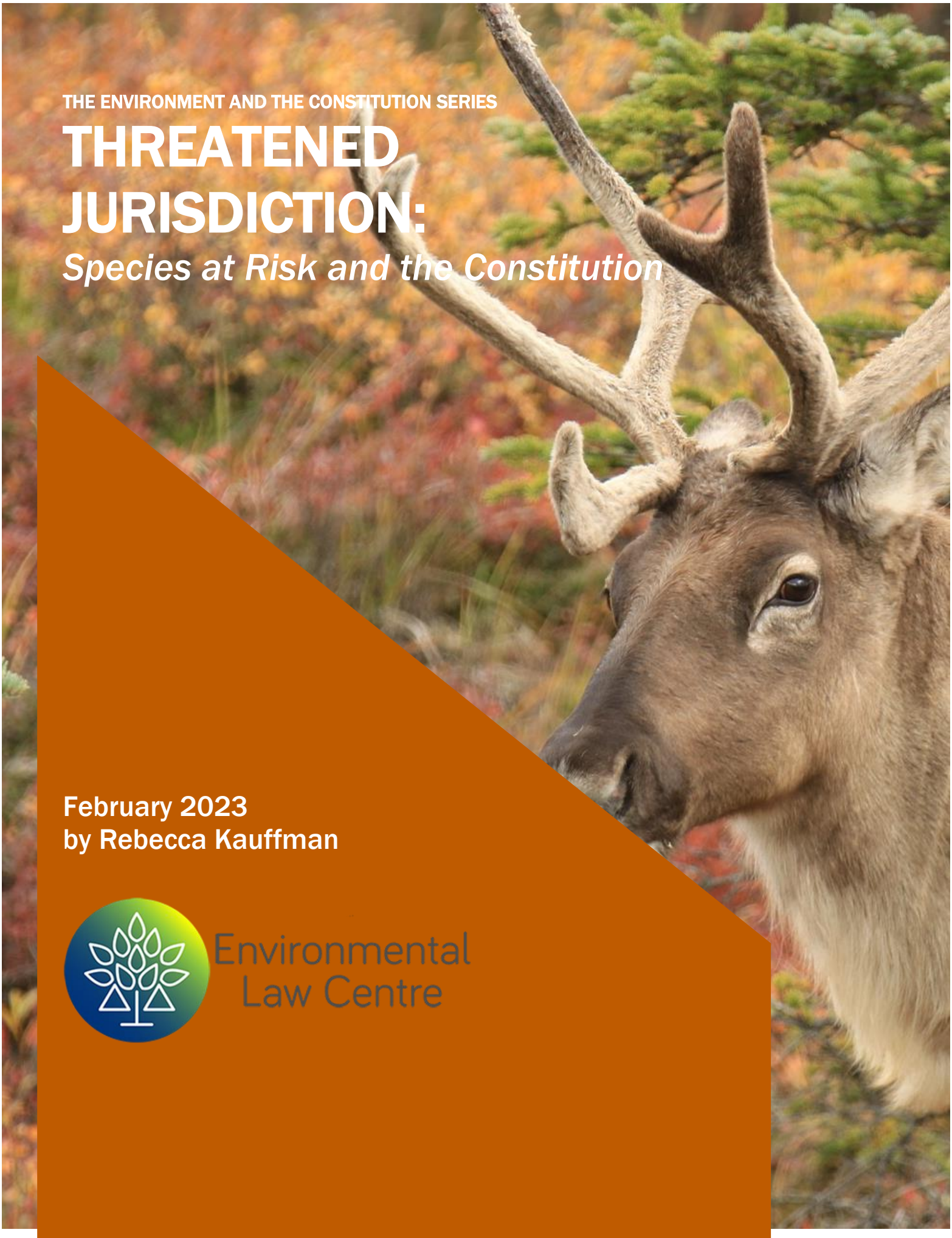

THE ENVIRONMENT AND THE CONSTITUTION SERIES

THREATENED JURISDICTION:

Species at Risk and the Constitution

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TABLE OF CONTENTS

SPECIES AT RISK & THE CONSTITUTION

There is no explicit reference to species at risk, or wildlife more generally, in the Constitution.[1] Instead, species at risk, have been "considered to fall under mainly provincial jurisdiction: namely, under ss 92(5), (13), (16), and s 109" of the Constitution.[2] These sections refer to "the management and sale of public lands", "property and civil rights in the province", "all matters of a merely local or private nature", and "all lands, mines, minerals and royalties belonging to the several Provinces of Canada", respectively.[3] Much of this control originates in provincial jurisdiction over public lands and resources.

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[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 92(13), (16), & 109 [*Constitution Act, 1867*].

[2] Sara L. Jaremko, "Laws Protecting the Sage Grouse in Alberta as Compared to Saskatchewan and the United States" (15 March 2019) *Canadian Institute of Resources Law Occasional Paper #69* at 4 online: https://cirl.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%2369.pdf [Jaremko].

[3] *Constitution Act, 1867*, *supra* note 1, ss 92(13), (16), & 109.

However, there is also overlap with federal jurisdiction in a number of instances. Specifically, the federal government has authority over aquatic species due to section 91(12) of the *Constitution Act, 1867* which designates sea coast and inland fisheries as a federal head of power.[4] In addition, the federal government has jurisdiction over migratory birds as listed in the *Migratory Birds Convention Act, 1994*.[5] As the owner of all federal lands - such as national parks - the federal government exerts authority over the organisms living on those lands.

Finally, criminal law has been assigned to federal jurisdiction under the *Constitution Act, 1867*, enabling the federal government with the exclusive authority over criminal law.'[6] Despite this jurisdiction, the provinces retain the authority to enact regulatory offences under section 92(15).[7] Arlene Kwasniak notes that these "constitutional powers would include the right of provinces to legislate in matters relating to provincial powers (s. 92(5), such as wildlife since wildlife is considered to be provincial property until legally taken), property and civil rights (s. 92(13)), and matters of a local and private nature (s.92(16))."[8] It remains the subject of litigation whether the federal government can enact criminal prohibitions regarding species that reside on provincial land and that do not otherwise fall under federal jurisdiction. We consider this in more depth in our sections on "The Criminal Law Power and Species at Risk" and the "Chorus Frog" below.

In light of this, legislation managing species at risk exists at both the federal and provincial level. Federally, there is dedicated species at risk legislation in the *Species at Risk Act* (SARA) but Alberta does not have a dedicated provincial equivalent. Instead, species at risk are managed under the *Wildlife Act* which is primarily hunting legislation. Given this gap in regulation and as noted by Priscilla Kennedy and John Donihee, "only a cooperative effort will ensure the long term presence of wildlife on our landscapes."[9] It is this cooperative effort, or lack thereof, that highlights the tension of federalism as it relates to species at risk.

In this report, we will outline legislation relevant to species at risk and wildlife at both the provincial and federal levels. From there, we will move on to case studies, highlighting certain species that have been the subject of overlapping legislation and notable caselaw.

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[4] *Ibid*, s 91(12).
[5] *Migratory Birds Convention Act, 1994,* SC 1994, c 22 [MBCA].
[6] *Constitution Act, 1867, supra* note 1, s 91(27).
[7] *Ibid*, s 92(15).
[8] Arlene Kwasniak, "Enforcing Wildlife Law" (Mar 2006) *Canadian Institute of Resources Law Canadian Wildlife Law Project Paper #2* at 2.
[9] Priscilla Kennedy & John Donihee, "Wildlife and the Canadian Constitution" (Aug 2006) *Canadian Institute of Natural Resources Canadian Wildlife Law Project Paper #4* at 14 online: https://prism.ucalgary.ca/bitstream/handle/1880/47560/CIRL-WL-KennedyDonihee-Report-4w.pdf?sequence=1&isAllowed=y.

Alberta: *Wildlife Act*

At the provincial level, Alberta does not have a dedicated species at risk act. Instead, species at risk and wildlife are governed primarily under the *Wildlife Act* and its regulations, and through government policy.[10] Although the *Wildlife Act* does "include designation of protected areas including habitat conservation areas, wildlife sanctuaries, migratory bird lure sites, and wildlife control areas", the Act is not habitat focused.[11] It is primarily, and historically, hunting legislation; however, amendments over the years have introduced prohibitions and some area-based protection, including provisions for the designation and limited protection of endangered species and their habitats.[12]

In particular, the *Wildlife Act* specifies that "the property in all live wildlife in Alberta is vested in the Crown."[13] Much of the jurisdiction over species at risk in the province stems from this ownership alongside the ownership of public lands under the *Constitution Act, 1867*.[14] In particular, the transfer of public lands to the province of Alberta occurred through the *Alberta Natural Resources Act* which transferred the ownership of public lands from the federal Parliament to the Alberta government.[15] We provide a more fulsome background discussion regarding the *Natural Resources Transfer Agreement* and subsequent *Alberta Natural Resources Act* in our accompanying report "Battleground Environment: Deconstructing Environmental Jurisdiction under the Canadian Constitution."

Overview of the *Wildlife Act*

There is no substantive definition of 'endangered' or 'threatened' species at the provincial level and, instead, the *Wildlife Act* only defines an 'endangered animal' as "an animal of a kind prescribed as such" with no definition for threatened species.[16] In this regard, listed species, including both endangered and threatened species can be found in Schedule 6 of the *Wildlife Regulation.*[17] To designate these species, the Act establishes the Endangered Species Conservation Committee, whose functions include advising the Minister about endangered species, creating recovery plans to manage those animals already identified as endangered, and identifying new species as at risk.[18]

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[10] *Wildlife Act,* RSA 2000, c W-10 [*Wildlife Act*].
[11] Jaremko, *supra* note 2 at 14.
[12] Shaun Fluker & Jocelyn Stacey, "The Basics of Species of Risk Legislation in Alberta" (2012) 50:1 AB L Rev 95 at 97 [Fluker & Stacey].
[13] *Wildlife Act, supra* note 10, s 7(1).
[14] *Constitution Act, 1867, supra* note 1, s 92(5).
[15] *Alberta Natural Resources Act*, SC 1930, c 3.
[16] *Wildlife Act, supra* note 10, s 1(1)(g).
[17] *Wildlife Regulation*, Alta Reg 143/1997, Sched 6 [*Wildlife Regulation*].
[18] *Wildlife Act, supra* note 10, s 6.

