area of Tasmania was listed on the Register of the National Estate (the Australian equivalent of the World Heritage List). In 1987, a Commission of Inquiry was formed as a result of the Commonwealth’s *Lemonthyme and Southern Forests (Commission of Inquiry) Act* to determine whether these areas qualified as World Heritage Sites, and accordingly, to be listed under the Convention for the Protection of the World Cultural and Natural Heritage (Parliament of
Australia 2003: section 5.40). The Commission of Inquiry was also required to investigate and attempt to resolve existing land-use conflicts in the area, which arose because the proposed protected area contained valuable forestry resources (Flinders University Library 2005). The Lemonthyme and Southern Forests Act provided provisional protection for the area, to prevent damage until the Commission of Inquiry had reached a decision regarding the best course of action in terms of land-use for the area (Parliament of Australia 2003: section 5.40). The Commonwealth Minister for the Environment, Senator Richardson, then launched a claim against the Forestry Commission and a logging company (Gunns Kilndried Timber Industries Ltd.), alleging that they had violated the temporary protective measures provided by the Act, and in particular, section 16 of this Act. The validity of the Act was challenged, and the matter taken to the High Court in 1988. The Forestry Commission and logging company (the ‘defendant’) argued that the Act was invalid in terms of its implementation of section 16 (Mason and Brennan 1988). Senator Richardson (the ‘plaintiff’) argued that the Act was a valid implementation of the external affairs power (section 51 [xxix]), as it is an implementation of the Convention for the Protection of the World Cultural and Natural Heritage, an international treaty to which Australia had committed (Mason and Brennan 1988: section 4).

The defendant argued that the Convention for the Protection of the World Cultural and Natural Heritage does not confer any obligations on Australia regarding the Lemonthyme and Southern Forest areas until these areas are officially designated as a World Heritage Site (Mason and Brennan 1988: section 17). The second aspect of the defendant’s argument was that Articles 3 and 11(3) of the Convention state that it is the responsibility of the “State concerned” to designate properties for inclusion as World Heritage Sites,

---

30 The provisional/interim period is defined in section 3 of the Act to start at the commencement of the inquiry and to end when the inquiry is complete (up to a maximum of 42 days from the commencement) (Mason and Brennan 1988: section 13).
31 The Forestry Commission is the legal authority created by the Forestry Act of 1920 that has control over the State of Tasmania’s forest policy and resources.
32 Section 16 makes it an offence during the interim protection period “to kill, cut down or damage a tree in, or to remove a tree, or a part of a tree from, the protected area,” “to construct or establish a road or vehicular track within the protected area,” or to “carry out of any excavation works within the protected area.”
and not the responsibility of the Commonwealth to do so (Mason and Brennan 1988: section 17). However, these arguments ignored the "nature of the obligations imposed by the Convention," and in particular the obligations each State has with respect to its cultural and natural heritage (Mason and Brennan 1988: section 18). The ruling in the Tasmanian Dams case, where it was decided that the external affairs power gives the Commonwealth Parliament the power to implement the Convention for the Protection of the World Cultural and Natural Heritage, was called upon to further refute this argument (Mason and Brennan 1988: section 18).

In the case judgment written by Justices Mason and Brennan, it was stated that if and when Parliament employs the external affairs power to implement an international treaty, the method by which the treaty is implemented is for Parliament to decide, providing that the "means chosen are capable of being reasonably considered and adapted" to that purpose (Mason and Brennan 1988: section 18). It was also decided that because the Lemonythyme and Southern Forests area could potentially contain world heritage characteristics, that it was the Commonwealth's duty to protect these areas from harm (i.e., by way of the Lemonythyme and Southern Forests Act), because if the area were to be damaged, there would be a failure on the part of Australia to uphold the Convention for the Protection of the World and Cultural Heritage (Mason and Brennan 1988: section 33). Because the external affairs power is a "plenary power," it supports legislation intended to support the Commonwealth's "known obligations" as well as its "reasonably apprehended obligations," and this includes treaty obligations (Mason and Brennan 1988: section 33). Because Parliament allowed the Commission of Inquiry to be established, and also allowed for the interim protection period this Commission recommended, a legislative judgment in its favour had been made on the issue, thereby supporting its validity (Mason and Brennan 1988: section 33). As a result, the Act was declared to be valid and the plaintiff's case was upheld (Mason and Brennan 1988: section 34).

This broad interpretation of the external affairs power was confirmed by the decision in this case (Martin 1996: 73). As a result of this and the Tasmanian Dams decisions, this broad interpretation is often said to be beyond dispute (Crawford 1991: 23). Judge Deane
of the Australian High Court has even gone so far as to say that “Australia would, in truth, be ‘an international cripple’” if a narrow view of the section 51 external affairs power were abided by (Deane 1983: section 23).

The Rainforest Case

Case name: The State of Queensland and Another v The Commonwealth of Australia and Another, 1989 (167 CLR 232)

Judicial panel: Chief Justice Anthony Mason, Justices Gerard Brennan, John L. Toohey, Mary G. Gaudron, Michael McHugh, William Deane

In December 1988, a proclamation was made under the World Heritage Properties Conservation Act of 198333 in respect to several pieces of land known as the “Wet Tropical Rainforests of Northeastern Australia” (Gaudron 1989: section 1), a World Heritage Site. This proclamation subjected this area of land to section 6(3) of the Act, which states that,

Where the Governor-General is satisfied that any property in respect of which Proclamation may be made under this subsection is being or is likely to be damaged or destroyed, he may, by Proclamation, declare that property to be property to which section 9 applies.

Section 9 of the Act states that if it is applied to an area, it is not permissible to carry out certain acts in that area (in this case, forestry operations) without the consent of a Minister (Gaudron 1989: section 1). The State of Queensland questioned whether it was permissible for the Commonwealth to make a proclamation under section 6 in relation to this property, and whether the declaration of the area as a World Heritage Site was conclusive evidence of it being part of Australia’s ‘natural heritage’ and therefore eligible for a section 6 proclamation (Parliament of Australia 2003: section 5.47). This question was brought to the High Court.

33 This Act is the domestic legislation which enacts Australia’s commitment to the Convention for the Protection of the World and Cultural Heritage.
According to the Act, in order to be eligible to have a proclamation made in its regard, a property must meet criteria established by sections 3 and 6(2) of the Act. The property in question meets the section 3 criteria through its listing on the World Heritage List. Section 6(2) states that a property must be either one whose protection is a matter of "international obligation, whether by reason of the Convention or otherwise," one where the protection of the property is required to give effect to a treaty (including the Convention), or one where the protection of the property is a matter of “international concern” (Gaudron 1989: section 5). The State of Queensland argued that the property’s listing as a World Heritage Site did not confirm its status as an area whose conservation is an international obligation, and therefore it was not an area eligible for the proclamation made for its protection. The Commonwealth countered that acceptance as a World Heritage Site provided enough evidence of the property’s international value for a proclamation under section 6(2) to be made, and therefore for section 9 of the Act to apply (Gaudron 1989: section 8). If it were to be shown that the international duty to protect the property did exist under section 6(2) of the Act, section 51[xxix] of the Constitution would apply (because it would qualify as an external affair) and the proclamation would therefore be within the legitimate realm of legislative power of the Commonwealth (Gaudron 1989: section 8). Therefore, the decision of whether there was an international duty to protect the property determined whether one of the section 6(2) criteria was met, and whether section 51[xxix] of the Constitution could be applied.

It was decided in Court that because the property had been included on the World Heritage List, and because the process for inclusion on this list is extensive and involves adequate proof of its status of natural or cultural significance on an international level, that its inclusion on the List was sufficient evidence of Australia’s international obligation to protect it (Gaudron 1989: section 13). Therefore, the Court ruled in favour of the Commonwealth, stating that for these reasons, a section 6(2) criterion had been met, and that there was constitutional backing for issuing the proclamation (Gaudron 1989: section 13). This case continued to provide further support for the Court’s broad interpretation of the external affairs power.
3.2.8 Reasons for the Shift in Power

While the initial shift toward increased Commonwealth power can be traced back to the *Engineers’ Case* (Sawer 1988: 98), it is the judicial ruling in the *Rainforest Case*, which came on the heels of two other important decisions, that confirmed the movement toward increased Commonwealth power (Zines 1984: 277), particularly in relation to environmental matters. The rulings in the series of cases discussed above have led to the formation of precedents in terms of the scope of the external affairs power, and as a result of these cases, the broad view of the section 51[xxix] powers has become more widely utilized (Crawford 1991: 23). A body of case law was formed out of these rulings that will impact future court decisions and continue to propagate this broad interpretation. Because of the rulings, it is now accepted that the external affairs power grants the Commonwealth government the authority to implement international treaties, regardless of the subject of these agreements, and that the power can even been utilized in areas traditionally under jurisdiction of the States (Parliament of Australia 2003: section 5.62). These judicial rulings have the power to influence future decisions in the High Court, which in turn have the ability to further evolve constitutional interpretation. In addition, this pattern in judicial rulings has also likely led to increased confidence on the part of the federal government, which has made it more likely to implement its powers in areas, including management of the environment, where it may not have before.

The shift that occurred is decidedly in favour of increased federal involvement in the arena of environmental conservation, largely because the States were failing to make conservation issues a priority, and because national need and the perception of problems and their solutions on a national scale were an important theme in many of these court rulings (Zines 1984: 278). The High Court Justices in these cases repeatedly found the States to be negligent in their duties to protect the environment, and turned to the Commonwealth to uphold these values. Despite the traditional constitutional responsibilities in this area, the Justices were able to interpret the Constitution to allow for greater Commonwealth responsibility. In the case of *Tasmanian Dams*, the State of Tasmania was willing to sacrifice the Franklin River and much of the surrounding area, which had been shown to be of international cultural and environmental significance, in
the interest of low-cost power and job creation. In the *Lemonthyme Forest* case, the Commonwealth Environment Minister had to take the State of Tasmania's Forestry Commission to High Court in order to put the environmental and heritage importance of the Lemonthyme and Southern Forests area ahead of the potential profit from forest harvesting activities. And in the *Rainforest Case*, the State of Queensland attempted to overrule a Commonwealth proclamation under legislation enacted to protect a World Heritage Site, in the name of financial profit from forest harvesting. All of these cases illustrate examples of where the States placed economic gain ahead of environmental conservation.

Aside from these judicial rulings, there are several other important reasons for the growth in centralized power within Australia. One of these is Australia's growing international presence, and accordingly its increased commitments to international treaties. Australia is party to numerous international conventions (entered into under section 61 of the Constitution), and as a result, utilizes federal power under section 51 to enact and ensure compliance with the terms and obligations of these conventions. This automatically involves the federal government in jurisdictions where it may not have legislated before.

