SHARING RESPONSIBILITY

Principles and Procedures for Compensation Under the Species at Risk Act

A Report to the Minister of the Environment

Peter H. Pearse

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PREFACE

On April 11, 2000 the Minister of the Environment introduced into Parliament Bill C-33, the *Species at Risk Act*, to provide the legislative framework for fulfilling the government's commitment to protect endangered species in Canada. The main threat to these endangered plants and animals is destruction of their natural habitats, and to protect critical habitats the *Act* emphasizes voluntary and cooperative arrangements with provincial and territorial governments, landowners, aboriginal groups, resource industries and others, with federally sponsored financial incentives and stewardship programs. The *Act* recognizes that cooperative efforts are likely to fail sometimes, and to deal with such cases it provides for regulatory restrictions on the use of land to protect the critical habitats of species at risk. The *Act* also provides that compensation may be paid to anyone who suffers losses as a result of any "extraordinary impact" of the restrictions.

These arrangements for compensation represent a significant departure from the customary approach to land use regulation in Canada and elsewhere, and they are a subject of keen interest and concern among those who are likely to be most affected by them. But the *Act* itself offers limited guidance as to how compensation should be provided. In April 2000, the Minister asked me for independent advice on the principles and policies that should guide the provision of compensation under the *Species at Risk Act*. This report contains my conclusions and recommendations.

I conducted my investigation during the summer and fall of 2000, while the *Species at Risk Act* was before Parliament. Before this report was completed, Parliament was dissolved with the call of an election in late October, leaving the Bill's future uncertain.

In appointing me to this task, the Minister asked me to meet with representatives of those who were likely to be most affected by the compensation provisions of the proposed Species at Risk policy to ensure that their concerns would be taken into account.

I immediately contacted all those who had expressed views on the subject, either to the Minister or to the Department of the Environment. I also contacted the relevant deputy ministers in all provinces and territories, and other industrial organizations, aboriginal groups and environmental representatives who I thought would have views on the subject. During the ensuing months, a considerable number of individuals and organizations contacted me to express their views and concerns.

My consultations took various forms - written submissions, meetings, email messages, telephone conference calls, discussions with individuals and combinations of these. I also had the benefit of submissions to the House of Commons Standing Committee on Environment and Sustainable Development, which was simultaneously reviewing Bill C-33.

I travelled across Canada several times to meet with interested groups. These consultations have been exceedingly helpful, and I believe that the input I received is a balanced representation of the views and opinions of those who are likely to be most affected by the compensation provisions of the *Species at Risk Act*.

The organizations and individuals I consulted overwhelmingly supported the basic objective of the *Species at Risk Act* - to protect the full range of natural plants and animals in Canada - and in this respect they were representative of the view of all Canadians, reflected in public opinion polls. The thrust of their representations was, therefore, how to make the legislation work most effectively and fairly. Their contribution — a stimulating range of information, suggestions and advice — was most helpful to me in carrying out this task. I am also deeply indebted to Professor Philip Bryden of the Faculty of Law at the University of British Columbia for his assistance with the legal aspects of this issue.

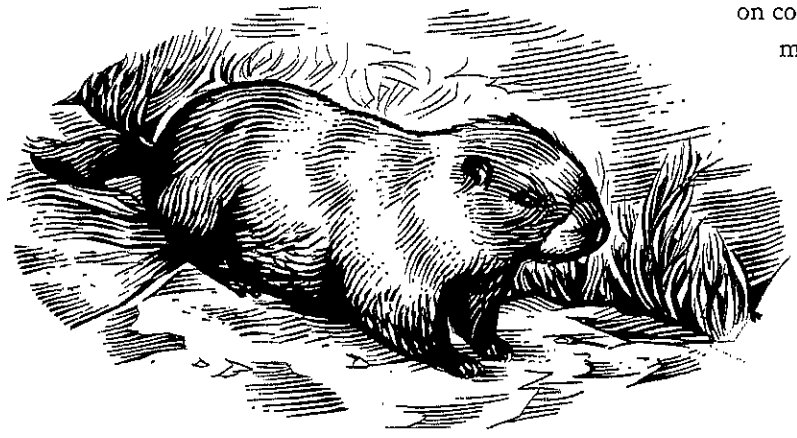
Peter H. Pearse, C.M.
Vancouver

INTRODUCTION

The *Species at Risk Act*, which died on the order paper when Parliament was dissolved with the call of an election in October 2000, has been a central element in the federal government's strategy in support of the international effort to protect the natural diversity of plants and animals. Canada, because of its vast area and variety of forests, wetlands, lakes and other landscapes, supports an enormous number and variety of natural species. But 12 species have become extinct in Canada, 341 are at risk of extinction, and the list is growing, mainly due to disturbance of their natural habitats.