However, the final decision to designate a species as endangered is done at the political, rather than scientific level. While an Endangered Species Conservation Committee may recommend that a species be designated as endangered, the final decision lies with the Minister.[19]

The main legal effect of an endangered species listing is that it becomes an offence to "wilfully molest, disturb, or destroy a house, nest or den" of an individual listed as an endangered species.[20] This general prohibition does not apply where harm results from a prior authorization, licence, written permission from the Minister, or when otherwise permitted by regulation.[21] The applicability of this section to habitat protection is restricted by the qualification that the harm is undertaken "willfully", meaning intentionally or knowingly.[22] This language means that accidentally destroying an animal's den or home (even the den or home of an animal considered to be at risk), if the accidental destruction was not reasonably foreseeable, cannot be prosecuted under this section.

Further, beyond this prohibition, nothing is required for the protection of the critical habitat of these species, even with such a listing. As an example, the *Wildlife Act* enables the creation of recovery plans upon recommendation by the Endangered Species Conservation Committee.[23] These plans are designed to address the best ways to increase a species' population. However, these plans are not required to identify critical habitat and instead "endangered species recovery plans **may** include population goals and identification of critical habitat" [emphasis added].[24] However, there is no provision requiring the Minister to respond to any such recommendation.[25]

The Act does provide the Minister with the ability to make regulations "respecting the protection of wildlife habitat and the restoration of habitat that has been altered, and enabling the Minister to order persons responsible for the alteration to restore the habitat and to charge them with the cost of it if they have failed to effect the restoration" and "respecting the protection of endangered species, the hunting of endangered animals and the possession, importation and exportation of or trafficking in endangered organisms."[26] Regulations made under section 103(1)(z) (the latter section described above) with respect to endangered species "may make provisions of this statute that are applicable to any kind of animals applicable to endangered species, with any adaptation

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[19] *Ibid*, s 6.
[20] *Ibid*, s 36(1).
[21] *Ibid*, ss 1(y)(ii) & 36.
[22] *R v Brown*, 1982 ABCA 194 - There is no need to prove malicious intent but only that the impugned act was intentional or knowingly undertaken.
[23] *Wildlife Act, supra* note 10, s 6(1).
[24] *Wildlife Act, supra* note 10, s 6(3).
[25] Shaun Fluker, "Endangered species under Alberta's Wildlife Act: Effective legal protection?" (29 March 2010) *ABlawg* online: https://ablawg.ca/2010/03/29/endangered-species-under-alberta%e2%80%99s-wildlife-act-effective-legal-protection/.
[26] *Wildlife Act, supra* note 10, ss 103(1)(u) & (z).

and modifications considered appropriate."[27] At the time of writing no regulations of this nature have been passed.

Overall, there is limited protection for species at risk and their critical habitat in the *Wildlife Act* and such, if a species is listed as a species at risk under the SARA and under the *Wildlife Act*, it will have more protection when it is on federally controlled land and less when it crosses a border onto provincial land. This lack of species at risk legislation in Alberta conflicts with the goals of the SARA.[28]

Provincial Species at Risk Law Across Canada:

Despite this gap in Alberta, other provinces have passed endangered species-specific legislation. For example, Manitoba has *The Endangered Species and Ecosystems Act*; Quebec has the *Act Respecting Threatened or Vulnerable Species*, Newfoundland has the *Endangered Species Act*, and Nova Scotia has their own *Endangered Species Act*.

Other Provincial Legislation

While not specific to species at risk, the provincial *Public Lands Act* and the *Forests Act* are reflective of the provincial ownership of public lands and the resources thereon. We consider both below.

Public Lands Act

Public lands management falls under provincial jurisdiction in section 92(5) of the *Constitution Act, 1867* which assigns the provinces the jurisdiction to regulate the "management and sale of the public lands belonging to the province."[29] Alberta's property interest in public lands was conferred by way of the *Natural Resources Transfer Agreement*.[30] Today, the management of public lands falls under the auspices of the *Public Lands Act*.[31]

Interests in land in Alberta are granted via dispositions primarily governed by the *Public Lands Act* and the accompanying *Public Lands Administration Regulation*.[32] Dispositions may include rights to access public lands, timber rights, surface rights, and mineral rights. Generally, dispositions of public land are meant to enable resource extraction or

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[27] *Ibid*, s 103(2).
[28] Fluker & Stacey, *supra* note 12 at 99-100.
[29] *Constitution Act, 1867, supra* note 1, s 92(5).
[30] *An Act respecting the Transfer of the Natural Resources of Alberta*, SA 1930, c 21.
[31] *Public Lands Act,* RSA 2000, c P-40 [PLA].
[32] *Public Lands Administration Regulation*, Alta Reg 187/2011.

access to public lands and are not responsive to the needs of species at risk.[33] Further, the Act does not have an express habitat management and protection purpose.

Despite there being no reference to species at risk in the *Public Lands Act*, the management of species at risk has still referred to this Act in planning for the recovery of species at risk. For example, in the 2009 federal action plan for the piping plover, it reads "[b]ecause all critical habitat for piping plovers in Alberta occurs on crown-owned bed and shore, effective protection of these areas is already afforded under Alberta's Public Lands Act."[34] The action plan refers to section 54(1)(e) of the Act which states that "[n]o person shall cause, permit or suffer the disturbance of any public land in any manner that results or is likely to result in injury to the bed and shore of any river, stream, watercourse, lake or other body of water or land in the vicinity of that public land" but which does not refer specifically to any species at risk.[35] This protection of public land from "loss or damage" may in this case purport to stand in for protection for species at risk more specifically.[36]

Forests Act

The primary piece of legislation managing forests in Alberta is the *Forests Act*.[37] The provincial government derives its jurisdiction to manage forestry in the province from section 92(5) which awards the provinces jurisdiction over the "management and sale of the public lands belonging to the province and of the timber and wood thereon" and section 92A(1) which states that "in each province, the legislature may exclusively make laws in relation to (b) development, conservation and management of non-renewable natural resources and forestry resources in the province."[38] However, despite these potential impacts and despite there being trees listed on the federal registry of species at risk, the *Forests Act* does not make any direct reference to species at risk.[39] The

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[33] Brenda Heelan Powell, "Habitat Law in Alberta Volume 2: Barriers to Habitat Management and Protection in Alberta" (Oct 2019) *Environmental Law Centre* at 26 online: https://elc.ab.ca/wp-content/uploads/2019/10/Habitat-Law-in-Alberta-VOLUME-2-Barriers-to-Effective-Habitat-Management-and-Protection-in-Alberta-1.pdf [Powell - Habitat Law].

[34] Species at Risk Public Registry, "Piping plover (*Charadrius melodus circumcinctus*) in Alberta: proposed 4.3.

[35] PLA, *supra* note 31, s 54(1)(e).

[36] To read more about the gaps in our protection for species at risk and their habitat see Powell- Habitat Law, supra note 33 and Jason Unger, "Habitat Law in Alberta Volume 4: Recommended Reforms to Habitat Management & Protection Regulations" (Oct 2019) *Environmental Law Centre*.

[37] *Forests Act*, RSA 2000, c F-22.

[38] *Constitution Act, 1867, supra* note 1, ss 92(5) & 92A(1).

[39] See for example: COSEWIC, "Assessment and Status Report on the Whitebark Pine *Pinus albicaulis*" (2010) *Government of Canada* online: https://www.sararegistry.gc.ca/virtual_sara/files/cosewic/sr_Whitebark%20Pine_0810_e.pdf.

preamble to the Act does mention promoting "healthy ecosystems" but it is not carried out throughout the rest of the Act or its regulations.[40]

Instead, the *Forests Act* focuses on the management of forests as a timber source rather than as an ecosystem.[41] The Act sets out the regulatory framework for forestry operations and broadly addresses forest administration, forest tenure, reforestation, and offences and penalties. There are also several regulations which detail these administration and operation activities. Timber may be disposed via a forest management agreement, timber quota certificates in conjunction with timber licences, or timber permits. This is a problem because as Brenda Heelan Powell has argued, "[g]iven the term length and access to a large amount of public land, forest management agreements can have a significant impact on habitat" and therefore on species at risk.[42]

Federal: *Species at Risk Act*

At the federal level, the *Species at Risk Act* ("SARA") aims to "prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened."[43] It is the main federal statute that manages and protects species at risk.

It is important to note that SARA prohibitions, at least in the first instance, apply primarily to federal lands, aquatic species, and migratory birds - covered under the *Migratory Birds Convention Act, 1994* ("MBCA, 1994"). This is a reflection of the federal constitutional linkage to fisheries, implementation of the MBCA, 1994, and power over its lands. This means that when species at risk are on federal lands, for example in a national park, they are protected under the SARA but when they migrate across provincial borders, they are at the whim of provincial legislation. This has resulted in unequal protection. The SARA goes further, however, in providing for a "safety net" when provinces and territories fail to adequately protect federally listed endangered and threatened species. Some of these specific options are highlighted in the next section.

We highlight some of the most important provisions in the SARA below, including those that can be used by the federal government to extend protection to species at risk beyond the baseline federal jurisdiction. The federal government has significant

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[40] Brenda Heelan Powell, "Changes made to Alberta's forest laws in May 2021 but has anything really changed?" (28 Oct 2021) *Environmental Law Centre* online: https://elc.ab.ca/changes-made-to-albertas-forest-laws-in-may-2021-but-has-anything-really-changed/.
[41] Brenda Heelan Powell, "Managing Forests not Forestry: Law and Policy Recommendations for Ecosystem-Based Management of Alberta's Forests" (Dec 2021) *Environmental Law Centre* at 13 online: https://elc.ab.ca/wp-content/uploads/2022/01/Managing-Forests-not-Forestry-December-2021.pdf.
[42] Powell, Habitat Law, *supra* note 33 at 27.
[43] *Species at Risk Act*, SC 2002, c 29, s 6 [SARA].

discretion with regards to each of these exceptional steps under the SARA including the consideration of social and economic factors and their relationship with the provinces.[44] In large part, this discretion has meant that federal protections under the SARA have rarely been invoked. Sean Fluker and Jocelyn Stacey conclude that scholarship has shown "that the federal government is generally reluctant to exercise its powers, even in the face of provincial ineffectiveness." [45] Thus, to improve the protection of species at risk in Alberta, in light of our constitutional frameworks, changes will need to be made to the *Wildlife Act* or, preferably, a stand-alone provincial species at risk legislation should be introduced.

Overview of the SARA

The SARA attempts to fulfill its purposes through the use of species monitoring and assessment; species and habitat protection provisions; and recovery strategies unique to each listed species. It retains significant relevance to habitat management and protection, in large part because of its unique provisions on critical habitat.