Another reason for the growth in Commonwealth power is that the environment is often viewed as an area of national (and international) concern, because the health of the environment has implications for the entire nation. This means that even if a certain problem is limited to one state, the ramifications may be felt on a national scale. Additionally, some environmental problems may be too complicated for a single state to deal with adequately (Zines 1984: 287). These factors in combination have also contributed to greater federal involvement.

Species at risk is the perfect example of this type of problem because a species (be it flora, fauna, or microbial) is not restricted or impacted by political state boundaries, and can therefore be considered of concern to the entire nation. Indeed, the environment is more thoroughly protected when it is perceived as a "whole" entity that should be treated
and conserved in its entirety, with coherent strategies “to overcome environmental impact or deterioration” (Crawford 1991: 11).

The demands and recommendations of citizens, government bodies and scientists also influence the Commonwealth role in government. In 1999, the Australian Senate Committee on the Environment, Recreation, Community and the Arts conducted public hearings to ascertain what the State governments, non-governmental organizations, and the general population valued as important with respect to the Commonwealth’s role in environmental protection, and then made recommendations to the Australian Senate on these issues. The information gathered shows “overwhelming support... for the Commonwealth to take a leadership role in environmental matters” (Commonwealth Chapter 3 1). There were two main reasons indicated for this recommendation. The first was a distrust in the States’ ability to protect the environment (some argued that the State governments view the environment only as an economic or political commodity), and the second was the view that the Commonwealth was “better equipped” to compile the necessary resources and funding to sufficiently conserve the environment (Commonwealth Chapter 3 1). In other words, there may be a need for a national solution to a national problem.

As a result of these findings, the Committee made recommendations to the Senate regarding the Commonwealth role in environmental protection. The recommendations of relevance include: (a) the Commonwealth should “not hesitate to creatively employ the wide powers it possesses in order to protect and conserve the environment and should vigorously defend its power when challenged” (Commonwealth Chapter 2 5); and (b) “The Commonwealth should exercise a leadership role on the protection and improvement of the Australian environment. This role should be supported by the unsparing use of all Constitutional power available to the Commonwealth to act in the field of the environment” (Commonwealth Chapter 3 2). The Committee also recommended the formation of an independent statutory commission to advise the government on the role of the Commonwealth in environmental protection (Commonwealth Chapter 2 6). When these factors are considered together, the reasons
for the shift in Australian governance over the environment, and species-at-risk protection in specific, become clear.

The external affairs power is likely to be of even greater significance in coming years, as awareness of the importance of species at risk and their habitats is increasing on a global level, and there may be growth in the creation of international treaties regarding their protection. The 1992 Convention on Biological Diversity is one international agreement already ratified by Australia over which the external affairs power could have relevance for species-at-risk protection, and the Convention for the Protection of the World Cultural and Natural Heritage is another treaty with potential ramifications. The external affairs power effectively gives the Commonwealth “a plenary power with respect to the environment” (Martin 1996: 92). It should be noted that in order to be affected by the external affairs power, an international treaty must be “bona fide,” and not being entered into for the sole purpose of allowing the signing country to implement internal legislation (Crawford 1991: 23).

There are many potential implications for species at risk as a result of the shift toward greater Commonwealth power in Australia. However, because species at risk are a relatively new area of concern, there is a dearth of literature on the potential impacts of this power shift on the health of these species. Because of the nature of species at risk and their associated conservation issues, I believe the documented shift that is occurring towards a unified approach for their protection will be beneficial. As is well known, the “concerns of wildlife management, whether in terms of species or habitats, often transcend boundaries” (Gauthier and Wiken 2001: 63) arbitrarily assigned by political willpower.

3.2.9 What legislation exists federally to protect species at risk?

The primary federal legislation in Australia for the protection of species at risk is the Environment Protection and Biodiversity Conservation Act, 1999 (EPBC Act). This Act
retracts and replaces a multitude of earlier acts. The fundamental aims of the EPBC Act are to list, protect, and recover threatened species and ecological communities, and also to identify key threats to these species and communities and to work to abate these threats.

The EPBC Act provides protection for threatened species and ecological communities; migratory species; marine species; cetaceans in Commonwealth waters (and outside Australian waters); and protected species in the territories of Christmas Island, the Cocos Islands and the Coral Sea Islands (Government of Australia 2006b). Section 3A of the Act lists several principles by which it is governed. These principles are referred to as the “principles of ecologically sustainable development,” and reflect the overarching themes of the Act. These principles include the incorporation of both long and short-term goals, the employment of the precautionary principle, the consideration of future generations, and the conservation of biological diversity.

Using these principles as a framework, the EPBC Act provides extensive protection for species at risk on Commonwealth land (Government of Australia 2006a). The Act also regulates the activities of Commonwealth agencies, and provides an assessment and approval process for activities that are likely to impact a matter of National Environmental Significance, regardless of whether this activity or development is taking place on Commonwealth land (Government of Australia 2006a). A matter of National Environmental Significance is an issue that impacts Australia on a national or international level. Currently, there are seven recognized matters of National Environmental Significance:

- threatened species and communities
- migratory species
- commonwealth marine areas

species protection under the EPBC act

section 18 of the EPBC act, prohibits any actions that might have a “significant impact” on any threatened species in an at-risk category. This stipulation applies to a species in any listing category, as well as to an endangered community in any category. section 20A of the act extends this stipulation to listed migratory species, and section 24A extends it to Commonwealth marine environments (and marine areas outside the Commonwealth domain, but within the realm of Australian jurisdiction). section 196 also provides protection for listed species and communities from being killed, injured, taken, or traded. This same protection is offered to listed migratory species under section 211. section 225 offers protection specifically to cetaceans in Commonwealth marine areas via the Australian Whale Sanctuary, and section 229 makes it an offense to injure, kill, take, trade, keep, move, or interfere with a cetacean within the Australian Whale Sanctuary, or outside its boundaries (not including coastal waters under jurisdiction of a state or Northern Territory), and section 254A provides similar protection for listed marine species.

the listing process

section 178 of the EPBC act lists the categories of risk that can be assigned to native species. These categories are extinct, extinct in the wild, critically endangered, endangered, vulnerable, and conservation dependent, and are assigned to species by the Minister for the Environment and Heritage. section 179 further describes these categories and assigns the criteria required for designation in each category. Categories of risk can also be assigned to threatened ecological communities by the Minister, as per section 181. These categories include critically endangered, endangered, and vulnerable.
The Minister must also compile a list of key threatening processes, as per section 183. A key threatening process is defined in section 188 as a process that “threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.”

Under Section 191, a person may nominate to the Minister a species, ecological community or threatening process to be included in any category of the at-risk species list. Under the same section, it is stipulated that the Minister must forward this recommendation to the Scientific Advisory Committee for review within 10 days of its receipt.

The Scientific Advisory Committee

Section 189 of the EPBC Act stipulates that the Minister must consult the Scientific Advisory Committee before any amendments to the list in section 178 (the at-risk species list) can be made. This section also states that if a native species, ecological community or threatening process has been nominated for listing that the Scientific Committee must provide advice to the Minister regarding this listing within the period of 12 months (or longer if permitted expressly by the Minister) after the Minister indicates to the Committee that the species/community/process has been nominated. As per section 274, the Scientific Advisory Committee must be consulted regarding recovery plans for listed species or ecological communities.

Critical Habitat Provision

Section 207 of the EPBC Act provides protection for the critical habitat, which is defined in the Act as habitat that the Minister perceives as critical to the survival of a listed threatened species or ecological community. Section 207A requires that the Minister consider scientific advice when designating critical habitat, and section 207B provides protection against the intentional destruction of critical habitat on Commonwealth land. Section 207C stipulates that if the Commonwealth sells land which has been designated
as critical habitat to a threatened species or ecological community, included in the contract of sale there must be a covenant for the protection of that land.

Recovery Procedures

Section 269A requires that the Minister ensure a recovery or threat abatement plan be in force for every listed threatened species or ecological community. The Minister may create a recovery plan alone or jointly with a state or territorial Minister, should the species or community occur on state or territorial lands. A recovery plan must not be created for a species that occurs wholly or partly outside a Commonwealth area unless a plan made jointly with the relevant state or territory is not possible. The Minister may also choose to adopt an existing recovery plan created by a state or territory. Section 278 stipulates that the Minister not adopt an existing state or territorial recovery plan unless it has been proven to meet the criteria listed in section 270 (described below).

Section 270 outlines the required content for recovery plans under this Act. The general goal of a recovery plan is stated in section 270(1), and it indicates that a recovery plan must prescribe the actions required to halt the population decline and increase the chances of recovery for a threatened species or ecological community. There are further, more specific objectives for recovery plans listed in section 270(2), and these include: stating the objectives to be achieved, setting criteria to measure the achievement of the objectives, specifying the actions needed to achieve the objectives, identifying threats to the species or community, identifying critical habitat, identifying any populations of the species or community in question facing particular stress, estimating the duration and cost of the recovery process, identifying any interests that will be affected by the plan's implementation, and identifying who will evaluate the recovery process. Section 283 states that a recovery plan may cover more than one threatened species or community. Wildlife conservation plans are created in place of recovery plans for listed migratory species, marine species, or cetacean species as per section 285, and have similar processes and implementation procedures to recovery plans.
Section 270A is also relevant to recovery planning. This section states that the Minister may at any time choose to create a “threat abatement plan” for a key threatening process (identified in section 183). In this case, the Minister must also cooperate with the relevant state or territorial minister, and also consult the Scientific Committee for its advice about the process. Existing state or territory plans may also be adopted in this case. Section 271 lists in detail the necessary content of a threat abatement plan. This content is comparable to the necessary content of a recovery plan, and accordingly, will not be listed here. Section 283 also states that a threat abatement plan may cover more than one key threatening process.

Section 273 lists the time limits for implementation of recovery plans. For a species or ecological community located entirely or partly on Commonwealth land, the recovery plan must be implemented within two years for a critically endangered species or community, within 3 years for an endangered species or community or a species extinct in the wild, and within 5 years for a vulnerable species or community. If a species or ecological community is located wholly outside commonwealth land, the recovery plan must be implemented as soon as possible after its inclusion in a threatened category. This same section requires that a threat abatement plan be in force within three years of the decision to create the plan.

Section 274 requires that the Scientific Committee be consulted on the content of recovery and threat abatement plans, and also on the timing and implementation of these plans. Under section 275, the public must be made aware of the content of recovery and threat abatement plans through publication in local newspapers, and by making the plan available for purchase by the public.