The *Species at Risk Act* was specifically designed to prevent more species from becoming extinct, and to restore threatened populations to healthy levels.

The *Act* sets out a comprehensive program for identifying species at risk, controls to protect them and their habitats from further harm, measures to ensure their recovery, and arrangements for engaging relevant parties — provincial and territorial governments, landowners, aboriginal groups and others - in the whole process.



The *Species at Risk Act* covers all wildlife species at risk and their habitats throughout Canada, but it also recognizes the responsibilities of the provinces and territories in managing wildlife and emphasizes cooperative arrangements among governments. For the purposes of this report, the federal government's most important powers under the *Species at Risk Act* are referred to as a "safety net;" these are the powers that enable it to ensure that the collective effort of all governments combined is adequate and complete, so that Canada can meet its commitment to protect its endangered species.

> "... we live in a society today where, if an individual suffers losses because of undertakings carried out in the public interest, the public interest requires that the individual be compensated."
>
> B.C. Law Reform Commission
> *(cited in B.C. Forest Industry Task Force on Resource Compensation 1992)*

The federal government's preferred approach to protecting the critical habitats of species at risk, reflected in the proposed *Act*, is to engage the voluntary efforts of landowners and others through incentive and "stewardship" programs, supported when needed, with federal funds. This distinguishes the policy from most other government efforts to protect public values on land in Canada, which usually take the form of regulatory restrictions backed up by penalties. The emphasis here is on the carrot, rather than the stick.

While the emphasis of the *Species at Risk Act* is on cooperative arrangements, it does provide for mandatory controls. Where voluntary efforts cannot be negotiated, or fail for one reason or another, or where there is no other governmental protection, the *Act's* "safety net" provisions provide for regulatory restrictions on land use to

protect the critical habitats of threatened and endangered species. For these cases, which are expected to be rare, the *Act* provides for compensation to those whose property is adversely affected, as follows:

Compensation

64. (1) The Minister may, in accordance with the regulations, pay compensation to any person for losses suffered as a result of any extraordinary impact of the application of section 58, 60 or 61 or an emergency order identifying habitat necessary for the survival or recovery of a wildlife species.

Regulations

(2) The Governor in Council may make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection (1), including regulations prescribing:

(a) the procedures to be followed in claiming compensation;

(b) the methods to be used in determining a person's eligibility for compensation, the amount of loss suffered by that person and the amount of compensation to be paid for that loss; and

(c) the terms and conditions for the payment of compensation.

"(The *Species at Risk Act*) recognizes that compensation may be needed to ensure fairness following the imposition of the critical habitat prohibitions."

Bill C-33 (Summary)

This report deals specifically with these arrangements for compensation. Although regulatory restrictions on land use and compensation are not intended to be the usual way of protecting critical habitats, they are, for those who depend on the freedom to manage their land and resources, the most sensitive and controversial feature of the proposed policy. I was asked for independent advice on compensation, and specifically to recommend a set of principles and policies for administering the compensation provisions of the *Species at Risk Act*.

Because this is to be a public report, it goes beyond a bare summary of my recommendations to the Minister, to explain a little about the *Species at Risk Act* itself, the role of compensation in its larger framework, the concerns that, in light of the representations made to me, I think must be responded to, and the rationale of my conclusions. My assignment was not to propose amendments to the *Act* but to recommend a framework for compensation that can be embodied in supplementary regulations.

While I was preparing this report, Parliament was dissolved with the call of an election in October 2000, and the *Species at Risk Act* died on the order paper. A new government might, of course, use different language in any new legislation to protect endangered species. But my assignment, and my consultations with interested parties, took place within the context of the *Species at Risk Act* that was before Parliament, and my recommendations are designed to implement that particular act.

The Species At Risk Act And The Compensation Issue

Canadian legislation to protect endangered species is part of a global effort to maintain the biological diversity of the planet. In 1992, with broad public support, Canada signed the United Nations Convention on Biological Diversity. This involved a commitment to put in place "... legislation and/or regulatory provisions for the protection of threatened species and populations."

Because responsibility for wildlife is shared by federal and provincial governments, Canada's international commitment calls for intergovernmental cooperation. In 1996, all provinces and territories, and the federal government, agreed on a national commitment in the form of the Accord for the Protection of Species at Risk. This includes an undertaking to "... establish complementary legislation and programs that provide for effective protection of species at risk throughout Canada." Four provinces already had laws to protect endangered species, and six provinces and territories have since introduced new or strengthened legislation.