The Act establishes the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC"), which meets twice yearly to assess Canadian species and classify them under one of the categories listed in the 'Categories of Species at Risk.'[46] Once a classification has been made, COSEWIC can recommend that any species determined to be at risk be added to the SARA list of protected species – a recommendation which is not binding upon the Minister.[47] If the Minister chooses to exercise this discretion, he or she must prepare a strategy for the species' recovery.[48] The recovery strategy must address any threats to the survival of the species, including any loss of habitat and must include:[49]

a) a description of the species and its needs;

b) an identification of the threats to the species and its habitat;

c) an identification of the species' critical habitat or (c.1) a schedule of studies to identify critical habitat; and

d) a statement of the population and distribution objectives to assist in recovery;

along with any other relevant matters.

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[44] Eric C. Palm et al., "The long road to protecting critical habitat for species at risk: The case of southern mountain woodland caribou" (5 May 2020) Conservation Science & Practice at 3 online: https://conbio.onlinelibrary.wiley.com/doi/epdf/10.1111/csp2.219 [Palm].
[45] Fluker & Stacey, *supra* note 12 at 112.
[46] *SARA*, *supra* note 43, s 14.
[47] *Ibid*, s 25(3).
[48] *Ibid*, s 37(1).
[49] *Ibid*, s 41(1).

Based on the recovery strategy, the competent Minister must go on to prepare an action plan, identifying the species' critical habitat, including activities likely to result in its destruction.[50] A statement on proposed measures to protect the species' critical habitat and an identification of any portions of the species' critical habitat that have not yet been protected must also be included.[51]

Critical habitat is defined as "the habitat that is necessary for the survival or recovery of a listed wildlife species."[52] SARA specifies that no person shall destroy any part of the critical habitat of any endangered, threatened, or extirpated (if reintroduced) species if:[53]

a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;

b) the listed species is an aquatic species; or

c) the listed species is a species of migratory bird protected by the MBCA, 1994.

Some specific provisions are highlighted below.

Section 11:

Section 11 allows the Minister to enter into a conservation agreement with any government in Canada, including the province of Alberta, "to benefit a species at risk or enhance its survival in the wild."[54] At the time of writing, there are two conservation agreements in Alberta, the "Agreement for the Conservation of the Woodland Caribou, Boreal Population with Athabasca Chipewyan First Nation and Mikisew Cree First Nation" and the "Agreement for the Conservation and Recovery of the Woodland Caribou in Alberta."[55]

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[50] *Ibid*, ss 47 & 49(1)(a).
[51] *Ibid*, ss 49(1)(b) & (c).
[52] *Ibid*, s 2(1).
[53] *Ibid*, s 58(1); Three major legal decisions, Alberta Wilderness Association v Canada (Environment), 2013 FCA 190, Environmental Defence Canada v Canada (Minister of Fisheries and Oceans), 2009 FC 878, and David Suzuki Foundation v Canada (Fisheries and Oceans), 2010 FC 1233 at para 299, also clarified the definition of 'critical habitat'. These cases specified that critical habitat means more than the geophysical attributes required by a species but also includes biological attributes necessary for the survival of the species. These cases also specify that both forms of habitat must be included in a protection order or recovery strategy.
[54] SARA, *supra* note 43, s 11(1).
[55] *Agreement for the Conservation and Recovery of the Woodland Caribou in Alberta*, (19 October 2020) between Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Province of Alberta pursuant to Section 11 of the Species at Risk Act and Sections 10 & 11 of the *Government Organization Act* online: https://open.alberta.ca/dataset/40a40950-f210-4a37-b2a1-e274a9c75a48/resource/9d5326f4-0f3a-4aef-b0a2-d6fabc8439b4/download/aep-agreement-for-the-conservation-and-recovery-of-the-woodland-caribou-in-alberta-2020.pdf [Section 11 Agreement].

The contents of these agreements must "provide for the taking of conservation measures and any other measures consistent with the purposes of this Act" and may include measures:[56]

(a) monitoring the status of the species;

(b) developing and implementing education and public awareness programs;

(c) developing and implementing recovery strategies, action plans and management plans;

(d) protecting the species' habitat, including its critical habitat; or

(e) undertaking research projects in support of recovery efforts for the species.

In some instances, these agreements will implement federal protections over otherwise provincially controlled species.

Sections 32 - 34:

Sections 32 and 33 of the SARA prohibit the harm or taking of an individual of a listed species or its residence.[57] However, these protections only apply to aquatic species, migratory birds, or species located on federal lands, unless a further order is in place.[58]

For other types of species, if federal protection under sections 32 and 33 is to be extended to protect those species it first requires a Ministerial order be passed according to section 34 of the SARA.[59] This type of order can be used if the Minister is of the opinion "that the laws of the province do not effectively protect the species or the residences of its individuals."[60] This section is known as the "safety net provision" because it allows the federal government to step in if they believe provincial governments are not doing enough to protect the species at risk in question. [61] Once passed, section 34(2) enables the Governor in Council, upon recommendation of the Minister, to order that those prohibitions under sections 32 and 33 apply to species that are not aquatic species or migratory birds located on provincial lands.[62]

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[56] SARA, *supra* note 43, s 11(2).
[57] *Ibid*, ss 32 & 33.
[58] *Ibid*, s 34(1).
[59] *Ibid*, s 34.
[60] *Ibid*, s 34(3).
[61] Jaremko, *supra* note 2, at 11.
[62] SARA, *supra* note 43, s 34(2).

Section 58:

In section 58(1), the SARA prohibits the destruction of critical habitat of species if the critical habitat is located on federal land, the listed species is an aquatic species, or the listed species is a migratory bird.[63]

If this section applies and the critical habitat is located in a national park, the Rouge National Urban Park, a marine protected area, a migratory bird sanctuary, or a national wildlife area, the Minister must identify the relevant critical habitat within 90 days of the release of a recovery strategy or action plan for the species.[64]

If the critical habitat is not located in one of these protected areas, the prohibition only applies if specified in a ministerial order.[65] In that case, the Minister must make an order for the protection of critical habitat within 180 days of the recovery strategy or action plan for the species if the critical habitat, or any portion of the same, is not legally protected by another provision.[66] If the Minister chooses not to make such an order, he must explain how the critical habitat is legally protected and must include this statement in the public registry.[67]

Section 61:

Section 61(1) of the SARA enables the Minister to recommend an order which, if passed, would prohibit anyone from destroying any part of the critical habitat of a listed species that is in a province or territory and not located on federal land.[68] The Minister **may** recommend a section 61 order if a province, territory, or the Canadian Endangered Species Conservation Council has requested one.[69] However, the Minister is only required to make an order if they are of the opinion that "there are no provisions in, or other measures under, this or any other Act of Parliament that protect the particular portion of the critical habitat, including agreements under section 11 and the laws of the province of territory do not effectively protect the critical habitat."[70] This section has yet to be used.

Notably, this section does not apply to an aquatic species or the critical habitat of a migratory bird.[71]

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[63] *Ibid*, s 58(1).
[64] *Ibid*, s 58(2).
[65] *Ibid*, s 58(4)
[66] *Ibid*, s 58(5)(a).
[67] *Ibid*, s 58(5)(b).
[68] *Ibid*, s 61(1).
[69] *Ibid*, s 61(3).
[70] *Ibid*, s 61(4).
[71] *Ibid*, s 61(1.1).

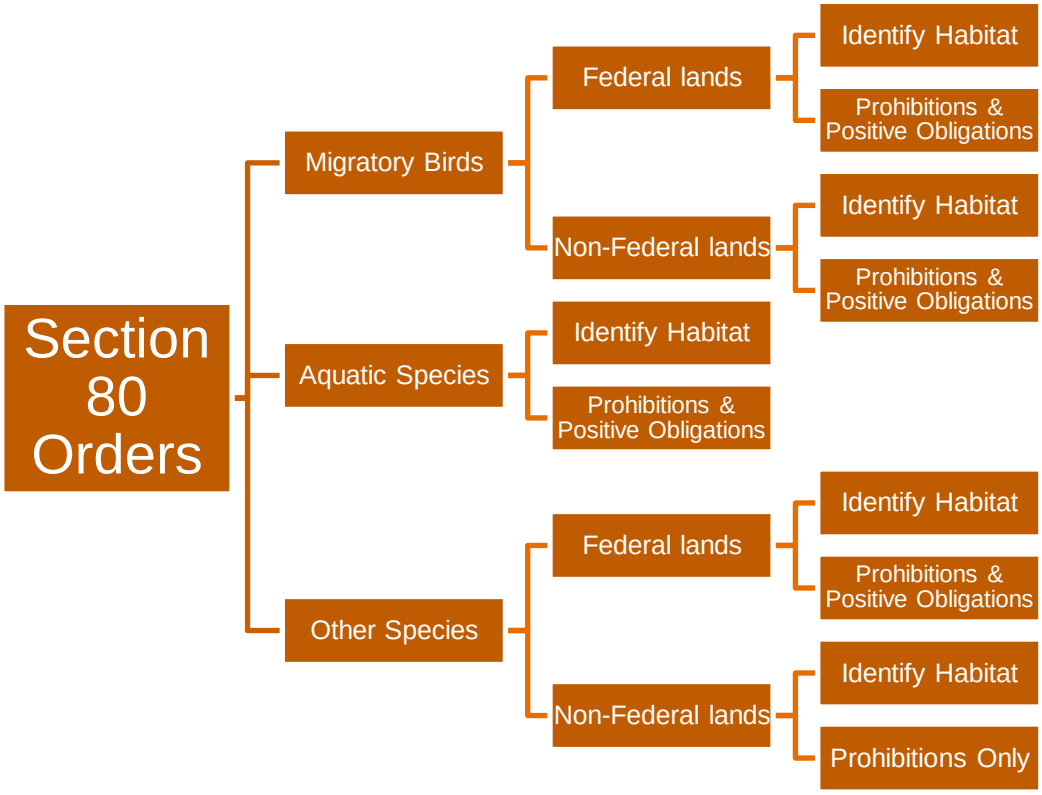
Section 80:

Section 80 allows the Governor in Council, upon recommendation of the Minister, to issue an emergency order providing for the protection of a listed wildlife species.[72] The Minister is required to make such a recommendation if they are of the opinion that the species faces imminent threats to its survival or recovery.[73] Emergency orders may identify habitat necessary for the survival or recovery of a listed species - including aquatic species and migratory birds.[74] They can also prohibit certain activities that may adversely affect the species and their habitat.[75] Notably, the scope and application of an emergency order differs depending on the listed species. As Fluker and Stacey aptly note, the emergency order provision has the same limits as the rest of the SARA "an emergency order has widest application to fish, migratory birds, and other species located on federal lands."[76]

Specifically, the nature of obligations and prohibitions that may accompany an emergency order depend on whether the order applies to federal lands (or the exclusive economic zone of Canada) or is being applied to other lands, except for aquatic species. For non-aquatic species (i.e. migratory birds, mammals, plants, invertebrates, etc.) on federal lands, the order may require certain activities be done to protect the species and its habitat.[77] In contrast, when an emergency order applies to species other than an aquatic species or a migratory bird located on land outside of federally owned land, an emergency order is restricted to prohibiting those activities that may adversely affect the species and their habitat but cannot impose obligations "to do things that protect the species and that habitat".[78] In effect, an emergency order applied to non-federal lands cannot order restoration activities on species habitat that may have been impacted by historic activities. For aquatic species, this limitation does not apply. See Figure 1 below for an illustrated version.