**Stewardship Efforts under the EPBC Act**

Section 171 provides some incentive to members of the public or any Non-Governmental Organization, academic institution, etc. to participate in biodiversity conservation measures. The section states that financial or other types of assistance may be provided
to any person who intends to monitor biodiversity or partake in other important conservation efforts.

3.2.10 To what extent does Australia apply relevant international laws and conventions?

Australia enters international treaties and conventions by way of section 61\textsuperscript{35} of the Constitution. The responsibility of entering into treaties belongs to the Executive branch of government, rather than the Parliamentary branch (Government of Australia 2006c). The decision to sign and ratify a convention is Ministerial, and in some instances is taken to the Cabinet level (Government of Australia 2006c). Parliament is consulted on the ratification of treaties, however. Each treaty signed by Australia is tabled in both Parliamentary Houses for a minimum of 15 sitting days before any internationally binding action is taken (such as entering into or withdrawing from a treaty) (Government of Australia 2006c). In some cases, there is a need for the Australian government to create a federal law to implement an international treaty. Section 51[xxix] (the external affairs power) allows the government to accomplish this (Government of Australia 2006c). As was mentioned previously, the signing of bona fide international treaties can allow the federal government to create legislation in environmental arenas as long as they can be shown to be an “external affair” (see section 4.2.1.1 for a more in-depth discussion).

Australia is party to a significant number of international treaties, including approximately 157 of relevance to the environment (Government of Australia 2006d). There are several reasons why it is important for Australia to enter into treaties on a global scale. Australia is a relatively small nation, and involving itself in treaties increases its international presence. Australia’s geographic isolation and relatively small population can also be seen as weaknesses if the only means by which it can participate in the international arena is via economic and military activities (Australasian Legal

\textsuperscript{35} Section 61 is called the Executive Power. This power is exercised by the Governor-General (on behalf of the Queen), and it "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."
Information Institute 2006). As a nation of "middle-ranking" power, Australia has the ability to influence the terms of the international treaties to which it is party, which can further benefit federal interests (Australasian Legal Information Institute 2006). International treaties also benefit the participating nations by providing a forum for international cooperation on issues such as sustainable development and international crime, which can lead to more effective solutions to these problems, which accordingly benefits Australia (Australasian Legal Information Institute 2006).
4.0 DISCUSSION

In this thesis, I have addressed two questions:

- Is increased federal constitutional power possible\textsuperscript{36} as a means for Canada to fulfill its commitments under the Convention on Biological Diversity?
- If increased federal constitutional power is determined to be a possible means, then should the Canadian federal government assume greater federal jurisdiction over the protection of species at risk?

To answer these questions, several research objectives were formulated, and responding to these objectives primarily involved comparing Canadian and Australian constitutional law as case studies. The starting point for this analysis was to establish comparability between the Canadian and Australian cases, while at the same time noting the major differences between the cases and the impact of these differences on my assessment. The next step was to assess whether the Canadian federal government could assume greater jurisdiction over species at risk. This section involved demonstrating the feasibility on a constitutional level for Canada to increase federal jurisdiction in general matters currently viewed as provincial jurisdiction. The next step was to examine the extent to which an increase in federal jurisdiction specifically for species-at-risk protection can be justified by way of a reinterpretation of the Constitution Act, 1867. This latter section used evidence and justification gleaned from the Australian case study, as well as from an examination of existing species-at-risk policies in Canada to support a reallocation of jurisdiction. This process also involved a discussion of provincial and territorial performance in creating species-at-risk legislation.

\textsuperscript{36} The term "possible" in this context refers to one of three alethic modalities (i.e., necessary/possible/impossible) used in the analysis of norms (Sumner 1987: 22). It does not refer to possibility or impossibility in the physical sense. In other words, it refers to whether it would be possible to reinterpret the constitution given the current norms governing constitutional law.
4.1 Comparability of the Canadian and Australian Cases

Canada and Australia have similar governmental structures in a variety of ways. First, both Canada and Australia are Commonwealth nations. Both countries have British roots and were established as British colonies. Second, there are similarities in their governmental systems. More specifically, both are federalist nations, meaning that each has a dualistic system of government, with power divided between provincial or state governments and a federal government (see Section 1.2.5 for a detailed discussion of federalism). Third, both Australia and Canada have ratified the Convention on Biological Diversity and the Convention for the Protection of the World Cultural and Natural Heritage, and are thereby committed to creating adequate species-at-risk legislation to protect biodiversity. And finally, in both countries, the jurisdictional authority with respect to the environment is, for the most part, constitutionally allocated to the provinces or states.

There are also important similarities between Canada and Australia with respect to constitutional evolution. As was discussed in section 1.2.4, it is also crucial to note the importance of flexibility in constitutional interpretation in accordance with changes in societal values, and also that the Constitutions of Canada and Australia are not meant to be interpreted rigidly. Additionally, the constitutional documents of both nations are written with a similar structural basis, rooted in federalism.

In terms of differences between the Canadian and Australian cases, the most significant dissimilarity between the constitutions that is of relevance to this thesis is the assignment of residual power. In Australia the residual power lies with the states, whereas in Canada it lies with the federal government. This discrepancy may appear to be fundamental, and contrary to the argument that the cases are comparable. However, this is not so, due to the particular nature of the discrepancy. In this situation, the discrepancy serves to further the argument in support of Canada moving toward greater federal involvement, as Australia did. This is because Canada is approaching this situation from a more centralized starting point. Australia moved toward greater federal involvement, despite residual power lying with the states, whereas in Canada, this power already resides with
the federal government. Moving towards greater federal power is therefore likely to be
an easier shift in Canada than it was in Australia.

4.2 Constitutional Feasibility of Canadian Federal Jurisdiction over
Species at Risk

There are four arguments supporting the case that the Canadian federal government
could, if the need to do so was proven, assume greater jurisdiction over species-at-risk
protection. The first argument comes directly from the Constitution Act, 1867, and relies
on the concept of “national concern” and also the “provincial inability test.” Defining
when a matter becomes of national concern, or “the concern of the Dominion as a
whole,” is a difficult undertaking. As previously discussed, two Supreme Court of
Canada cases, Johannesson and Munro, can offer some guidance in formulating a
definition. However, the guidance provided by these cases still leaves room for
interpretation. Ultimately, all that can be garnered from these rulings is that a subject of
legislation must be of “nation-wide importance” to be of national concern (Hogg 2005:
452).

This criterion alone does not define a matter of national concern, and it can be expanded
to say that such a matter must be outside the abilities of the provinces and territories to
manage without federal intervention (Gibson 2005: 33). In addition, legislative
homogeneity on a national level is not only desirable but is a requirement (Hogg 2005:453-
54). Together, these interpretations help to form a set of criteria to determine whether an
issue is a matter of national concern. The single most critical criterion for national
concern is that there be a need for a federal law (or laws) to accomplish a goal that cannot
be achieved by independent efforts of the provinces because the negligence of one
province would result in negative consequences for the other provinces. This defining
element is closely related to the guidelines delineating a matter which qualifies under the
provincial inability test: a matter in which “the failure of one province to act would
injure the residents of the other (cooperating) provinces” (Hogg 2005: 453).
Using these criteria as a guide, the case can be made that species-at-risk protection is a matter of national concern, and indeed satisfies the provincial inability test. Species at risk are a matter of national concern because while a certain species may only be located in a specific area of a specific province, the endangerment and potential loss of this species could impact Canada as a whole. Because Canadian biodiversity is composed of species in every province, if one species is lost, the entire nation loses a piece of Canada’s national biodiversity. Hogg cautions that the national concern provision should not be applied to “sweeping categories” such as environmental pollution, because if this precedent was set, this could lead to qualification of nearly any matter as of national concern (2005: 469). However, it is my argument that biodiversity conservation, and even more specifically, species-at-risk protection, are “more specific and meaningful categories for the purposes of allocating federal jurisdiction” (2005: 469), and thereby avoid falling into the sweeping category of legislation. In addition, the conservation of biodiversity falls into a category which ranks it as of importance to humanity on a global level. While an issue such as environmental pollution could be described as “sweeping,” in theory it could be handled by individual provinces. Biodiversity is of importance to humanity, as is indicated by the international Convention on Biological Diversity’s existence to address this issue, and thereby this issue meets the definition of the national concern test.

The second argument supporting the case for greater federal involvement in species-at-risk protection is also related to the concept of national concern, and comes from an argument which was discussed in a previous section of this thesis (section 1.2.4). It was previously pointed out that social, economic, and environmental circumstances change over time, and the Constitution Act, 1867 was written in vague language so as to accommodate reinterpretation with changing circumstances. I argue that the protection of species at risk is one of those changing circumstances.

At present, the environment is a significant issue in Canadian culture. A poll conducted by Pollara in 2001 (commissioned by the Sierra Legal Defense Fund) found that almost half of Canadians were willing to forgo tax cuts, restrict resource extraction activities
such as mining and logging, and give up land for conservation activities (Jaimet 2001). Additionally, species-at-risk legislation has been at the forefront of media issues in recent years (for example, the introduction and implementation of SARA in 2002 and 2003, and the spotted owl debate in British Columbia). The increased importance placed on environmental issues throughout Canada becomes an important consideration in allowing for the possibility of reinterpreting the constitution to allow for more effective species-at-risk legislation. In addition, there have been several court rulings which indicate an increased willingness on the part of the Canadian courts to interpret the constitution more broadly.

There is an avenue for reinterpreting the constitution by way of the POGG clause and the national concern test. The use of the POGG clause in this manner can be correlated with Australia’s use of the external affairs power to allow the federal government greater power over the normally-state-controlled environment. In the past, the use of the POGG power for environmental purposes has been limited. However, in this instance, given that species-at-risk protection could be considered to be a matter of national concern, and an issue of appropriate scope to be acceptable, the POGG power could be applied.

The third argument is directly related to the Australian experience. Given that the Canadian and Australian cases are comparable, Canada could follow Australia’s path toward greater federal involvement in environmental matters. Australia has made the shift toward increased Commonwealth (i.e., federal government) involvement as a result of several important case rulings of the High Court. In Australia, the High Court ruled in favour of increased federal jurisdiction in three critical court cases in the 1980s. The states were failing to uphold an international environmental convention. Therefore, the High Court reinterpreted the Constitution so as to provide greater federal jurisdiction in environmental matters. In Australia the external affairs power of the Australian federal government allowed the federal government to step into what had formerly been state jurisdiction.