> "...a strong law which protects both species at risk and their habitat is a critical component of Canada's national implementation of obligations under the Convention on Biological Diversity."
>
> West Coast Environmental Law

The new federal legislation, in the form of the *Species at Risk Act*, thus responds to both an international commitment and a national commitment to protect endangered species. The international commitment means that we must find a way to protect Canada's share of the world's flora and fauna. The national commitment means that we must do so in a way that respects our unique constitutional division of governmental responsibilities and the values of Canadians. The latter is especially relevant to the arrangements for compensation to landowners or others confronted with burdensome restrictions to protect species at risk — the subject of this report.

The federal effort to put in place the legislative framework to protect endangered species has been underway for several years. The first attempt to provide a federal legislative framework was the Canada *Endangered Species Protection Act* (Bill C-65). It was introduced in Parliament in 1996 but died on the order paper with the call of an election in 1997. The *Species at Risk Act* addresses several criticisms of the earlier bill. Among other things, it provides for compensation to people who suffer losses as a result of an extraordinary impact of the regulatory restrictions on land use imposed under the *Species at Risk Act*.

The federal government's consultation effort included publication of discussion papers on its developing policy framework, one of which provided a summary of the commentary received from landowners and other interest groups on the specific question of compensation under the new *Act*. This paper, *Proposed Species at Risk Act: A Discussion Paper on Compensation* (May 2000), was particularly helpful in my consultations with interest groups, and in focusing attention on the issues I was assigned to deal with, as discussed on the following pages.

The Path Toward Compensation

The *Species at Risk Act* recognizes that to protect endangered wildlife, it is necessary to protect not only threatened plants and animals themselves, but also their critical habitats. The compensation provisions of the *Act* apply only when regulatory measures are taken to protect critical habitats.

Before compensation becomes an issue, several steps must be taken. First, an independent committee of scientists must assess the status of each wildlife species considered at risk, and classify it as extinct, extirpated, endangered, threatened or of special concern. This will form the basis for the Minister of the Environment's recommendation to Cabinet of an official List of Wildlife Species at Risk.

Any species appearing on the List as extirpated, endangered or threatened will automatically be protected against killing, harassing, capturing, disturbing its nest or residence and trading in it. These prohibitions apply, in the first instance, to all federal land and to aquatic species and migratory birds that are subjects of federal jurisdiction.

The prohibitions may also be extended, by Cabinet order, to provincial, territorial and private lands if the Minister concludes, after consultation with the responsible provincial or territorial minister, that the laws of the province or territory do not adequately protect the species.

For each species listed as endangered or threatened, the Minister must prepare a recovery strategy in cooperation with provincial and territorial ministers, other federal ministers, aboriginal organizations, landowners and others who have responsibilities or interests in the area where the species is found. Among other things, the recovery strategy must identify, to the extent possible, the population of the species, its critical habitat, its needs and threats to its survival, and, if its recovery is feasible, the approach to be taken to address these threats. To implement the recovery strategy, the Minister must prepare one or more action plans, again in cooperation with ministers and others with interests in the case.

As part of the action plan, the minister may enter into agreements with any government, organization or person to take conservation measures, and the minister may contribute to the cost. These voluntary stewardship arrangements with landowners and others are expected to become the primary way of protecting critical habitat.

In the event that adequate voluntary arrangements cannot be negotiated, the Minister may, after further consultations, recommend to Cabinet the adoption of regulations to protect the critical habitat, which may require the owners and users of the land or water to do certain things or refrain from certain activities. If the critical habitat is not already protected, the Minister is required to recommend regulations and to report on the measures taken within 180 days following identification of the critical habitat. This regulatory power extends to all lands and waters in Canada, not just federal lands. (These controls are referred to in this report as "regulations" or "regulatory restrictions", to distinguish them from the automatic "prohibitions" against harming listed species, referred to above.) When such regulatory restrictions are invoked, "The Minister may... pay compensation to any person for losses suffered as a result of any extraordinary impact...".

"Many, many farmers have demonstrated an interest and willingness to assist wildlife species at risk."

Ontario Soil and Crop Improvement Association

This report is concerned with the last of these steps - the provisions for compensation when stewardship and other cooperative arrangements cannot be made and the government, as a last resort, imposes regulatory restrictions to protect critical wildlife habitat.