[72] *Ibid*, s 80(1).
[73] *Ibid*, s 80(2).
[74] *Ibid*, s 80(4).
[75] SARA, *supra* note 43, s 80(4).
[76] Fluker & Stacey, *supra* note 12 at 110.
[77] SARA, *supra* note 43, ss 80(4)(a)(ii), (b)(i)(B), & (c)(i)(B).
[78] *Ibid*, s 80(4)(c)(ii). Contrast with s 80 (4)(c)(i).

Figure 1: Section 80 Orders by Species and Location



Only two section 80 emergency orders have been issued – one for the western chorus frog and one for the greater sage grouse. Specifically, "for the western chorus frog, the order prohibited critical habitat destruction from a housing subdivision development project near Montreal and for the sage grouse, the order prohibited certain activities across 1,672 km^2."[79]

Other Federal Legislation

While not specific to only species at risk, the federal *Fisheries Act* and the *Migratory Birds Convention Act, 1994* are related to federal jurisdiction over species and wildlife.

[79] Palm, *supra* note 44 at 3.

Fisheries Act

The *Fisheries Act* is federal legislation tasked with the protection of fish and fish habitat in Canadian waterways.[80] The purpose of the Act is the proper management and control of fisheries and the conservation and protection of fish and fish habitat.[81] To do this, the Act prohibits any work, undertaking, or activity that results in the harmful alteration, disruption, or destruction ("HADD") of fish habitat.[82] Additionally, if a person is carrying on a work, undertaking, or activity in an ecologically significant area (as defined by Cabinet), the person, on request of the Minister, shall provide information to the Minister with respect to the activities that are likely to affect fish habitat.[83] Based on the information given, the Minister can require the person to modify the work, undertaking, or activity, or restrict it altogether.[84]

The Act also provides the Governor in Council with broad regulatory making powers, including the power to create regulations for:[85]

- the proper management and control of the seacoast and inland fisheries, including for social, economic, or cultural purposes;
- the conservation and protection of fish, respecting the rebuilding of fish stocks and the restoration of fish habitat;
- the issuance, suspension, and cancellation of licences and leases respecting the conservation and protection of fish habitat;
- the conservation and protection of spawning grounds;
- the import or export of fish;
- a definition of aquatic invasive species; and
- the management and control of aquatic invasive species.

Finally, the *Fisheries Act* sets out general prohibitions including limits on actions that affect fish and fish habitat.[86] With respect to these provisions, 'fish' is interpreted broadly and applies to marine mammals and aquatic life.

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[80] *Fisheries Act*, SC 2019, c 14 [*Fisheries Act*].
[81] Although this clause is more accurately a codification of existing law as set out by the Supreme Court of Canada, it will help to clarify the purpose going forward for both project proponents and those in the pursuit of habitat protection. *Ward v Canada*, 2002 SCC 17; *Comeau's Sea Foods Ltd. v Canada* (Minister of Fisheries and Oceans) [1997] 1 SCR 12.
[82] *Fisheries Act, supra* note 80, s 35(1).
[83] *Ibid*, s 37(1.1).
[84] *Ibid*, s 37(2).
[85] *Ibid*, ss 43(1)(a), (b), (f), (g), (h), (i), (n), (o), (j), (m), & (n).
[86] *Ibid*, ss 23, 24, 25, 29 & 32.

Migratory Birds Convention Act, 1994

Migratory birds are subject to a more unique set of jurisdictional powers than other species due to the *Migratory Birds Convention* – a treaty signed between the United States and Britain in 1916.[87] This treaty was later incorporated into the *Migratory Birds Convention Act, 1994* which added the original convention as a Schedule to the Act.[88]

Notably, not all migratory birds are included in the schedule. There are certain families of birds not named or protected under the *Migratory Birds Convention Act, 1994* including vultures, pelicans, owls, falcons and others.[89]

The purpose of the *Migratory Birds Convention Act, 1994* ("MBCA") is to "implement the Convention by protecting and conserving migratory birds – as populations and individual birds – and their nests."[90] The MBCA defines a migratory bird as "a migratory bird referred to in the Convention, and includes the sperm, eggs, embryos, tissue cultures, and parts of the bird."[91] The MBCA includes a number of prohibitions including against:

- Being in possession of a migratory bird or nest or buying, selling, or trading a migratory bird or nest;[92] and
- Depositing a substance that is harmful to migratory birds in waters or areas frequented by migratory birds.[93]

Finally, the MBCA enables the creation of regulations including the *Migratory Birds Regulations*.[94] This is the Regulation which sets hunting rules, permitting processes, and any exceptions for Indigenous peoples.

Migratory birds are also subject to a different set of protections under the SARA. For example, the prohibition against the destruction of critical habitat in section 58(1) with respect to birds protected under the MBCA "only applies to those portions of the critical habitat that are habitat to which that Act applies and that the Governor in Council may, by order, specify on the recommendation of the competent minister."[95] The impact of this section and its reference to 'that Act' suggests a focus on nests rather than critical habitat more broadly.

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[87] Penny Becklumb, "Federal and Provincial Jurisdiction to Regulate Environmental Issues" (29 October 2019) *Library of Parliament* at 2 online: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2013-86-e.pdf.

[88] MBCA, *supra* note 2, Sched.

[89] Government of Canada, Birds protected under the *Migratory Birds Convention Act*" online: https://www.canada.ca/en/environment-climate-change/services/migratory-birds-legal-protection/convention-act.html#_004 [GOC – Birds].

[90] MBCA, *supra* note 2, s 4.

[91] MBCA, *supra* note 2, s 2(1).

[92] *Ibid*, s 5.

[93] *Ibid*, s 5.1.

[94] *Ibid*, s 12(1); *Migratory Birds Regulations*, CRC, c 1035.

[95] SARA, *supra* note 43, s 58(5.1).

The Constitutional Question of Treaty-Making

In addition to the jurisdictional issues that arise due to discrepancies between the SARA and the provincial *Wildlife Act*, there remains debate about the jurisdiction to implement international treaties. This is relevant to migratory birds because federal jurisdiction over migratory birds is derived from a treaty signed over 100 years ago. At the time, section 132 of the *British North America Act* gave the federal government the authority to implement treaties signed by the United Kingdom on Canada's behalf – known as 'empire treaties.' [96] It wasn't until 1926 that Canada received the authority to sign treaties on its own behalf.[97] Stewart Elgie highlights a jurisdictional question that arose out of this situation – does section 132 of the *British North America Act* transition into federal jurisdiction to enter into treaties? He cites two cases, with different outcomes, to highlight this debate.

The first decision to consider the federal government's jurisdiction to enter into international treaties, was the 1932 *Radio Reference* case heard by the Privy Council.[98] While this decision did not have an environmental lens, the Privy Council held that although section 132 of the *British North America Act* no longer applied, the authority to implement treaties signed by Canada was properly found within the federal government's POGG power.[99] However, only a few years later, in 1937, the Privy Council went back on this decision.[100] In the *Labour Conventions* decision, the Privy Council found that the power to implement treaties did not fall within POGG but rather the specific subject matter needed to be considered.[101] They held that if the subject matter fell within provincial jurisdiction, the power to implement the treaty would fall under provincial jurisdiction and the opposite would apply if the subject matter was properly within federal jurisdiction.[102] To distinguish *Labour Conventions* from the previous *Radio Reference* decision, they argued that radio communication was properly a national concern.[103]

Most recently, the Supreme Court of Canada considered Canada's treaty making power in the *Reference re Greenhouse Gas Pollution Pricing Act,* finding that:[104]

> "As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure

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[96] Stewart Elgie, "Kyoto, The Constitution, and Carbon Trading" (2007) 13:1 Rev of Const Studies 67 at 91.
[97] *Ibid* at 91.
[98] *AG Que v AG Can et al*., [1932] AC 304 [*Radio Reference*].
[99] *Ibid*.
[100] *AG Can v AG Ont*, [1937] AC 326 [*Labour Conventions*].
[101] *Ibid*.
[102] *Ibid*.
[103] *Ibid*.
[104] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para 190.

> to act directly threatens Canada as a whole. **This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations — it does not —** [emphasis added]."

Similarly, in the *Reference re Impact Assessment Act*, the Alberta Court of Appeal made reference to the *Labour Conventions* decision opining that there is "no freestanding treaty implementation power under s 91 of the Constitution Act, 1867" and "no international accord or international undertaking implementation power either."[105] The Court declared that "Parliament cannot impose on the provinces international accords or undertakings which do not even have the status of treaties through legislation relating to matters allocated to provincial Legislatures."[106] This decision is not binding; however, it may suggest the view of the court in Alberta.

Jurisprudence Regarding the Migratory Birds Convention

The New Brunswick Provincial Court directly considered whether the MBCA is properly within federal jurisdiction in their 2008 decision of *R v JD Irving Ltd.* The decision of *R v JD Irving Ltd.* involved a criminal charge against the defendant JD Irving which alleged that they had conducted operations that resulted in the disturbance of an active Great Blue Heron colony and damaged approximately eight Great Blue Heron nests.[107] Great Blue Herons are protected under the MBCA and the Crown was asking for damages for the disturbance.

In their defence, JD Irving argued that the *Migratory Birds Regulations* should be declared unconstitutional for violating the "division of powers enshrined in the Constitution Act or for violating Section 7 of the Charter through vagueness and overbreadth."[108] To support this defence, JD Irving argued that the MBCA is more properly considered hunting legislation and should therefore fall under provincial jurisdiction, specifically provincial control over property and civil rights.[109]

In making this argument, JD Irving relied on the word 'take' in the regulation to suggest that it was intended as a hunting regulation rather than for protection of environment or habitat.[110] They went on to argue that the "legislation is overbroad in that the means chosen and enunciated in Section 6 of the regulation is not proportionate to the state objective."[111] Specifically, they focus on the original intent of the treaty which they allege was to "manage the indiscriminate slaughter and over-hunting" of migratory birds to suggest that a total ban on the destruction of birds and their nests is overbroad.[112]

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[105] *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 297.
[106] *Ibid* at para 297.
[107] *R v JD Irving Ltd*., [2008] NBJ No 371, 37 CELR (3d) 200 at para 1.
[108] *Ibid* at para 2.
[109] *Ibid* at para 4.
[110] *Ibid* at para 5.
[111] *Ibid* at para 23.
[112] *Ibid* at para 24.