37 1983 Tasmanian Dams Case, 1988 Lementhyme Forest Case, 1989 Rainforest Case
In Canada we have a similar situation. The provinces are failing to uphold another international convention, the Convention on Biological Diversity, despite the Accord for the Protection of Species at Risk. The federal government, under the *Constitution Act, 1867*, has similar powers as the Australian external affairs power. In particular this takes the form of the POGG clause, which allows the federal government to assume jurisdiction when the provincial inability test or the national concern test have been met. I have presented evidence that the provinces' collective failure to protect species at risk in Canada meets these two tests. As a result, the POGG clause could be used to assert greater federal jurisdiction over species-at-risk protection in a manner that is similar to the Australian federal government's exercise of its external affairs power.

The fourth and final argument in support of Canada's ability to increase federal jurisdiction is the precedent that was set by the *Migratory Birds Convention Act, 1994*, which gives effect to the treaty signed between Canada and the United States in 1916. The Act was passed in 1917 and amended in 1994. This Act allows for the Canadian federal government to infringe on the provincial jurisdiction of the protection of a particular subset of species: migratory birds. The *Migratory Birds Convention Act, 1994* allows the federal government to designate either federal or provincial lands as sanctuaries for these birds, and prohibits the destruction of either individuals or their nests. The rationale for allowing the federal government to create legislation under provincial jurisdiction was that the control of migratory bird hunting, and thereby the control of migratory bird protection, could be more effective on a large scale (Wagner and Thompson 1993). This rationale can also be applied to the conservation of species at risk. Many species do not adhere to provincial boundaries, and therefore unified federal legislation could potentially be more effective at protecting transient species at risk. In addition, unified legislation is also more administratively effective and efficient than a collection of smaller pieces of legislation, and has a decreased likelihood of deficiency. The signing of this treaty, and the subsequent implementation of the relevant Act, provide a precedent that could ease federal infringement on provincial jurisdiction in the present situation.
4.3 Reasons in Support of Increased Federal Jurisdiction

I have made a case that it is possible to increase federal constitutional power over species-at-risk protection. Now I will speak to why this power shift should take place.

An increase in federal jurisdiction over species-at-risk protection can be justified by four reasons. The first is that the provinces and territories are not fulfilling their commitment to the Accord. Evidence for this assertion, which is largely based on my own analysis of provincial performance, has been presented in section 3.1.3 and also in Appendix 3. No single province or territory is coming close to fulfilling the fifteen criteria assigned by the Accord. As mentioned previously, my own analysis indicates that across Canada, only 26% of Accord criteria are fulfilled completely, and another 10% are fulfilled to a limited degree. Only two provinces have completely fulfilled more than half of the 15 criteria, and the remaining eleven provinces and territories have completely fulfilled one third or less of the criteria. The Stratos Inc. report discussed in an earlier section of this thesis corroborates this analysis, stating that no province or territory has met the full set of Accord criteria. In the case of British Columbia, the 2004 paper written by Wood and Flahr also confirms this assessment. British Columbia and Ontario also have the highest numbers of species at risk, in combination with some of the most deficient legislation in the nation.\(^{38}\) In addition, although conclusive evidence is lacking, there is suspicion that in cases where sufficient legislation is in place, it is not being implemented effectively. This type of information is difficult to accurately assess. However, regardless of this potential for further obstacles, the first step toward effective legislation is creating the legislation, and at present, this deficiency is the primary concern.

The second reason that justifies increased federal jurisdiction is that the provinces are in an apparent conflict-of-interest situation. Resource extraction and biodiversity conservation are in competition to a large extent, and the provinces regard the use of provincial natural resources to generate revenue as more important than the protection

\(^{38}\) British Columbia has fulfilled no criterion listed by the Accord completely, and three to a limited degree. Ontario has fulfilled four criteria completely, and an additional one criterion to a limited degree.
and conservation of biodiversity (Harrison 1996: 91). This concept can be further illuminated with an example. Most species become threatened or endangered as a result of habitat loss (Sala et al. 2000: 1770; Pimm et al. 2001). In British Columbia, many of the species currently identified as at-risk by the BC Conservation Data Centre are forest-dependent, and many of these species are threatened by habitat loss. The provincial government receives revenue from stumpage and royalties from areas that are harvested. Therefore, if the provincial government were to forgo harvesting and therefore the revenue gained from harvesting in order to protect species-at-risk, it would sacrifice income. This leads to the conflict-of-interest situation.

There is further evidence of the conflict-of-interest situation directly embedded in one of the provincial species-at-risk protection programs in place in BC. Under the Identified Wildlife Management Strategy (under the Forest and Range Practices Act) there is a 1% cap placed on the impact that the Identified Wildlife Management Strategy is permitted to have on the annual allowable cut in BC (Ministry of Water, Land, and Air Protection 2004: 13). Wood et al. (2003: 21) have also noted that in British Columbia, “conflicting mandates [have] existed between ministries that had the authority to protect the habitat of species at risk in forested areas of BC.” These facts indicate that a priority is being placed on revenue from provincial resources rather than on species-at-risk protection.

By contrast, the federal government has a better record of performance in the protection of species at risk. This performance is assessed against the Accord criteria, and is presented in the final table of Appendix 3 and is summarized in Appendix 4. The federal government’s Species at Risk Act meets 13 of the Accord criteria, and the remaining two criteria are met in a limited sense. This high level of performance certainly does not suggest that the federal government would be capable of immediately providing effective species-at-risk protection for every province and territory. There would be many obstacles to overcome before this could be achieved. However, this evidence does suggest that the legislation created by the federal government is more closely aligned with the recommendations laid out by the Accord, and this is a solid indication of the sufficiency of the federal legislation. The Accord criteria were agreed to in order to meet
standards set by the Convention on Biological Diversity, an international agreement with international standards. SARA’s adherence to these standards is an indication of its adequacy.

Greater federal involvement could also help resolve the conflict-of-interest situation within the provinces and territories. The provinces have a vested interest in maximizing revenue from resource harvesting, as much of their revenue comes from this source. In fact, the provinces and territories have exclusive power over the revenue from natural resource harvesting in their regions (Department of Finance Canada 2004). The federal government does not have this same direct interest in resource harvesting. In support of this point, Harrison notes that, “in contrast to provincial jurisdiction, federal authority over the environment is indirect and less closely tied to the exploitation of natural resources” (1996:19). Most federal revenue comes from income tax collection, so in this sense the federal government has an interest in keeping employment high and would not want jobs cut from the resource harvesting sector. However, because in theory these jobs could be replaced by others in more sustainable industries, this interest is more indirect as compared to that of the provinces and territories, which rely directly on revenue from resource harvesting. In fact, in recent years employment in the resource sector has been dropping, and so federal interest in job creation in other sectors should be heightened (Natural Resources Canada 2006).

The third reason that justifies greater federal involvement in species-at-risk protection is that the federal government would likely be more effective at protecting species at risk. The evidence supporting this assertion can be divided into two categories. The first is that the federal government has a good track record of advocating for species-at-risk, and the second is that the federal government has a vested interest, on an international scale, in providing effective protection.

The federal government’s proven track record for conservation initiatives has three components. First, as my analysis shows, SARA more completely meets the Accord criteria than any piece of provincial or territorial legislation. Second, with respect to
another piece of federal legislation, the *Canada National Parks Act*, it is stated that while it is important for the public to enjoy and experience wilderness through national parks, “ecological integrity is [Parks Canada’s] endpoint” (Parks Canada 2006a). In addition, Parks Canada states that its overall mandate is to “enhance and restore ecological integrity while fostering public understanding, appreciation and enjoyment” (Parks Canada 2006b). This mandate places the conservation of species ahead of recreational values. The requirement that the principal focus of the Parks Canada mandate be ecological integrity is new, and illustrates the federal government’s willingness to put conservation ahead of other values (Parks Canada 2006b). Finally, the federal government has been running the RENEW program since 1988. As mentioned in an earlier section, RENEW works to create and implement recovery strategies for COSEWIC-listed species. However, RENEW has been in place longer than SARA has legally required recovery planning, and its existence for the past 19 years demonstrates the federal government’s long-term commitment to species at risk.

The federal government also has a vested interest in providing effective species-at-risk protection to uphold its international reputation. The federal government is the main representative of Canada at the Convention on Biological Diversity and its associated meetings of the Conference of the Parties. This means that the federal government has motivation to keep its international record positive, and is required to defend Canada on an international level. The federal government therefore has an interest in fulfilling its commitments under the Convention on Biological Diversity, and thereby to place importance on matters of international relevance, such as species-at-risk and biodiversity conservation.

The fourth reason that justifies greater federal involvement in species-at-risk protection is that biodiversity should be conserved. There are many reasons to conserve biodiversity, including its instrumental and intrinsic values, which were discussed in detail in a previous section of this thesis. Further to these reasons, looking at the broader picture it can be stated that biodiversity is an “essential environmental condition” (Wood 2000: 40), a condition that is reached only when a composite of individual species and
ecosystems are combined. This condition is achieved in only one way, and that is when biodiversity is intact. It follows that biodiversity can only remain intact if it is conserved. Because biodiversity makes an invaluable contribution to the world, and species are a key component of biodiversity, it follows that it should be protected.

It is our responsibility to conserve this environmental condition that is in our charge. If the provinces and territories are unable or unwilling to enact or implement legislation that accomplishes this goal, then the federal government should exercise its power to do so.
5.0 CONCLUSIONS AND SUGGESTIONS FOR FURTHER RESEARCH

5.1 Concluding Observations

In this thesis, I have shown that greater federal involvement in species-at-risk protection is one option for improving the effectiveness of biodiversity conservation in Canada and would simultaneously provide a means for Canada to fulfill its commitments under the Convention on Biological Diversity.

I have shown that given Canada's constitutional structure this route is a feasible option. First, I described the limitations and problems with the existing structure of species-at-risk legislation in Canada, and how the current interpretation of the Constitution Act, 1867 contributes to these limitations. Second, I examined the current policies, at both federal and provincial levels, that exist to protect species at risk in Canada. Subsequently, I demonstrated the deficiencies in the existing body of provincial and territorial legislation. Third, I used the case of Australia as a comparative tool for analysis. Through this example, I have shown that another Commonwealth nation, with a similar constitutional structure and political framework, has shifted toward greater federal involvement in environmental protection. Australia made this shift as a result of several important rulings in the Australian High Court. These rulings revealed the negligence of the Australian states in protecting biodiversity despite the commitments Australia as a nation had made under another international environmental convention, the Convention for the Protection of the World Cultural and Natural Heritage.

Using these three themes, I have shown that the constitutional framework exists for Canada to follow the path taken by Australia, and that Canada could use similar reasoning to justify increased federal jurisdiction over the protection of species at risk.

I have also explained that Canada should make this shift for four reasons: first, because of the failure of the provinces to meet the terms of the Accord; second, because of the conflict of interest that exists in the provincial governments between conservation and
revenue generation by natural resources; third, because there is evidence that the federal government could more effectively protect species at risk; and fourth, because biodiversity and the species that compose it constitute an essential environmental condition for humanity and therefore should be conserved.