Some general features of the *Act* bear on the compensation issue. One is that, for lands and species other than those falling under federal jurisdiction, it defers in the first instance to provinces and territories (which are treated much like provinces) to protect critical habitats, and gives the federal Minister a responsibility to intervene only when he finds their measures inadequate. Another is its heavy emphasis throughout on consultative and cooperative arrangements with provincial and territorial governments, private landowners, aboriginal organizations and others affected by the policy. A third feature, reinforced by the previous two, is its detailed provisions for voluntary actions to protect the critical habitats of species at risk, and the correspondingly lesser emphasis on the mandatory, regulatory restrictions under which compensation may be provided.

The reliance on voluntary measures and incentives distinguishes the *Species at Risk Act* from its legislative counterpart in the United States, which depends on mandatory restrictions backed up with penalties. The U.S. system has been associated with a good deal of economic dislocation and significant losses suffered by landowners and others, with no compensation. Many observers believe the U.S. legislation has sometimes had the perverse effect of inducing landowners to destroy evidence of endangered species on their land — to "shoot, shovel and shut up". Unhappy experience in the United States has raised anxieties in this country, and led to some confusion about the government of Canada's new legislation.

Incentives versus Compensation

Before proceeding further I must distinguish carefully between "incentives" and "compensation" as these terms apply to the endangered species policy. Both can refer to a transfer of funds from government to a landowner, offsetting costs or losses incurred in protecting wildlife habitat, and so they are often confused. There is an important difference, however, in the context in which the payment is made and its purpose. An incentive payment is made to someone who accepts it as part of a willing undertaking to cooperate in a stewardship effort to help protect or enhance an endangered species.

Compensation, in contrast, is a payment made to someone who will suffer a loss from a governmental restriction on the way he may use or manage his land. The restriction is not mutually agreed upon, but unilaterally imposed by the government to protect a species' habitat.

"...a carrot should be used whenever possible, starting with incentives for good management and ending with compensation."

Federation of Canadian Municipalities

The payment is intended to reduce the landowner's loss. Thus compensation refers, here and in the *Species at Risk Act*, to payments to those that would otherwise bear the full burden of restrictions on land use, and these regulatory restrictions will be invoked only when voluntary arrangements, including incentives, cannot be arranged.

The Limited Role for Compensation

While compensation is regarded by many who might be affected by the *Species at Risk Act* as extremely important, if not the issue of greatest concern, it is intended to play a relatively minor role. The legislation and supporting documentation are clear in their intention that protection of the habitats of endangered species will be based mainly on voluntary, cooperative efforts, supported when necessary with government funds or other incentives.

Under the proposed Species at Risk policy, compensation will come into play only when landowners are unable or unwilling to engage in cooperative solutions and critical habitats are not otherwise protected; where, in effect, all other efforts fail and the government must resort to the imposition of regulatory restrictions. If the policy works well, these cases will be rare; the better it works, the rarer they will be. To put it another way, the frequency with which the federal government invokes regulatory controls and compensation will be a measure of the policy's failure.

"...compensation should only be a last resort. We should avoid creating a system which would remove incentives for involvement in stewardship... We must also be careful not to siphon off precious resources from... recovery programs..."

Government of Newfoundland and Labrador

The scope for compensation under the *Species at Risk Act* is thus narrowed in several ways. In the first place, it is a federal provision, and the first responsibility for protecting many endangered species falls to the provinces and territories. In the second place, when the federal government intervenes, it will emphasize cooperative, voluntary measures not calling for compensation. And further, even when coercive measures are necessary, they are likely to open the door to compensation only when the habitat needing protection is terrestrial, because aquatic habitat associated in any way with a fishery is already protected under the federal *Fisheries Act*, which has the advantages of broader scope, simplicity of application and familiarity.

My consultations revealed broad support for the federal effort to protect endangered species in Canada. Almost all those who made representations to me supported the basic objective of the *Species at Risk Act* — to protect the full range of natural plants and animals in Canada.

Representatives of some resource industries went further. Though conscious of the potential costs, they also saw possible benefits in the engagement of government expertise in managing wildlife on their lands, in the identification of their products with environmentally friendly methods of production, and in the opportunity to prove themselves responsible stewards of land and resources.

But support for the *Species at Risk Act* is qualified, and for many groups an important condition of their support is compensation for those who would otherwise bear the full brunt of regulatory restrictions on land designated critical habitat. Those whose land and resources are likely to be impacted by this legislation generally support a broad compensation program, and most others consider compensation reasonable and appropriate, at least.