The Court disagreed with these arguments, finding that the "protection and preservation of migratory birds is a matter of international concern" and that it should fall within federal powers because the failure of one party to act would result in the measures being ineffective – a branch of the test for the national concern doctrine.[113] Further, the Court found that the *Migratory Birds Convention Act* was enacted within proper federal jurisdiction to enter into international treaties and the 1994 Act was written to reaffirm the constitutionally sound 1916 treaty.[114] In response to the argument of overbreadth, the Court found that:[115]

> "Section 6 of the *Migratory Birds Regulations* is a clear prohibition against the destruction or disturbance of birds and their nests, it also clearly delineates a risk zone and it is not required that the framers of the law or the drafters of the law anticipate each possibility and refer to it specifically."

They even went on to state, "this is not merely hunting legislation, this is environmental legislation."[116] However, not only is a New Brunswick lower court decision not binding on other courts but the Court in this case focused on the protection of migratory birds as federal jurisdiction and did not find that a general treaty making power fell under federal jurisdiction.

The Criminal Law Power and Species at Risk

As has been discussed, certain species attract more specific Constitutional focus than others, particularly, aquatic species. The question arises then, how does the federal government assert constitutional jurisdiction over other species that are not part of the fisheries or migratory birds realm. The scope of the criminal law power in the environmental realm was considered in the Supreme Court of Canada case of *R v Hydro-Quebec*, where the court considered whether a regulatory regime focused on toxic/hazardous substances was validly within the federal criminal law power.[117]

In light of this decision, we consider whether the federal criminal law power enables the federal government to extend prohibitions related to the wide range of species that reside on provincial or private lands. There are limited cases that have considered the criminal law power; however, a recent case from the Federal Court of Appeal considered the constitutional validity of an emergency order related to a frog on private land in Quebec.[118] The lower court in that case concluded that there was "no doubt" in relation

[113] *Ibid* at para 8.
[114] *Ibid* at paras 10 & 15.
[115] *Ibid* at paras 21 & 22.
[116] *Ibid* at para 27.
[117] *R v Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 SCR 213.
[118] *Groupe Maison Candiac Inc v Canada* (*Attorney General*), 2020 FCA 88 [*Groupe Maison, FCA*].

to whether section 90(4)(c)(ii) had a "legitimate public purpose in criminal law... associated with the suppression of evil."[119] Specifically the Court stated:[120]

> "I have difficulty in understanding how the release of toxic substances into the environment, caused by human activity, can properly constitute a source of legitimate criminal concern, but not an imminent threat, caused by human activity, to the survival or recovery of a species at risk, which, like all other species, is essential to maintaining life-sustaining systems of the biosphere, the depletion or which, by human activity, no longer needs to be demonstrated, nor does the impact of this depletion on the quality of the environment."

Justice LeBlanc connects this directly with *R v Hydro-Quebec* stating that it "follows the same logic of protection of the environment, which is a legitimate public purpose of criminal law" and in "both cases, the intent was to suppress conduct likely to diminish the quality of the environment."[121]

On appeal, the Federal Court of Appeal found that the criminal law power relied upon to uphold this order was no different than the 'evil' referred to in *R v Hydro-Quebec* – in which the Supreme Court of Canada set out the test for the federal criminal law power.[122] With regard to this emergency order, the Court went on to say that "the precise identification of proscribed activities and the area where the habitat of a listed wildlife species must be protected to ensure the recovery or survival of the species is a virtue and is better than an unnecessarily broad measure which is likely to have a disproportionate impact on the exercise of provincial powers."[123] The conclusion was that the use of the emergency order and its application to provincial land did not offend the division of powers.[124]

Application for leave to appeal at the SCC was dismissed.[125]

The remaining question is whether a similar approach can be taken in relation to the other safety net provisions of the Act (i.e., those provisions that enable federal prohibitions to apply to provincial lands) rather than being limited to the emergency order provisions. The argument that the other safety net provisions are valid under the criminal law power is compelling as the Act sets up a system of determination of whether the federal prohibitions are "necessary" in light of provincial or territorial shortcomings (see section 61(4)).

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[119] *Groupe Maison Candiac Inc. v Canada* (*Attorney General*), 2018 FC 643 at para 102.
[120] *Ibid* at para 110.
[121] *Ibid* at para 114.
[122] *Groupe Maison*, FCA, *supra* note 118 at para 55.
[123] *Ibid* at para 67.
[124] Jaremko, *supra* note 2 at 38.
[125] *Groupe Maison Candiac Inc v Canada (Attorney General),* 2020 SCC No 39272 [*Groupe Maison SCC*].

Enforcement and Associated Penalties

Along with differences in management and protection, there are different enforcement and penalty regimes at the provincial and federal levels. Table 1 sets out the relevant penalties under the provincial and federal laws. Notably, the penalties listed under the *Wildlife Act,* unlike the *Species at Risk Act,* do not focus on habitat disturbance.[126]

Table 1: Comparative potential fines, remedial orders and time limits on prosecutions

Provision	Individual	Corporation	Time limit on prosecution
Provincial			
Wildlife Act: - s 25(1) hunting outside of an open season or if no open season if endangered species - s 35 hunting for trafficking - s 55(3) possession of unlawful animal - s 59(1) export wildlife without permit - s 62(1) & (2) trafficking in wildlife	max $100,000 no more than 2 years in prison (s 92(1))	max $100,000 no more than 2 years in prison (s 92(1))	2 years (s 89)
Wildlife Act: - s 92(2) any offence involving a contravention of this Act	max $50,000 no more than 1 year in prison (s 92(2))	or person who has previously been convicted within 5 years max $100,000	

[126] We do not consider the *Fisheries Act* provisions in depth below but they are included in our accompanying report "A Fish Out of Water: Inland Fisheries, Water Management and the Constitution."

Provision	Individual	Corporation	Time limit on prosecution
		no more than 2 years in prison (s 92(1)(b))	
Public Lands Act: (harm to bed and shore) (s 54)	max $25,000 (s 59.1)	max $100,00	2 years (s 56.1)
Federal			
Species at Risk Act: - s 32(1) prohibition against harm to an individual of a listed species - s 32(2) possession of an individual of a listed species - s 33 damage of the residence of a listed species - s 36(1) harm to a provincially listed species or its residence - s 58(1) destruction of critical habitat on federal land, or of an aquatic species or migratory bird - s 60(1) destruction of habitat of a provincially listed species - s 61(1) destruction of critical habitat on provincial land once properly ordered - contravenes a prescribed provision of an emergency order	On Indictment: (s 97(1.1)(a)) - max $250,000 or no more than 5 years in prison	On Indictment: (s 97(1.1)(a)) - max $1,000,000 - max $250,000 if non-profit	
	On Summary Conviction: (s 97(1.1)(b)) - max $50,000 or no more than 1 year in prison	On Summary Conviction: (s 97(1.1)(b)) - max $300,000 - max $50,000 if non-profit	On Summary Conviction: (s 107(1)) 2 years
2nd offence	Fines may be doubled (s 97(3))	Fines may be doubled (s 97(3))	

There is a significant difference between available penalties under the provincial and federal regimes. For example, at the federal level, a harmful event may attract, on a second indictable offence, a fine of $2,000,000 for a corporation or $500,000 for an individual. This is in contrast with a maximum $100,000 fine under the *Wildlife Act*.

A Focus on Species

In our final section, we will consider specific species including the greater sage grouse, the chorus frog, the caribou, and the westslope cutthroat trout. These case studies serve to illustrate the interaction between provincial and federal species at risk law and the need for increased cooperation to better protect these species.

Greater Sage Grouse

The greater sage grouse ("sage grouse") are a species of bird with habitat in southeast Alberta and southwest Saskatchewan. The sage grouse population in Canada is facing a steep decline due primarily to habitat loss and, as such, are listed under both the SARA and the *Wildlife Act*.[127] However, because they are located primarily on private or provincially owned lands, legal protection was limited to section 36(1) of the *Wildlife Act* which prohibits the willful disturbance or destruction of a house, nest or den in

[127] *Species at Risk*, SC 2002, c 29, Sched 1, Part 2; *Wildlife Regulation*, supra note 17, Sched 6, Part 1, Sub-Part 1; Alberta Wilderness Association, "The greater sage-grouse (*Centrocercus urophasianus*) is possibly Canada's most endangered species" online: https://albertawilderness.ca/issues/wildlife/sage-grouse/#:~:text=The%20greater%20sage%E2%80%90grouse%20was,in%20both%20Alberta%20and%20Saskatchewan.

prescribed areas and at prescribed times.[128] Any other protection for the sage grouse was restricted to policy – for example, policy limits on the density of oil and gas activity near sage grouse mating sites.[129] Notably, greater sage grouse are not a migratory bird and therefore the provisions available for migratory birds under the *Migratory Birds Convention Act* and the SARA are not available.[130]

This meant that protection was limited in comparison to that which would be available under the SARA. In fact, Professor Shaun Fluker argued that "Alberta's refusal to enact meaningful legal protection for the sage grouse is almost certainly the primary reason for the application of federal legislation on provincial lands" through the emergency order – described below.[131] At the federal level, a recovery strategy for the sage grouse was released in 2008 and eventually, the sage grouse became the subject of the first emergency order to be enacted under the SARA. This order was enacted on November 20, 2013, following the release of the recovery strategy and litigation at the Federal Court of Canada.[132]

The Emergency Order

The *Emergency Order for the Protection of the Greater Sage-Grouse* (the "sage grouse order") specifies the habitat necessary for the survival or recovery of the sage grouse in Alberta and Saskatchewan and sets out prohibited activities in the affected areas.[133] The sage grouse order prohibits a number of activities including:[134]

- moving or killing sagebrush plants, native grasses or native forbs;
- installing or constructing fences, new roads, or other structures; and
- installing or constructing a machine that produces a noise that exceeds 45 dB(A) for a total daily duration of at least 60 minutes for at least 10 days of any month.