The simplest way to attain sufficient species-at-risk legislation in Canada would be for the provinces and territories to fulfill their commitments to the Accord. Given the current failure of the provinces and territories, a reinterpretation of the constitution to increase federal jurisdiction is a strong option to improve species-at-risk protection and to meet Canada’s commitments under the Convention on Biological Diversity.

5.2 Suggestions for Further Research

There is need and opportunity for further research in the area of provincial and territorial species-at-risk policies in Canada. While I provided a thorough summary of the policy and legislation that currently is in place on a provincial level, there is a need to take this research a step further. An exhaustive compilation of existing legislation, policies, non-legislated programs, and stewardship activities for each province and territory would make a considerable contribution to the literature. In addition, a survey such as this would be of great assistance in pinpointing deficiencies and weaknesses in the current legislation, would help detect problems that are common to a number of provinces, and therefore would be a useful tool for the formulation of solutions to these problems.
6.0 REFERENCES

Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd., 1920 [28 C.L.R. 129]. High Court of Australia.


*Canadian Wildlife Federation v Minister of the Environment,* 1989 [3 FC 309 (TD)]. Supreme Court of Canada.


Commonwealth v Tasmania, 1983 [158 CLR 1]. High Court of Australia.


Environment Canada. 2006b. *Species at Risk: Search by Species.*


Government of Australia. 2006a. *Do You Need Approval?*  


Government of Canada. 2005a. *COSEWIC FAQ.*
http://www.cosewic.gc.ca/eng/sct0/assessment_process_e.cfm#tbl1 Accessed 10
May 2006.

August 2005.


June 2006.


2006.


http://www.nwtwildlife.com/Biodiversity%20web%20version%202005/members.
htm Accessed 1 November 2006.


Accessed 1 October 2006.


Johanneson v West St. Paul, 1952 [1 SCR 292]. Supreme Court of Canada.

*Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*, 1908 [6 CLR 309]. High Court of Australia.

Accessed 1 October 2006.

*Koowarta v Bjelke-Petersen*, 1982 [153 CLR 168]. High Court of Australia.


Munro v National Capital Comm., 1966 [SCR 663]. Supreme Court of Canada.


http://www.nrcan.gc.ca/cfs/national/what-quoi/sof/sof06/statistics_e.html


Norton, Bryan G. 2003. Defining Biodiversity: Do we know what we are trying to save? University of British Columbia, Faculty of Forestry Jubilee Lecture Series.


*R v Burgess Ex parte Henry*, 1936 [55 CLR 608]. High Court of Australia.


*Richardson v Forestry Commission*, 1988 [164 CLR 261]. High Court of Australia.


Appendix 1: Article 8 of the Convention on Biological Diversity

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

(b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

(c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;

(d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;

(e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;

(f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;

(g) Establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health;

(h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species;

(i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations;

(l) Where a significant adverse effect on biological diversity has been determined pursuant to Article 7, regulate or manage the relevant processes and categories of activities; and

(m) Cooperate in providing financial and other support for in-situ conservation outlined in subparagraphs (a) to (l) above, particularly to developing countries.
# Appendix 2: Criteria for Accord for Protection of Species at Risk

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Accord for Protection of Species at Risk</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Address all native, wild species</td>
</tr>
<tr>
<td>2</td>
<td>Provide an independent process for assessing the status of species at risk</td>
</tr>
<tr>
<td>3</td>
<td>Legally designate species as threatened or endangered</td>
</tr>
<tr>
<td>4</td>
<td>Provide immediate legal protection for threatened or endangered species</td>
</tr>
<tr>
<td>5</td>
<td>Provide protection for the habitat of threatened or endangered species</td>
</tr>
<tr>
<td>6</td>
<td>Provide for the development of recovery plans within one year for endangered species and two years for threatened species that address the identified threats to the species and its habitat</td>
</tr>
<tr>
<td>7</td>
<td>Ensure multi-jurisdictional cooperation for the protection of species that cross borders through the development and implementation of recovery plans</td>
</tr>
<tr>
<td>8</td>
<td>Consider the needs of species at risk as part of environmental assessment processes</td>
</tr>
<tr>
<td>9</td>
<td>Implement recovery plans in a timely fashion</td>
</tr>
<tr>
<td>10</td>
<td>Monitor, assess and report regularly on the status of all wild species</td>
</tr>
<tr>
<td>11</td>
<td>Emphasize preventive measures to keep species from becoming at risk</td>
</tr>
<tr>
<td>12</td>
<td>Improve awareness of the needs of species at risk</td>
</tr>
<tr>
<td>13</td>
<td>Encourage citizens to participate in conservation and protection actions</td>
</tr>
<tr>
<td>14</td>
<td>Recognize, foster and support effective and long term stewardship by resource users and managers, landowners, and other citizens</td>
</tr>
<tr>
<td>15</td>
<td>Provide for effective enforcement</td>
</tr>
</tbody>
</table>
Appendix 3: Detailed Assessments of Provincial Performance against Accord Criteria

Legend
N= No
Y= Yes
L= Limited
NA= Not Applicable
NL= No Legislation
U=Unknown or unclear

Note: there may be non-legislated programs in place in addition to those mentioned here. Acts other than the principal species at risk act may be used to fulfill criteria in the Accord list, if they exist.


<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>L</td>
<td>No species have been added to the <em>Wildlife Act</em>’s list in over 20 years. The IWMS only applies to species affected by forest or range activities that are not protected by any other legislation.</td>
</tr>
<tr>
<td>2</td>
<td>NR</td>
<td>Not required by the <em>Wildlife Act</em>, although the information is available from the BC Conservation Data Centre and COSEWIC. For the IWMS, COSEWIC-listed species are protected (but again, only those affected by forest and range practices).</td>
</tr>
<tr>
<td>3</td>
<td>L</td>
<td>Yes, but the <em>Wildlife Act</em> only lists 4 species, and the IWMS lists a limited number of species based on the criteria listed above.</td>
</tr>
<tr>
<td>4</td>
<td>L</td>
<td>Under the <em>Wildlife Act</em> section 6 of the amendment provides protection for individuals. The IWMS does not mention protection for individuals.</td>
</tr>
<tr>
<td>5</td>
<td>L</td>
<td>Yes, under section 5 for the <em>Wildlife Act</em> and section 6.1 in the amendment to this Act (Bill 51). For IWMS, Wildlife Habitat Areas (WHAs) and General Wildlife Measures protect habitat, but WHAs will only be implemented until the annual allowable cut has been affected by 1% (per forest district), and forest harvesting may occur in WHAs if it is compatible with the species for which the WHA was designated.</td>
</tr>
<tr>
<td>6</td>
<td>N</td>
<td>No recovery plans are mentioned in either the <em>Wildlife Act</em> or the IWMS.</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>Not applicable, because there are no recovery plans.</td>
</tr>
<tr>
<td>8</td>
<td>NR</td>
<td>It is not required under either piece of legislation that species at risk be considered in an environmental assessment process.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Details</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>Again, not applicable because there are no recovery plans.</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>Not specifically required by either piece of legislation.</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>Not part of either piece of legislation.</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>Some programs to raise awareness about species at risk are in place in BC, but none is required by these pieces of legislation.</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>Again, there are programs in place in BC, but none is required by law.</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
<td>Again, there are programs in place in BC, but none are required by law.</td>
</tr>
<tr>
<td>15</td>
<td>N</td>
<td>Under section 84, the <em>Wildlife Act</em> provides for penalties for committing an offence under this Act (monetary fines and/or imprisonment), but enforcement is nowhere mentioned. In Appendix 9 of the 2004 version of the IWMS, there are regulations regarding General Wildlife Measures, but again, there is no mention of enforcement.</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>There is no mention in the Act of characteristics that prohibit a species from consideration for listing.</td>
</tr>
<tr>
<td>2</td>
<td>Y</td>
<td>Yes, the “Scientific Subcommittee” of the “Endangered Species Conservation Committee” provides advice to the Minister, as per section 6 of the Act. Recommendations are not legally binding.</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>The Scientific Subcommittee will make recommendations about “establish[ing]” species as endangered to the Minister.</td>
</tr>
<tr>
<td>4</td>
<td>U</td>
<td>In the Species Assessments prepared by the Endangered Species Conservation Committee, it is stated in each assessment that it is “illegal to harm species X” (see any species assessment for an example) (Government of Alberta 2006e). However, nowhere in the Act is there mention of protection for at-risk species.</td>
</tr>
<tr>
<td>5</td>
<td>L</td>
<td>Section 36 (and section 96 of the Regulations) provides protection for the nest, den, dam or house of all “endangered animals”, but not general habitat, critical habitat or any other measures. Schedule 2 of the Regulations also designates the Alberta Conservation Association with habitat enhancement projects for endangered species.</td>
</tr>
<tr>
<td>6</td>
<td>L</td>
<td>Recovery plans are mentioned in section 6 of the Act, but there is no designation of these plans as “required.” However, the</td>
</tr>
</tbody>
</table>
Alberta Government claims that recovery plans are required for endangered species within one year of listing, and for threatened species within two years (Government of Alberta 2006d). The government also notes that recovery plans are only prepared when the resources are available to do so (Government of Alberta 2006d).

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>N</td>
</tr>
<tr>
<td>8</td>
<td>N</td>
</tr>
<tr>
<td>9</td>
<td>U</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
</tr>
<tr>
<td>15</td>
<td>N</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Section 2 of the Act declares that the Act applies to all wild, native species in the province.</td>
</tr>
<tr>
<td>2</td>
<td>NR</td>
<td>The Minister may request or consider information from the “Scientific Working Group,” but it is not required to do so (the Working Group is appointed in section 8, and the optional status of their recommendations cited in section 48 of the Act).</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Section 49 allows the Minister to designate a species as extirpated, endangered, threatened or vulnerable.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Yes, according to the Act.</td>
</tr>
</tbody>
</table>
Section 83 states that the cabinet may create regulations regarding habitat protection, and section 50 states that recovery plans may contain provisions for the protection of listed species' habitats. Nests are protected by section 32.