However, the sage grouse order did not come into force without concerted effort. Litigation at the Federal Court of Canada preceded and, as Sara Jaremko argues "likely prompted" the sage grouse order.[135]

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[128] *Wildlife Act, supra* note 10, s 36(1).
[129] Shaun Fluker, "The Curious Case of the Greater Sage Grouse in Alberta" (17 January 2014) *ABlawg* online: https://ablawg.ca/2014/01/17/the-curious-case-of-the-greater-sage-grouse-in-alberta/ [Fluker – Sage Grouse].
[130] GOC, Birds, *supra* note 89.
[131] Fluker – Sage Grouse, *supra* note 129.
[132] *Emergency Order for the Protection of the Greater Sage-Grouse*, SOR/2013-202.
[133] *Ibid*, ss 2 & 3(1).
[134] *Ibid*, s 3(1).
[135] Jaremko, *supra* note 2 at 31-32.

Sage Grouse Litigation

The first lawsuit was filed after the release of the 'Recovery Strategy for the Greater Sage-Grouse (*Centrocercus urophasianus urophasianus)* in Canada' on January 14, 2008 (the "sage grouse recovery strategy") .[136] The Alberta Wilderness Association ("AWA") along with other environmental groups sought judicial review of the sage grouse recovery strategy at the Federal Court. The applicants argued that the sage grouse recovery strategy was insufficient because it did not identify any critical habitat and instead relegated any identification of critical habitat to a schedule, stating "several knowledge gaps and technical activities must be addressed before critical habitat can be identified."[137]

The Court identified the issues in this case as:[138]

- What is the correct standard of review of the respondent's decision to not identify any critical habitat in the Greater Sage-Grouse Recovery Strategy; and
- Does the decision of the respondent to not identify any critical habitat meet that test and, if not, what is the appropriate remedy?

With regard to the first issue, the Court found that the question to be answered was whether the Minister's decision that no critical habitat could be identified, according to section 41(1) of the SARA, was reasonable.[139] The Court found that:[140]

> "in examining whether the respondent's decision was reasonable, it is appropriate to examine the decision not to identify any critical habitat by looking at the Recovery Strategy itself to see whether there is anything in it that leads to a conclusion that the decision (being the Recovery Strategy) was based on an erroneous finding of fact (namely that critical habitat could not be identified) made in a capricious or perverse manner or without regard for the material before it."

The respondent argued that while they could identify habitat, they could not identify critical habitat [emphasis added].[141]

Regardless, the Court opined that because habitat was identified including "habitat that is necessary for the survival or recovery" of the sage grouse, it was unreasonable to conclude that no critical habitat could be identified and therefore that the "failure to identify any habitat as critical is unreasonable in light of the conclusion that source habitat is to be maintained."[142] In a supplementary judgment, the Court ordered Section

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[136] *Alberta Wilderness Association v Canada (Attorney General*), 2009 FC 710 at para 1.
[137] *Ibid* at para 10.
[138] *Ibid* at para 26.
[139] *Ibid* at para 44.
[140] *Ibid* at para 53.
[141] *Ibid* at para 54.
[142] *Ibid* at para 70.

2.6 of the Recovery Strategy to be redrafted to include identification of all known active leks (nests) in Alberta and Saskatchewan as critical habitat and identification of the source habitat identified in the Manyberries Area as critical habitat.[143] In the end, the recovery strategy was successfully contested as inadequate.

The Second Action

A second action followed with an interlocutory decision appealed up the Federal Court of Appeal. In this case, the appellants, AWA and the other ENGOs were "seeking the Court's assistance in relation to an emergency order pursuant to section 80 of the SARA and an amendment to the Recovery Strategy for the greater sage-grouse."[144] They were concerned that the Minister had not yet requested an emergency order pursuant to section 80 of the SARA despite dwindling population numbers. Further, the appellants requested the production of documents – specifically the record of materials relied upon by the Minister to refuse to make the order in question and any reasons for a refusal to identify further critical habitat in the recovery strategy including any written reasons; and any other relevant materials.[145]

One issue on appeal was whether the claim of cabinet privilege which the Minister claimed during the decision-making process about an emergency order under section 80 of the SARA was valid. The second issue was "whether the Court should order the Minister to say whether a decision has been made with respect to a recommendation for an emergency order" and advise the appellants of the same.[146] The Court found the Minister's decision to decline to make a recommendation was reviewable under the standard of review of reasonableness.[147] From there, the Court ordered that:[148]

- the appellant's motion for an order that the respondents are to inform the appellants whether the Minister of the Environment has made a decision to recommend an emergency order pursuant to subsection 80(2) of the SARA is dismissed and returned to the case management judge and the Minister to advise on the status of his decision;
- the appellant's motion for an order declaring that the *Certification and Objection Pursuant to the Federal Courts Rule 318* is invalid is allowed in relation to the appellants' request for an order of *mandamus*. It is also declared that the Certification and Objection does not constitute a valid claim for Cabinet confidence pursuant to section 39 of the *Canada Evidence Act*;

[143] *Alberta Wilderness Association v Canada (Attorney General)*, 2009 FC 882 at para 9.
[144] *Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190 at para 1.
[145] *Ibid* at paras 10 & 11.
[146] *Ibid* at paras 27-29.
[147] *Ibid* at para 49.
[148] *Ibid* at para 57.

- the appellant's motion for an order that any subsequent Certification and Objection be limited by the considerations set out at paragraph 3 of the motion is dismissed; and
- the appellant's motion for leave to file a requisition for hearing is dismissed and the matter is to be dealt with by the case management judge.

While the Court did not order the Minister to proceed with an emergency order in their decision, within the year, the sage-grouse order was released.

Following the publication of the sage grouse order, litigation was launched by a number of parties who were affected by the order including LGX Oil & Gas Inc. and the City of Medicine Hat. Initially, LGX Oil & Gas along with the City of Medicine Hat filed an application for judicial review of the sage grouse order in 2014 seeking a declaration that the sage grouse order made under sections 80(2) and 97(2) of the SARA were *ultra vires* the jurisdiction of the Federal government.[149] In 2020 the parties reached a settlement agreement prompting the City of Medicine Hat and LGX Oil & Gas Inc. to discontinue their case.[150] While the terms of the settlement are not public, they were likely informed by the outcome of another decision concerning the only other emergency order to be issued under the SARA – the Emergency Order for the Protection of the Western Chorus Frog (the "chorus frog order").[151]

However, in addition to this action for judicial review which was filed at the Federal Court, the same plaintiffs filed a Statement of Claim with the Alberta Court of King's Bench.[152] The plaintiffs claim compensation "for the *de facto* expropriation of their mineral rights to the oil and natural gas and the associated mineral and surface leases and rights-of-way located in the Manyberries area in southeastern Alberta as a result of the" sage-grouse order.[153] The plaintiffs go on to argue that their interests are affected by the restrictions included in the sage-grouse order and that this extends to interests within the sage-grouse order boundaries as well as those located outside this area. Specifically, they argue that "[n]otwithstanding the very significant impact of the Order on the Oil and Gas Interests, the Minister did not consult with the Plaintiffs nor offer any

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[149] *The City of Medicine Hat et al v Attorney General of Canada et al* (January 3, 2014), Doc. Calgary T-12-14 (FC) (Notice of Application)); Jaremko, *supra* note 2 at 36-37.
[150] Ecojustice, "Fighting for emergency protections for the greater sage-grouse" online: https://ecojustice.ca/case/sage-grouse-emergency-order/.
[151] *Emergency Order for the Protection of the Western Chorus-Frog* (*Great Lakes/St. Lawrence – Canadian Shield Population*), SOR/2016-211 [Chorus Frog Order]; Shaun Fluker, "More Justice for the Western Chorus Frog" (12 September 2018) *ABlawg* online: https://ablawg.ca/2018/09/12/more-justice-for-the-western-chorus-frog/.
[152] *LGX Oil & Gas Inc. et al v The Attorney General of Canada,* Statement of Claim 1501-14562 ABKB (16 May 2018).
[153] *Ibid* at para 1.

compensation to the Plaintiffs."[154] They go on to argue that this applies to future oil and gas interest, prohibiting them from future development.[155]

This argument relies on the plaintiffs asserting a *de facto* expropriation without adequate compensation. In the alternative, they assert an injurious affection to the plaintiffs' interests without adequate compensation.[156] The specific compensation they reference is section 64 of the SARA which states that "the Minister may provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species."[157] The primary relief sought by the plaintiffs is damages in the amount of $123,600,000.[158]

The Government of Canada filed a Statement of Defence in response to this claim arguing that "the effect of the [sage-grouse order] made pursuant to the [SARA] is regulatory and does not constitute *de facto* expropriation or injurious affection, and, therefore, this claim is not justiciable."[159] They go on to list a number of alternative arguments including that the Crown has chosen not to make regulations providing for compensation and therefore the Plaintiffs' claim is not compensable; that the Emergency Order did not have an extraordinary impact on the Plaintiffs; and/or that compensation under the SARA is discretionary.[160]

As of publishing, no further court proceedings have been initiated in this matter; however, it seems that the precedent from the chorus frog decision, below, would apply in this case as well.

The Chorus Frog

The *Emergency Order for the Protection of the Western Chorus-Frog (Great Lakes/St. Lawrence – Canadian Shield Population)* (the "chorus frog order") was issued in 2016 and identified critical habitat necessary for the recovery of the Western Chorus Frog while prohibiting certain activities in the affected areas.[161] Not long after the chorus frog order was passed, wildlife enforcement officers identified 'activities likely to destroy habitat' occurring on the appellant's property. Specifically, this was the development of a housing project on land owned by Groupe Maison Candiac Inc. that included critical

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[154] *Ibid* at para 21.
[155] *Ibid* at para 25.
[156] *Ibid* at para 24.
[157] *Ibid* at para 28.
[158] *Ibid* at para 33.
[159] *LGX Oil & Gas Inc. et al v The Attorney General of Canada*, Statement of Defence 1501-14562 ABKB (28 June 2018) at para 2.
[160] *Ibid* at paras 3-5.
[161] Chorus Frog Order, *supra* note 151, ss 1, 2 & Sched.

habitat for the chorus frog as identified in the chorus frog order. In response to this finding, these activities were added to the order, thereby rendering them illegal.[162]

In response, Groupe Maison Candiac Inc. (the "applicant") filed a notice of judicial review asking the Court to declare "the section of the SARA unconstitutional because the order was equivalent to an expropriation of the applicant's property without compensation."[163] Their judicial review application eventually made it up to the Federal Court of Appeal, after the Federal Court refused to invalidate the chorus frog order finding that the Order fell within the jurisdiction of the federal criminal law power.[164]

The issues before the federal court of appeal were: [165]

- Did the federal court err in ruling that section 80(4)(c)(ii) falls within Parliament's criminal law power; and
- Did the federal court err in ruling that the absence of compensation does not invalidate the Order?