<table>
<thead>
<tr>
<th>5</th>
<th>L</th>
<th>Section 50 states that recovery plans may be prepared, but are not required.</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>NR</td>
<td>There is a provision in section 50 for multi-jurisdictional cooperation, but recovery plans are not required.</td>
</tr>
<tr>
<td>7</td>
<td>NR</td>
<td>Under the province's <em>Environmental Assessment Act</em>, no mention of species-at-risk protection is made.</td>
</tr>
<tr>
<td>8</td>
<td>N</td>
<td>Because recovery plans are not required, it is difficult to enforce the timely completion and execution of these plans, when they do exist.</td>
</tr>
<tr>
<td>9</td>
<td>NL</td>
<td>There is no mention of ongoing monitoring of species in the Act.</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>There are some measures in place, but none that are legislated by the Act.</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>Awareness may be raised through public involvement and stewardship efforts, but there is no legislated requirement to do so.</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>Programs such as The Green Strategy and Operation Burrowing Owl exist to encourage citizen involvement in conservation; however, the implementation of these programs is not legislated.</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>There are some stewardship programs in place, but none are mandatory or mentioned in the Act.</td>
</tr>
<tr>
<td>14</td>
<td>Y</td>
<td>Sections 57-60 of the Act provide for Wildlife Officers to investigate possible offences against the Act, and sections 69-75 list the penalties for these offenses.</td>
</tr>
</tbody>
</table>

Manitoba *Endangered Species Act* (1990, CCSM c. E.111)

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Yes, as per section 8.</td>
</tr>
<tr>
<td>2</td>
<td>Y</td>
<td>Section 6 established an Endangered Species Advisory Committee to advise the Minister on species-at-risk designations, or any other matter relating to species at risk (the Committee advice is binding).</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Section 8 allows the Cabinet to designate a species as extinct, endangered, extirpated or threatened.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Yes, as per sections 8 and 10.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Section 10 provides habitat protection for species listed as extirpated, endangered or threatened. Section 10 also provides...</td>
</tr>
</tbody>
</table>
protection for any natural resource that a listed species needs for its life and propagation.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>N</td>
<td>Sections 7 and 9 imply the use of recovery plans, but none are specifically provided for in the Act.</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>Not applicable because recovery plans are not mandatory.</td>
</tr>
<tr>
<td>8</td>
<td>N</td>
<td>There is no mention of environmental assessment processes in the Act, nor any mention of species at risk protection in the Manitoba Environment Act.</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>Again, not applicable.</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>There is no monitoring provision in the Act, however there are provincial programs in place (such as the Big Game Monitoring Program with the Manitoba Conservation Wildlife and Ecosystem Protection Branch).</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>None are emphasized in the Act.</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>Stewardship programs and educational programs (e.g., Canadian Wildlife Federation’s Project WILD) increase awareness of species at risk, but again, none are required by law.</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>Stewardship programs may encourage citizen involvement, however no program to increase involvement is mentioned in the Act.</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
<td>There are stewardship programs in place in the province (e.g., the federal Habitat Stewardship Program, and the Manitoba Habitat Heritage Corporation’s North American Waterfowl Management Plan) however, none are required by the Act.</td>
</tr>
<tr>
<td>15</td>
<td>N</td>
<td>Section 13 lists penalties for offenses relating to the Act, however, no mention of enforcement of the Act is mentioned.</td>
</tr>
</tbody>
</table>

**Ontario Endangered Species Act (RSO 1990 Chapter E.15)**

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Section 3 of the Act states that “any species of fauna or flora” may be listed as being threatened with extinction.</td>
</tr>
<tr>
<td>2</td>
<td>NL</td>
<td>The Committee on the Status of Species at Risk in Ontario (COSSARO) reviews COSEWIC status reports and “makes recommendations” to the Minister for listing (Government of Ontario 2006c). COSSARO is not mentioned in the Act.</td>
</tr>
<tr>
<td>3</td>
<td>L</td>
<td>According to section 3, any species “may” be declared as threatened with extinction.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Section 3 provides immediate legal protection.</td>
</tr>
</tbody>
</table>
| 5        | Y      | Section 5 has protection for “the habitat of any species of fauna or
flora,” although what defines “habitat” is not specified.

6 NL Recovery planning is not part of the Act, although there is recovery planning on the provincial level through the Species at Risk Unit of the Ministry of Natural Resources (MNR).

7 N The recovery plans issued by the MNR make no mention of cross-border provisions (Government of Ontario 2006b).

8 NR There is no mention of species-at-risk protection in Ontario’s environmental assessment process (McMaster University 2006).

9 NA Since recovery plans are not required, it is difficult to ensure they are enforced in a timely manner. No information about the timeliness of their implementation could be found.

10 NL There is no mention of a monitoring program in the Act or on the MNR website.

11 NL The Ontario Biodiversity Strategy cites preventative measures as a focus of future species-at-risk efforts (Ministry of Natural Resources 2005b: 30-31).

12 NL There are plans in the Ontario Biodiversity Strategy to increase public awareness of the needs of species at risk, including the creation of the “Ontario Biodiversity Science Forum” (Ministry of Natural Resources 2005b: 34).

13 Y/NL Ontario has a “Conservation Land Tax Incentive Program” to encourage land-owners to protect natural resources with the incentive of tax benefits (Ministry of Natural Resources 2005a). Efforts to “engage Ontarians” in conservation activities will be made as a result of the 2005 Ontario Biodiversity Strategy, but this is not a requirement under the Act (Ministry of Natural Resources 2005b: 24). There are plans to create an “Education and Awareness Task Team.”

14 NL Again, stewardship is a focus of the Ontario Biodiversity Strategy, but it is not required under the Act (Ministry of Natural Resources 2005b: 25). There are plans to involve private landowners, and to strengthen partnerships with NGOs.

15 N Section 6 of the Act lists penalties for offences, but does not provide for effective enforcement.

Quebec An Act Respecting Threatened or Vulnerable Species (RSQ 1989 c. E.-12.01)

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Yes, according to section 1 of the Act.</td>
</tr>
<tr>
<td>2</td>
<td>N</td>
<td>There is no independent assessment process provided for in the Act.</td>
</tr>
<tr>
<td>3</td>
<td>NR</td>
<td>Section 9 states that the Minister of Sustainable Development,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Environment and Parks and the Minister of Natural Resources and Wildlife “may” establish a list of threatened or vulnerable species.</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>4</td>
<td>L</td>
<td>While species receive immediate designation under the Act, protection comes later. Only 19 plant species and one animal species are currently legally protected, despite a much higher number of species being listed.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Section 17 of the Act prohibits activities that may alter the existing ecosystem of a threatened or vulnerable plant species. Sections 10-15 allow for the preparation of a “chart” outlining the habitat to be protected for a listed animal species.</td>
</tr>
<tr>
<td>6</td>
<td>NL</td>
<td>Recovery plans are not mentioned in the Act, but sections 6 and 7 mention programs to increase the chances of survival of listed species, including habitat protection and restoration.</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>Not applicable because recovery plans are not required.</td>
</tr>
<tr>
<td>8</td>
<td>U</td>
<td>I could not find mention of threatened or vulnerable species in any Act related to environmental assessment (Environmental Quality Act and associated regulations), but Nature Canada (2005) reports that species at risk are considered in this process.</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>Again, not applicable because recovery plans are not required.</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>No mention is made of monitoring or assessment programs in the Act.</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>The Act mentions taking actions for species that may become vulnerable, but nothing specific is required (e.g., section 8, 9, etc.).</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>Public information projects have been undertaken, but are not required by any legislation (Government of Quebec 2002).</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>No mention of citizen involvement projects is made in the Act, even though there may be projects in place.</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
<td>Some cooperative projects are mentioned (e.g., between the Government of Quebec and NGOs such as the World Wildlife Fund, or corporations such as Alcan), but none are required to exist by law.</td>
</tr>
<tr>
<td>15</td>
<td>L</td>
<td>Sections 13-18 of An Act Respecting the Conservation and Development of Wildlife allow a protection officer to inspect premises for evidence of infraction against a listed threatened or vulnerable species under An Act Respecting Threatened or Vulnerable Species. Sections 28-34 of An Act Respecting Threatened or Vulnerable Species also provides for an inspector to check on the status of listed plant species. Section 40 lists penalties for violating An Act Respecting Threatened or Vulnerable Species.</td>
</tr>
<tr>
<td>Criteria</td>
<td>Rating</td>
<td>Details</td>
</tr>
<tr>
<td>----------</td>
<td>--------</td>
<td>---------</td>
</tr>
<tr>
<td>1</td>
<td>Y</td>
<td>Yes, according to section 3 of the Act.</td>
</tr>
<tr>
<td>2</td>
<td>Y</td>
<td>Yes, the Species-at-risk Working Group is created by way of sections 9 and 10 of the Act. The Group provides the Minister with a rationalized list of species at risk in the province (including those listed by COSEWIC), and advises the Minister of changes to the list, and also provides recommendations regarding recovery planning and habitat designation for listed species.</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Yes, according to sections 10 to 12 of the Act.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Yes, as per section 13 of the Act, no person may (or attempt to) “kill, injure, possess, disturb, take or interfere with” a threatened or endangered species.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Section 13 provides protection for the “specific dwelling place or area occupied or habitually occupied” by an endangered or threatened species. Section 17 allows for the designation by the Minister of “core habitat.”</td>
</tr>
<tr>
<td>6</td>
<td>Y</td>
<td>Recovery teams and plans are required under section 15 of the Act within one year for endangered species, and within two years for threatened species.</td>
</tr>
<tr>
<td>7</td>
<td>Y</td>
<td>According to section 15(8) the Minister may prepare a recovery plan in cooperation with other relevant jurisdictions.</td>
</tr>
<tr>
<td>8</td>
<td>N</td>
<td>There is no mention of species-at-risk protection in the Act related to environmental assessments in Nova Scotia (the Environment Act, 1994-95) or in the Endangered Species Act.</td>
</tr>
<tr>
<td>9</td>
<td>Y</td>
<td>Upon examining the list of endangered and threatened species, it is clear that the recovery plans are up to date (Government of Nova Scotia 2006).</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>There is no ongoing monitoring program for all species in the province mentioned in the Act.</td>
</tr>
<tr>
<td>11</td>
<td>L</td>
<td>Under section 11, the Minister may list species on a precautionary basis, regardless of whether sufficient scientific evidence of its status is available. Additionally, the importance of prevention of species reaching the at-risk status is mentioned in section 2(1a) of the Act, but other preventative measures are not regulated.</td>
</tr>
<tr>
<td>12</td>
<td>NR</td>
<td>While the importance of improving awareness of species at risk is mentioned in section 2(1g) of the Act, it is not required.</td>
</tr>
<tr>
<td>13</td>
<td>NR</td>
<td>While the importance of citizen involvement is mentioned in section 2(1d and 1e) of the Act, it is not required.</td>
</tr>
<tr>
<td>14</td>
<td>NR</td>
<td>Section 16(1) states that the Minister may enter into agreements with the aim of conserving species at risk. Additionally, the importance of stewardship activities is mentioned in section</td>
</tr>
</tbody>
</table>
2(lg), but these activities are not required.