The Federal Court of Appeal found that in both cases, the federal court did not err. In coming to their conclusion, the Court explored the purpose of the SARA, and the emergency order provision in particular, and found that its purpose was not to directly encroach on provincial jurisdiction or impose uniform national standards but instead was intended to permit an emergency response to prevent a wildlife species from suffering harm that jeopardizes its survival or recovery.[166] Specifically, the Court highlighted the limited scope of section 80(4)(c)(ii) and noted that it is intended to be used in an emergency.[167] They also noted that the Act includes a section requiring the Minister to make a recommendation to withdraw the emergency order if an imminent threat to survival is no longer there – again highlighting the emergency nature.[168]

The Court found, therefore, that the criminal law power relied upon to uphold this order was no different than the 'evil' referred to in *R v Hydro-Quebec* – in which the Supreme Court of Canada set out the test for the federal criminal law power.[169] The Court goes on to say that "the precise identification of proscribed activities and the area where the habitat of a listed wildlife species must be protected to ensure the recovery or survival of the species is a virtue and is better than an unnecessarily broad measure which is likely to have a disproportionate impact on the exercise of provincial powers."[170] The

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[162] *Groupe Maison, FCA*, *supra* note 118 at para 12.
[163] *Ibid* at para 16.
[164] *Ibid* at para 1.
[165] *Ibid* at para 26.
[166] *Ibid* at para 35.
[167] *Ibid* at para 40.
[168] *Ibid* at para 44.
[169] *Ibid* at para 55.
[170] *Ibid* at para 67.

conclusion was that the use of the emergency order and its application to provincial land did not offend the division of powers.[171]

An application for leave to appeal at the SCC was dismissed.[172] Note that we also briefly refer to this litigation in our section on the Criminal Law Power above.

Caribou

Protection for caribou under the SARA – or lack thereof – is the subject of another Federal Court decision. In *Adam v Canada (Environment)*, a group of First Nations and environmental organizations requested the Court compel the federal Minister of the Environment to, among other things, finalize a recovery strategy for boreal caribou in Northeastern Alberta and recommend an emergency order pursuant to section 80(2) of the Act.[173] Specifically, they sought: [174]

- an order from the Court declaring that the Minister failed to prepare a recovery strategy within the mandated time period under section 42(2);
- an order of *mandamus* compelling the Minister to comply with section 80(2); or
- an order declaring that the failure to recommend an emergency order is unlawful or unreasonable.

This action followed the release of a scientific review conducted by Environment Canada which summarized the status and health of caribou herds across Canada. In this report, Environment Canada noted that 30 of the 57 Canadian herds could not be considered self-sustaining and a further 21 were the subject of high levels of disturbance, including all 13 Alberta herds.[175] However, even with this review in hand, the Minister decided that because current range conditions were sufficient for 27 of the 57 herds, there were "no imminent threats to the survival of boreal caribou."[176] In making this decision, the Minister considered caribou across Canada as the standard, rather than considering self-sufficiency for each herd.[177] In particular, they considered the success of herds in Eastern Canada to suggest a healthy population.[178] In addition, the Minister argued that without sufficient scientific information on critical habitat, the recovery strategy could not be released until the summer of 2011 – despite a 2007 due date.[179]

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[171] Jaremko, *supra* note 2 at 38.
[172] *Groupe Maison SCC*, supra note 125.
[173] *Adam v Canada (Environment*), 2011 FC 962 at para 1.
[174] *Ibid* at para 2.
[175] *Ibid* at para 14.
[176] *Ibid* at para 16.
[177] *Ibid* at para 22.
[178] *Ibid* at para 22.
[179] *Ibid* at para 17.

The issues before the Federal Court included:[180]

- Did the Minister err in interpreting section 80(2) (the emergency order provision)?
- Should an order of mandamus be granted compelling the Minister to make a recommendation under section 80(2)?
- Did the minister err in failing or refusing to recommend an emergency order under section 80(2) by failing to consider relevant factors?
- Should the court declare that the Minister has contravened section 42(2) by failing to post a proposed recovery strategy for woodland caribou in the public registry?

In response to issue number one - did the minister err in his interpretation of section 80(2) - the Court found that the Minister did err in his decision by "failing to take into account the First Nations Applicants' Treaty Rights and the honour of the Crown in interpreting his mandate under subsection 80(2)."[181] In response, the Court directed the Minister to consider the effects of both an active course of conduct and continued inaction on the treaty rights of the First Nations – including any impact of the failure to post a Recovery Strategy.[182]

Moving on to other environmental impacts, the Court heard arguments that "any interpretation of the words survival or recovery that would allow for the extirpation of one or more of the seven herds would violate the basis purposes of the SARA" and that "[t]he only reasonable interpretation of 'survival' or 'recovery' in subsection 80(2) is therefore one that aims to conserve and recover all of the herds to self-sustaining levels."[183] However, the Court found that the better approach was to set aside the minister's decision on the basis that it failed to adequately set out reasons for the decision.[184]

With respect to the requirement to issue an emergency order, the Court found that the Minister is not confined to the best available scientific information in coming to a decision and can take their time to consider all available information.[185] Further, the Court held that the requirement to issue a recommendation for an emergency order is not triggered until, and unless, the Minister forms the opinion that the listed species faces imminent threats to its survival or recovery and that this can apply to the listed species as a whole.[186] Despite the applicants' evidence, the Court found that considering all available information, a finding of imminent threat to the recovery of boreal caribou was not the

[180] *Ibid* at para 24.
[181] *Ibid* at para 35.
[182] *Ibid* at para 36.
[183] *Ibid* at para 44.
[184] *Ibid* at para 51.
[185] *Ibid* at para 39.
[186] *Ibid* at para 47.

only reasonable conclusion available to the Minister.[187] Therefore, the requirement to issue a recommendation for an emergency order would not have been triggered.

However, the Court did find that the Minister's decision lacked appropriate reasons and in light of this, set aside the decision, remitting it back to the Minister for reconsideration.[188] Specifically, the Court found that the "Minister erred in failing to provide a meaningful explanation for how he reached his conclusion not to recommend an emergency order given the scientific information, the recovery objectives for boreal caribou, the language of section 80(2), and the purposes of SARA and the overall scheme of that legislation."[189] With respect to the recovery strategy, the Court was satisfied with the Minister's promise to release a recovery strategy in the summer of 2011 and defers any decision in this regard to September 1, 2011.[190]

The recovery strategy was eventually released in 2012; however, action remained at a near standstill.[191] In fact, a third lawsuit was commenced by the Canadian Parks and Wilderness Society in spring 2017 arguing that the federal minister was still not making sufficient efforts to protect boreal caribou.[192] This lawsuit prompted the federal government to release a *Report on the Progress of Recovery Strategy Implementation*.[193] Most recently, the federal government has entered into two section 11 conservation agreements for caribou in Alberta, the "Agreement for the Conservation of the Woodland Caribou, Boreal Population with Athabasca Chipewyan First Nation and Mikisew Cree First Nation" and the "Agreement for the Conservation and Recovery of the Woodland Caribou in Alberta."[194]

Moose Lake Access Management Plan

Although not focused on caribou *per se*, the *Moose Lake Access Management Plan* is a noteworthy approach to the management of industrial activities designed to support the outcomes of ecological integrity, exercise of Aboriginal and treaty rights, and the well

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[187] *Ibid* at para 55.
[188] *Ibid* at para 57.
[189] *Ibid* at para 66.
[190] *Ibid* at paras 74-76.
[191] Environment Canada, "Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal Population in Canada" (2012) online: http://www.sararegistry.gc.ca/virtual_sara/files/plans/rs_caribou_boreal_caribou_0912_e1.pdf
[192] Canadian Parks and Wilderness Society, "CPAWS takes federal Minister to court over Boreal Caribou Habitat Protection" (20 April 2017) online: http://cpaws.org/news/cpaws-takes-federal-minister-to-court-over-boreal-caribou-habitat-protectio; Peter Zimonjic & Susan Lunn, "Environmental group sues Catherine McKenna for failing to report on efforts to save caribou habitat" (20 April 2017) *CBC News* online: https://www.cbc.ca/news/politics/boreal-woodland-caribou-mckenna-sue-1.4076743.
[193]Environment Canada, "Report on the Progress of Recovery Strategy Implementation for the Woodland Caribou (*Rangifer tarandus caribou*), Boreal population, in Canada for the period 2012-2017", (2017) online: http://registrelep-sararegistry.gc.ca/virtual_sara/files/Rs-ReportOnImplementationBorealCaribou-v00-2017Oct31-Eng.pdf.
[194] Section 11 Agreement, *supra* note 55.

managed development of resources.[195] The plan applies to all Crown lands in the specified Moose Lake 10km zone (10KZ) and includes portions of the Birch Mountains Wildland Provincial Park and portions of the Red Earth Caribou Range. The Moose Lake area is sacred to Fort McKay First Nation members.

The primary activity in the 10KZ and surrounding area is bitumen extraction along with forestry, mineral and aggregate operations. The plan limits the total amount of buffered footprint for industrial resource development to 15% (15,537 ha) with disturbance limits allocated by resource sector. Developers are required to manage their development footprints within acceptable parameters by measuring **interior habitat** along with sector-specific components of land and footprint management actions with interior habitat being the percentage of native terrestrial and aquatic cover that is a specified distance from development footprint (i.e., specified distance is the buffer).

Aside from the buffered footprint allocation, there are specific requirements for each industry within the 10KZ. The *Moose Lake Access Management Plan* sets out recovery milestones which, as they are met, reduce the buffer and eventually the footprint is removed. This is meant to incentivize reclamation and recovery by providing a new footprint to work in.[196]

The *Moose Lake Access Management Plan* indicates that, because the management units for many birds and mammals are much larger than the 10KZ, focused management strategies specific to Moose Lake are inappropriate. However, it is recognized that existing policies and legislation may be used to promote health and abundance of species within the 10KZ. The *Plan* states that actions to support wildlife populations should not be limited to conservation measures but should "implement proactive and innovative management approaches and strategies that compliment habitat maintenance, connectivity and reclamation efforts".[197] It is acknowledged that access management to important habitats can provide excellent mitigation and reduce impacts on wildlife populations.[198] Specifically, with respect to Red Earth Caribou within the 10KZ, the *Plan* states that the "Government of Alberta will actively seek the collaboration and participation of Indigenous peoples and affected stakeholders in [their] recovery and sustainability".[199]

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[195] *Moose Lake Access Management Plan* (February 8, 2021), online: https://open.alberta.ca/dataset/093eb2fc-2cb8-4ece-8ede-ba906b8832e7/resource/b8388431-fa23-4f92-87f7-6a821671ea9f/download/aep-moose-lake-access-management-plan-2021.pdf. This plan is intended to be adopted as a subregional under LARP for the larger Moose Lake watershed and, in the interim, has been adopted as policy. It should be noted that there was some litigation around approval applications which were pending prior to finalization of this plan but these did not consider the plan itself: *Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta*, (2020) ABCA 85, *Fort McKay First Nation v Prosper Petroleum Ltd.,* (2020) ABCA 163, and *Fort McKay First Nation v Prosper Petroleum Ltd.,* (2019) ABCA 14.