<table>
<thead>
<tr>
<th>Section 7 assigns conservation officers to enforce this Act, and Sections 22 and 23 provide information regarding offences and prosecutions.</th>
</tr>
</thead>
</table>

**Newfoundland/Labrador Endangered Species Act (SNL 2001, c. E. 10.1)**

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Yes, according to section 3 of the Act.</td>
</tr>
<tr>
<td>2</td>
<td>Y</td>
<td>The Species Status Advisory Committee (SSAC) is created under section 6 to make recommendations to the Minister regarding species designations, based on the “best scientific knowledge available.”</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Yes, as per section 7 of the Act.</td>
</tr>
<tr>
<td>4</td>
<td>N</td>
<td>The process of receiving legal protection could take as much as 90 days. The Minister receives a recommendation from the SSAC or COSEWIC regarding a species status, and before the listing becomes legal, must gain approval of the listing from the Lieutenant-Governor in Council, which may be granted up to a maximum of 90 days from the date the recommendation was received by the Minister.</td>
</tr>
<tr>
<td>5</td>
<td>NR</td>
<td>Section 16 protects the residence of a listed species. Section 28 stipulates the Minister may set aside land for the critical habitat or recovery habitat of a listed species, but is not required to do so.</td>
</tr>
<tr>
<td>6</td>
<td>Y</td>
<td>Recovery teams are required for listed extirpated, endangered and threatened (as per sections 14 and 15). Recovery plans for endangered species must be released within one year of designation, within two years for threatened species, and within three years for extirpated species.</td>
</tr>
<tr>
<td>7</td>
<td>Y</td>
<td>Multi-jurisdictional cooperation in recovery plans is provided for in section 26 of the Act. This type of cooperation can occur with another provincial government if the jurisdiction over the species' management is shared.</td>
</tr>
<tr>
<td>8</td>
<td>NL</td>
<td>The Newfoundland/Labrador mechanism of environmental protection, the <em>Environmental Protection Act</em>, makes no mention of species at risk or their conservation, and the environmental assessment process is not mentioned in the <em>Endangered Species Act</em>.</td>
</tr>
<tr>
<td>9</td>
<td>U</td>
<td>No information on the implementation time of recovery plans could be found.</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>There are monitoring programs in place, including the “Dragonfly and Damselfly Monitoring Program,” the “Butterfly Monitoring Program” and “FrogWatch” (more details available at <a href="http://www.env.gov.nl.ca/env/wildlife/biodiversity/biodiversitymon.htm">http://www.env.gov.nl.ca/env/wildlife/biodiversity/biodiversitymon.htm</a>).</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>There are no preventative steps mentioned in the Act itself; but the monitoring programs mentioned above help to prevent further</td>
</tr>
</tbody>
</table>
Section 27 suggests that "education and public awareness programs" would be beneficial to species at risk, but these measures are not required.

There are programs in the province to encourage citizen awareness and involvement, such as "National Wildlife Week," but no such program is required by law.

Section 29 allows for "Conservation management agreements" to be made between landowners and the provincial government, in the interest of setting aside land for the critical or recovery habitat of a listed species.

Sections 32 to 36 state that a conservation officer may investigate offences against the Act. Penalties for offences against the Act are listed in section 38.

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Yes, according to section 8.</td>
</tr>
<tr>
<td>2</td>
<td>N</td>
<td>There is no independent process for assessing species at risk mentioned in the Act.</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Yes, according to section 8, species may be designated as endangered or regionally endangered.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Yes, section 3(a to c) provides protection for endangered and regionally endangered species.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Section 3(d to g) provides protection for the critical habitat and nest, den, or nest shelter of an endangered species or regionally endangered species.</td>
</tr>
<tr>
<td>6</td>
<td>NL</td>
<td>There are no provisions for recovery plans in the Act. However, the Department of Natural Resources has a recovery plan program in place (Government of New Brunswick 2006).</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>There are no provisions for recovery plans in the Act.</td>
</tr>
<tr>
<td>8</td>
<td>Y</td>
<td>The Dept. of the Environment and Local Government requires that listed species and also wildlife habitat be considered in environmental impact assessments (Department of the Environment and Local Government 2005: ix-x).</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>Recovery plans are not mentioned under the Act.</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>No monitoring plan is supported by legislation.</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>There are no requirements under the Act for preventative measures.</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>No efforts to improve awareness are supported by legislation.</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>The Recovery Program under the Dept. of Natural Resources promotes education and stewardship, but none of these activities</td>
</tr>
</tbody>
</table>
are legislated (Government of New Brunswick 2006).

<table>
<thead>
<tr>
<th></th>
<th></th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td>NL</td>
<td>The Recovery Program under the Dept. of Natural Resources works with a variety of stakeholders including landowners, researchers, and conservation groups, but this is not required by law (Government of New Brunswick 2006).</td>
</tr>
<tr>
<td>15</td>
<td>N</td>
<td>Section 6 lists penalties for violating section 3 of the Act, but no mention is made of enforcement.</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Yes, as per section 7, all wildlife species may be designated.</td>
</tr>
<tr>
<td>2</td>
<td>NR</td>
<td>Section 8 of the Act states that the Minister “may” appoint an advisory committee.</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Yes, as per sections 7(1), (2), and (3) of the Act, species can be designated as endangered, threatened, or of special concern.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Yes, as per section 7.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Section 7(4) provides protection against destroying, disturbing, or interfering with the “wildlife habitat” (breeding, nursing, feeding, and migration areas, or areas providing essential elements of survival such as food and water) of a listed species.</td>
</tr>
<tr>
<td>6</td>
<td>N</td>
<td>There are no recovery provisions in the Act.</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>There are no recovery plans or provisions for multi-jurisdictional cooperation in the Act.</td>
</tr>
<tr>
<td>8</td>
<td>NR</td>
<td>Species at risk do not appear to be a consideration in the environmental assessment process.</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>There are no recovery plans in the Act.</td>
</tr>
<tr>
<td>10</td>
<td>Y</td>
<td>Yes, it is required for the minister to monitor and report of and on the status of wildlife on a regular basis (starting in 1997 and within the first three years of every decade thereafter) as per section 6 of the Act.</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>There is no mention of preventative measures in the Act. However, the Department of Environment, Energy and Forestry has a Wildlife Management Area program in place to conserve species habitat (Government of PEI 2006).</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>There are no programs to improve awareness of species at risk mentioned in the Act, however, programs not legislated by the government may exist.</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>There are no programs mentioned in the Act to promote citizen involvement.</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
<td>Again, no stewardship programs are mentioned in the Act, but programs such as the Watershed Management Fund do exist to...</td>
</tr>
</tbody>
</table>
encourage long term conservation and habitat protection (Government of PEI 2006a).

|   | L   | Section 32 of the Act provides guidelines for penalties for offences against the Act, but does not provide for enforcement. |

Yukon *Wildlife Act* (RSY 2002, c. 229)

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>N</td>
<td>Section 1 of the Act defines wildlife (and thereby specially protected wildlife) to be only “vertebrate animal[s] of any species or type.”</td>
</tr>
<tr>
<td>2</td>
<td>N</td>
<td>There are no provisions for a scientific listing body under the Act.</td>
</tr>
<tr>
<td>3</td>
<td>L</td>
<td>Species are referred to under section 8 as “specially protected” but species are not legally designated anywhere in the Act. Section 192 allows the Commissioner in Executive Council to make regulations that prescribe a population, species or type of wildlife as specially protected.</td>
</tr>
<tr>
<td>4</td>
<td>L</td>
<td>Section 8 states that no person shall hunt, trap, or possess specially protected wildlife (with the exception of an Inuit person who is hunting or trapping in accordance with section 207 of the Act). Section 92 provides protection from harassment to wildlife.</td>
</tr>
<tr>
<td>5</td>
<td>L</td>
<td>Section 17 protects the nest and eggs of any wildlife species, and section 91(1) provides weak habitat protection as it prohibits damaging, the den, nest or lair of any wildlife species. It should be noted that according to section 91(4), the earlier provisions of section 91 can be broken for the purposes of road building, agricultural use or any other “similar purpose.” Section 187 of the Act provides for the designation of Habitat Protection Areas (areas of importance for the habitat of any species, population or type of wildlife).</td>
</tr>
<tr>
<td>6</td>
<td>N</td>
<td>There are no provisions for recovery plans under the Act.</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>There are no provisions for recovery plans. Section 189 provides for any agreement regarding the Act to be made with other provincial or the federal government, but no mention of specially protected wildlife is made.</td>
</tr>
<tr>
<td>8</td>
<td>Y</td>
<td>Section 48(4) of the <em>Yukon Environmental and Socio-economic Assessment Act</em> provides protection for the habitat of protected species, or in protected areas. The <em>Wildlife Act</em> makes no mention of the environmental assessment process.</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>There are no provisions for recovery plans.</td>
</tr>
<tr>
<td>10</td>
<td>N</td>
<td>There are no provisions in the Act for monitoring the status of wildlife.</td>
</tr>
</tbody>
</table>
There are no provisions in the Act emphasizing the importance of preventative measures.

No programs to improve awareness of species at risk are mentioned in the Act.

Wildlife viewing programs are offered by the government, which can increase awareness of species and biodiversity.

Again, no programs are mentioned in the Act although there may be stewardship programs in effect.

Section 161 of the Act provides guidelines for penalties for offences against the Act, but does not provide for enforcement.

Nunavut *Wildlife Act* (with Bill 35) (*SNu 2003, c. 26.6*)

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Yes, as per the definition of “species” listed in section 2 of the Act.</td>
</tr>
<tr>
<td>2</td>
<td>Y</td>
<td>Yes, section 159 establishes the Nunavut Species at Risk Committee (NSRC) to determine species status, advise on the construction and implementation of recovery plans. Section 151 establishes the Nunavut Wildlife Management Board (NWMB) which is required to confirm the recommendations of the NSRC.</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Species are designated as extirpated, endangered, threatened or of special concern as per section 131 of the Act.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Sections 62 and 63 of the Act protect listed species from harvesting, harm, harassment, disturbance or interference.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Sections 65 and 66 provide protection for habitat, including critical habitat (which is designated by section 139), wildlife sanctuaries, or special management areas (designated by section 141).</td>
</tr>
<tr>
<td>6</td>
<td>L</td>
<td>Section 134 designates the Superintendent to prepare a recovery plan and to submit it to the NWMB for approval. However, the timeline for this requirement is longer than prescribed by the Accord – two years for both endangered and threatened species. Section 136 requires the preparation of a management plan for a species of special concern within three years of listing.</td>
</tr>
<tr>
<td>7</td>
<td>Y</td>
<td>Section 175 states that the Minister may enter into agreements with other bodies regarding this Act, including the activities of the NWMB.</td>
</tr>
<tr>
<td>8</td>
<td>U</td>
<td>No evidence of consideration for species at risk could be found, but I could not locate the Act related to the environmental assessment process.</td>
</tr>
<tr>
<td>9</td>
<td>U</td>
<td>Since the Act was only created in 2003, information regarding the implementation of recovery plans is limited.</td>
</tr>
<tr>
<td>10</td>
<td>Y</td>
<td>Section 176 states the requirement for a Five Year Report to review</td>
</tr>
</tbody>
</table>
wildlife management programs in Nunavut and the state of biodiversity in Nunavut in general, among other things.