[196] *Ibid* at s 4.9.

[197] *Ibid* at s 7.4.

[198] *Ibid*.

[199] *Ibid*.

Westslope Cutthroat Trout

The westslope cutthroat trout ("WSCT") are fish native to "the mountain and foothill streams of southern Alberta within the Oldman and Bow Watersheds."[200] In light of ongoing population decline, the Alberta population of WSCT were identified as 'threatened' in 2006 at the provincial level and at the federal level in 2013.[201] In fact, as of 2017, the current populations of WSCT were assessed at low or very low abundance in the province and as "no longer exist[ing] within an entire watershed."[202] Today, recovery strategies exist at both levels.

The provincial *Alberta Westslope Cutthroat Trout Recovery Plan 2012-2017* was released in March 2013 and the initial federal recovery strategy, the *Recovery Strategy for the Alberta populations of Westslope Cutthroat Trout* (*Oncorhynchus clarkii lewisi*) was released a year later in March 2014, incorporating part of the provincial recovery plan.[203] In 2019, the federal government released a second *Recovery Strategy and Action Plan for the Westslope Cutthroat Trout (Onchrhynchus clarkia lewisi*) *Alberta Population* (also known as the Saskatchewan-Nelson River Populations) in Canada.[204] This plan incorporated more from the initial Alberta recovery plan; however, Fluker and Mayhood note that little was updated, despite there being many years in between the two recovery plans.[205]

The initial federal plan identified both a 'residence' and a 'critical habitat' for the WSCT. However, the definition of 'residence' was limited to the 'redd' which is "a depression in the stream gravel excavated by the female where her eggs are then laid and covered

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[200] Government of Alberta, "Cutthroat trout" online: https://www.alberta.ca/cutthroat-trout.aspx#:~:text=Westslope%20Cutthroat%20Trout%20are%20native,sub%2Dspecies%20of%20cutthroat%20Trout.

[201] Allan B. Costello, "Status of the Westslope Cutthroat Trout (*Oncorhynchs clarkia lewisii*) in Alberta" (December 2006) Alberta Wildlife Status Report No. 61 online: https://open.alberta.ca/dataset/c01f7c84-667f-4e15-a927-fe75a85b91cb/resource/793375ef-e090-4649-a415-82e88197385b/download/2006-sar-statuswestslopecutthroattroutalberta-dec2006.pdf; Fisheries and Oceans Canada, "Recovery Strategy for the Alberta populations of Westslope Cutthroat Trout (*Oncorhynchus clarkii lewisi*) in Canada" (2014) Species at Risk Act Recovery Strategy Series at iii online: https://wildlife-species.canada.ca/species-risk-registry/virtual_sara/files/plans/rs_truite_fardee_wstslp_cutthroat_trout_0314_e.pdf [WSCT Recovery Strategy].

[202] Government of Alberta, "Westslope Cutthroat Trout FSI" online: https://www.alberta.ca/westslope-cutthroat-trout-fsi.aspx.

[203] Alberta Westslope Cutthroat Trout Recovery Team, "Alberta Westslope Cutthroat Trout Recovery Plan: 2012-2017" (March 2013) *Alberta Environment and Sustainable Resource Development* online: https://open.alberta.ca/dataset/c9ab0297-c99a-4478-b9e5-ff8d7b9d2c03/resource/ab4527e8-0643-47ec-842a-efd79a6221b5/download/6246341-2013-alberta-westslope-cutthroat-trout-recovery-plan.pdf; WSCT Recovery Strategy, *supra* note 201.

[204] WSCT Recovery Strategy, *supra* note 201.

[205] Shaun C. Fluker & David W. Mayhood, "Environmental Stewardship of Public Lands? The Decline of Westslope Cutthroat Trout along the Eastern Slopes of the Rocky Mountains in Alberta" (2020) 42 Pub Land & Resources L Rev 39 at 75 [Fluker & Mayhood].

with gravel."[206] This is a limited definition because, in reality, and based on the definition of a 'residence' in the SARA, the residence of the WSCT should consist of the lake or entire length of stream used by the fish for all of their life history functions.[207]

This distinction between protected habitat and required habitat can be seen in the designation of critical habitat. SARA defines critical habitat 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."[208] Again; however, the critical habitat identified in the federal recovery strategy is less than the necessary habitat for the WSCT. For example, Shaun Fluker and David Mayhood note that the some of this missing habitat includes "the stream channels and tributaries upstream from the occupied stream reaches, which must be protected to protect the occupied reaches."[209] This is important because the SARA prohibits any person from destroying any part of the critical habitat of any listed endangered species or of any listed threatened species…if (b) the listed species is an aquatic species."[210] The limits on listed critical habitat for the WSCT mean; therefore, that protection is limited.

Constitutional issues also arise. For example, while the federal government could develop a recovery strategy under the SARA, it is to be "implemented on land and water owned by Alberta." This is an issue because as Fluker and Mayhood note, the Alberta government adheres to a multiple land use policy and, further, they found that government departments have even pushed back on federal critical habitat designations.[211] The multiple land use policy approach enables the provincial government to authorize land-use activities in areas with WSCT habitat.[212] This is another example where better protection of the WSCT would come from enhanced species at risk protection at the provincial level rather than reliance on extraordinary, and limited, action at the federal level.

If the province does not use their jurisdiction over provincial lands and resources to protect WSCT, there are options available under federal jurisdiction. As outlined above, section 58 of the SARA can be used to prohibit any person from destroying the critical habitat of any listed species. If the species is not located within a national park the prohibition can apply "in respect of the critical habitat … specified in an order made by

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[206] WSCT Recovery Strategy, *supra* note 201 at 3.
[207] SARA, *supra* note 43, s 2; Fluker & Mayhood, *supra* note 205 at 65.
[208] SARA, *supra* note 43, s 2.
[209] Fluker & Mayhood, *supra* note 205 at 66.
[210] SARA, *supra* note 43, s 58(1)(b).
[211] Steven A. Kennett & Monique M. Ross, "In Search of Public Land Law in Alberta" (January 1998) *Canadian Institute of Resources Law Occasional Paper #5* at 9 online: https://cirl.ca/sites/default/files/Occasional%20Papers/Occasional%20Paper%20%235.pdf; Fluker & Mayhood, *supra* note 205 at 58.
[212] Fluker & Mayhood, *supra* note 205 at 68.

the competent minister."[213] The Minister is required to issue such an order, within 180 days of the recovery strategy or action plan, if the critical habitat is not legally protected by provisions in this or any other Act.[214] If the Minister chooses not to issue such an order, they are required to identify how the habitat is being legally protected otherwise.[215]

In the case of the WSCT, the federal Minister issued a critical habitat protection order on December 2, 2015.[216] The order identified critical habitat for the WSCT located outside of a national park and on provincial public lands (the "WSCT critical habitat order").[217] This was the first such order to be applied on provincial lands.[218] The critical habitat order amounted to only one paragraph but has the authority to halt activities that would interfere with the identified critical habitat.[219]

The WSCT critical habitat order did influence the denial of an application made by Benga Mining Ltd. to construct, operate, and reclaim an open-pit metallurgical coal mine.[220] In denying the application, the panel concluded that "the project is likely to result in significant adverse environmental effects on westslope cutthroat trout."[221] Professor Shaun Fluker notes that the initial environmental impact assessment was filed by Benga Mining before the WSCT critical habitat order was passed and argues that "these paragraphs reveal to me that the AER denied this application because the coal mine would destroy the critical habitat for WSCT."[222] Notably, Alberta Environment did not make any submissions to the joint panel with regard to impacts on the critical habitat for the WSCT. This is relevant because under the current constitutional system, the federal government is constrained in its actions towards species at risk leaving much up to provincial regulation. Better protection for species at risk, under the current system, necessitates a change to the regulatory framework for species at risk at the Alberta level. Benga went on to appeal this decision but was denied by the Alberta Court of Appeal in 2022.[223] Later, the Supreme Court of Canada denied Benga Mining's application for leave to appeal.[224]

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[213] SARA, *supra* note 43, s 58(4).
[214] *Ibid*, s 58(5).
[215] *Ibid*, s 58(5).
[216] *Critical Habitat of the Westslope Cutthroat Trout (Oncorhynchus clarkii lewisi) Alberta Population Order, SOR/2014-241* (November 20, 2015).
[217] *Ibid*.
[218] Shaun Fluker, "Habitat Protection for the Westslope Cutthroat Trout in Alberta" (22 December 2015) *ABlawg* online: https://ablawg.ca/2015/12/22/habitat-protection-for-the-westslope-cutthroat-trout-in-alberta/ [Fluker – WSCT].
[219] *Ibid*.
[220] *Report of the Joint Review Panel: Benga Mining Limited Grassy Mountain Coal Project*, 2021 ABAER 010 [JRP Benga]; Fluker – WSCT, *supra* note 218.
[221] JRP Benga at para 3048.
[222] Shaun Fluker, "Justice for the Westslope Cutthroat Trout at Grassy Mountain" (19 July 2021) *ABlawg* online: https://ablawg.ca/2021/07/19/justice-for-the-westslope-cutthroat-trout-at-grassy-mountain/.
[223] *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30.
[224] *Benga Mining Limited v Alberta Energy Regulator*, 2022 SCC 40121 Applications for leave.

FINAL THOUGHTS

The majority of species at risk fall under provincial control. Federal jurisdiction is limited to certain species or federally-controlled lands, a small minority. As such, federal jurisdiction can only be relied upon to protect species at risk in extraordinary circumstances. It will be up to the provinces to implement strong habitat and species protections through their provincial endangered species laws and to cooperate and work with the federal government to ensure that protection extends beyond borders.

Alberta will need to enhance the *Wildlife Act* to include more robust and enforceable protection for the species at risk that fall under its jurisdiction or enact a standalone endangered species legislation to do the same. This would also manage some of the conflict that currently exists between the differing levels of protection available to species under the *Wildlife Act* and the federal SARA.