2 NL There are no preventative measures directly written into the Act.

13 NL Section 152 has a provision for promoting wildlife education of Inuit people.

14 NL Citizen involvement is nowhere mentioned in the Act, with the exception of section 152 which promotes education of the Inuit people regarding wildlife.

15 Y No evidence of stewardship programs could be found in the Act. However, partnerships between the government and the Inuit community are evident on the Government of Nunavut website (http://www.gov.nu.ca/Nunavut/environment/home/Wildlife.htm).

15 Y Section 164 stipulates that conservation officers have the duty of enforcing this Act. Sections 204 to 218 detail the enforcement process. Sections 220 to 224 outline penalties for offences against the Act.


<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>N</td>
<td>Unless otherwise mentioned, there are no provisions for species at risk under this Act.</td>
</tr>
<tr>
<td>2</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>3</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>4</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>5</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>6</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>7</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>8</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>9</td>
<td>N</td>
<td>N/A</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>There is a Species Monitoring Infobase in the NWT but it is not required by legislation to be utilized in any way (see <a href="http://www.nwtwildlife.com/ENR_Infobase/asp/Search.asp">http://www.nwtwildlife.com/ENR_Infobase/asp/Search.asp</a> for more information).</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>The Species Monitoring Infobase helps achieve this, but it is not required.</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>The Biodiversity Team can be joined by anyone, which could lead to increased awareness (Government of the Northwest Territories 2006a).</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>No citizen encouragement efforts could be found.</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
<td>While there is no mention of long term planning in the Act, there are some programs in place for this purpose. These include the</td>
</tr>
</tbody>
</table>
NWT Biodiversity Team, which is a multi-stakeholder group working on biodiversity planning (Government of the Northwest Territories 2006a).

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Section 15 assigns COSEWIC with assessing and categorizing each at-risk wild species in Canada (section 2 defines “wild” species to include all non-domestic species).</td>
</tr>
<tr>
<td>2</td>
<td>Y</td>
<td>COSEWIC is established in section 14 of the Act, and section 15 lists the responsibilities of COSEWIC to establish the federal at-risk species list, which, according to section 27, must be taken into account when the Governor in Council (on the recommendation of the Minister) makes or amends the list of wildlife species at risk.</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Section 15 legally designates species as threatened or endangered.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Sections 32 and 33 provide protection to listed species from killing, harming, harassing, capturing, or taking of an individual.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Critical habitat is protected under section 58(1).</td>
</tr>
<tr>
<td>6</td>
<td>Y</td>
<td>Section 37 requires that the competent minister prepare a recovery strategy for listed as extirpated, endangered or threatened. Section 42 dictates the strategy must be prepared within one year for endangered species and within two years for a threatened or extirpated species.</td>
</tr>
<tr>
<td>7</td>
<td>Y</td>
<td>Section 39 of the Act requires multi-jurisdictional cooperation (with provincial and territorial governments, wildlife management boards, aboriginal organizations, etc.).</td>
</tr>
<tr>
<td>8</td>
<td>Y</td>
<td>The federal <em>Environmental Assessment Act</em> has provisions for the effects of projects on listed wildlife species at risk (Section 2 defines consideration of listed species as part of an “environmental effect” a project may have).</td>
</tr>
<tr>
<td>9</td>
<td>Y</td>
<td>According to the “Status of Recovery Planning” chart, located on the Environment Canada website (<a href="http://www.speciesatrisk.gc.ca/publications/renew/2004-05/status_e.cfm">http://www.speciesatrisk.gc.ca/publications/renew/2004-05/status_e.cfm</a>), it seems that targets for implementation are being met.</td>
</tr>
<tr>
<td>10</td>
<td>Y</td>
<td>Section 128 stipulates that five years after the Act comes into effect, and every five years after that, the Minister must prepare a report regarding the status of all wildlife species.</td>
</tr>
<tr>
<td>11</td>
<td>L</td>
<td>Section 6 of the Act states that part of the purpose of the Act is to prevent species of special concern from becoming threatened or</td>
</tr>
</tbody>
</table>

**Canada The Species at Risk Act (2002 c. 29)**

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Rating</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Section 15 assigns COSEWIC with assessing and categorizing each at-risk wild species in Canada (section 2 defines “wild” species to include all non-domestic species).</td>
</tr>
<tr>
<td>2</td>
<td>Y</td>
<td>COSEWIC is established in section 14 of the Act, and section 15 lists the responsibilities of COSEWIC to establish the federal at-risk species list, which, according to section 27, must be taken into account when the Governor in Council (on the recommendation of the Minister) makes or amends the list of wildlife species at risk.</td>
</tr>
<tr>
<td>3</td>
<td>Y</td>
<td>Section 15 legally designates species as threatened or endangered.</td>
</tr>
<tr>
<td>4</td>
<td>Y</td>
<td>Sections 32 and 33 provide protection to listed species from killing, harming, harassing, capturing, or taking of an individual.</td>
</tr>
<tr>
<td>5</td>
<td>Y</td>
<td>Critical habitat is protected under section 58(1).</td>
</tr>
<tr>
<td>6</td>
<td>Y</td>
<td>Section 37 requires that the competent minister prepare a recovery strategy for listed as extirpated, endangered or threatened. Section 42 dictates the strategy must be prepared within one year for endangered species and within two years for a threatened or extirpated species.</td>
</tr>
<tr>
<td>7</td>
<td>Y</td>
<td>Section 39 of the Act requires multi-jurisdictional cooperation (with provincial and territorial governments, wildlife management boards, aboriginal organizations, etc.).</td>
</tr>
<tr>
<td>8</td>
<td>Y</td>
<td>The federal <em>Environmental Assessment Act</em> has provisions for the effects of projects on listed wildlife species at risk (Section 2 defines consideration of listed species as part of an “environmental effect” a project may have).</td>
</tr>
<tr>
<td>9</td>
<td>Y</td>
<td>According to the “Status of Recovery Planning” chart, located on the Environment Canada website (<a href="http://www.speciesatrisk.gc.ca/publications/renew/2004-05/status_e.cfm">http://www.speciesatrisk.gc.ca/publications/renew/2004-05/status_e.cfm</a>), it seems that targets for implementation are being met.</td>
</tr>
<tr>
<td>10</td>
<td>Y</td>
<td>Section 128 stipulates that five years after the Act comes into effect, and every five years after that, the Minister must prepare a report regarding the status of all wildlife species.</td>
</tr>
<tr>
<td>11</td>
<td>L</td>
<td>Section 6 of the Act states that part of the purpose of the Act is to prevent species of special concern from becoming threatened or</td>
</tr>
</tbody>
</table>
Section 128 also acts as a preventative measure. Section 120 stipulates the creation of a public registry to improve ease of access to all documents in relation to this Act. Section 123 details what must be included in this registry.

Sections 10 and 11 encourage citizens to participate in stewardship activities, but it is not required that citizens participate.

Section 10 provides that the Minister may, in consultation with the CESCC, create a “Stewardship Action Plan,” intended to support stewardship actions taken by any government, person, or organization in Canada. There is a detailed list of criteria for Stewardship Action Plans located in this section of the Act. Section 11 allows for the Minister to enter into a stewardship-related conservation agreement with any government, person, or organization to benefit a species at risk.

Section 85 designates enforcement officers for the purpose of enforcing this Act, and section 86 designates enforcement officers with the right to conduct inspections in relation to this Act. Section 97 lists penalties for offences against this Act.
Appendix 4: Summary Table

<table>
<thead>
<tr>
<th>Accord Criteria</th>
<th>British Columbia</th>
<th>Alberta</th>
<th>Saskatchewan</th>
<th>Manitoba</th>
<th>Ontario</th>
<th>Quebec</th>
<th>Nova Scotia</th>
<th>Newfoundland &amp; Labrador</th>
<th>New Brunswick</th>
<th>Prince Edward Island</th>
<th>Yukon</th>
<th>Nunavut</th>
<th>Northwest Territories</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>2</td>
<td>NR</td>
<td>Y</td>
<td>NR</td>
<td>Y</td>
<td>NL</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>NR</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>3</td>
<td>L</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>NR</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>4</td>
<td>L</td>
<td>U</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>5</td>
<td>L</td>
<td>L</td>
<td>L</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>L</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>6</td>
<td>N</td>
<td>L</td>
<td>NR</td>
<td>N</td>
<td>NL</td>
<td>NL</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>N</td>
<td>L</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>7</td>
<td>NA</td>
<td>N</td>
<td>NR</td>
<td>NA</td>
<td>N</td>
<td>NA</td>
<td>Y</td>
<td>Y</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>8</td>
<td>NR</td>
<td>N</td>
<td>NR</td>
<td>N</td>
<td>NR</td>
<td>U</td>
<td>N</td>
<td>NL</td>
<td>Y</td>
<td>NR</td>
<td>Y</td>
<td>U</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>9</td>
<td>NA</td>
<td>U</td>
<td>N</td>
<td>NA</td>
<td>NA</td>
<td>Y</td>
<td>U</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>U</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>10</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>Y</td>
<td>Y</td>
<td>NL</td>
<td>Y</td>
</tr>
<tr>
<td>11</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>Y</td>
<td>N</td>
<td>NL</td>
<td>Y</td>
</tr>
<tr>
<td>12</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NR</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
<td>Y</td>
<td>NL</td>
<td>Y</td>
</tr>
<tr>
<td>13</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>Y/NL</td>
<td>NL</td>
<td>NR</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
</tr>
<tr>
<td>14</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NR</td>
<td>L</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>NL</td>
<td>L</td>
</tr>
<tr>
<td>15</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>N</td>
<td>L</td>
<td>Y</td>
<td>L</td>
<td>N</td>
<td>L</td>
<td>L</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
<td>Y</td>
</tr>
</tbody>
</table>

Legend
N= No
Y= Yes
L= Limited
NA= Not Applicable
NL= No Legislation
NR= Not Required
U= Unknown or unclear