Some people object to compensation, however. Among these, some feel strongly that landowners have a duty, or social responsibility, to protect the ecological integrity of their land and the natural species it supports. Some assume (perhaps mistakenly) that those whose lands must be regulated to protect the habitats of endangered species are responsible for their endangerment in the first place, so they should not be compensated. Others fear the cost of compensation might deter government action to protect species at risk. And a widely held view among commentators is that government funds available for species recovery will be most usefully spent in support of voluntary stewardship measures, without recourse to regulatory restrictions and compensation.

> "if recovery planning involves affected stakeholders throughout the process, takes into account socio-economic considerations, and focuses on stewardship, incentives and voluntary activities, the requirements for compensation will be minimized."
>
> Council of Forest Industries
> Industrial, Wood and Allied Workers of Canada
> Forest Alliance of British Columbia

In the government's documentation, and in my consultations with landowners and others, the most frequent rationale for compensating people when the use of their land is restricted to protect endangered species is that of fairness: the benefit of protecting species accrues to everyone, so those few whose land is needed for this purpose should not have to bear the full cost. But other, less obvious reasons have been offered as well. One is the need for fiscal discipline: compensation forces governments to recognize the cost of their actions. A third rationale is to strengthen the institutions of property on which our economic and social systems heavily depend. And a fourth is pragmatic; U.S. experience has shown that the absence of incentives and compensation discourages landowners from protecting endangered species, and causes them to be regarded as liabilities.

Regulatory Restrictions versus Expropriation

For the purposes of this report, it is important to note the difference between "restrictions on the use of land", as contemplated in the *Species at Risk Act*, and "expropriation" of land. Expropriation means taking property from its private owner and transferring title to the Crown. Provincial and federal governments all have well established arrangements for expropriating private property for roads and other public purposes. Expropriation laws set out how this will be done, how compensation will be determined, how disputes will be resolved, and so on. Over the last couple of decades, expropriation codes in Canada have undergone substantial reform, becoming more respectful of private property, providing for more generous compensation, and employing more fair and open procedures.

The *Species at Risk Act* does not deal with compensation arising from expropriation, however. If a provincial, territorial or federal government were to expropriate property for the purpose of protecting an endangered species, it would do so under its existing expropriation laws. Thus it is not necessary, here, to deal with the way compensation should be handled in the event of expropriation of private property.

"Property owners must be compensated for partial takings, i.e. when the uses of the property are significantly reduced but ownership is not taken."

Ontario Property and Environmental Rights Alliance

The *Species at Risk Act* provides for regulatory restrictions on the use of land to protect critical wildlife habitats. If the impact of these restrictions were so severe as to prevent an owner from gaining beneficial use of his land, a court might deem it equivalent to expropriation (de facto expropriation, or, in the language of NAFTA, "tantamount to" expropriation). If so, the law governing expropriations would apply, and fair compensation be called for. Here, then, we need to concern ourselves only with regulatory restrictions to protect critical wildlife habitat under the *Species at Risk Act*, which are not so intrusive as to amount to expropriation.

The *Species at Risk Act* recognizes the possibility of the federal government acquiring land from a private owner, but that would involve the vendor's agreement on the price and other terms, so compensation would not be an issue. I am, therefore, concerned in this report with only a narrow band of circumstances, where the federal government, with advice from a committee of scientists, identifies a species as endangered or threatened; where the action plan for its protection and recovery calls for controls on the way its critical habitat is used and managed; where the federal Minister finds that the efforts of other governments are not sufficient to provide the needed habitat protection; where cooperative stewardship arrangements (including incentive payments when appropriate) cannot be negotiated; and where the federal government therefore resorts to regulatory restrictions to protect the habitat without disturbing the ownership of the land or water affected.

Break from Established Policies

Before turning to recommendations about the provision of compensation under the *Species at Risk Act*, it is important to note the established law and policies on compensation when governments in Canada intrude on the rights of landowners. There is an ongoing legal debate in Canada and elsewhere about the line between regulating land use and "taking" property, which parallels the debate about the kind of governmental intrusions that require compensation. The law is evolving and has many esoteric aspects; policies vary somewhat across the country; and there are many exceptions to the general rules. This is not the place to describe the established arrangements in detail but, at the risk of oversimplification, some generalizations can be made.

I have already noted that federal and provincial governments have well established provisions for compensating landowners when they expropriate private property - that is, when they take property away from its owners. However, under the *Species at Risk Act*, we are dealing not with expropriation but with regulatory restrictions on the way land may be used.

Governmental regulations prohibiting people from using their property in ways previously lawful have proliferated in recent years. Land reserves prohibit farmers and forest owners from developing their land; both rural and urban land is commonly zoned to restrict land to particular uses; agricultural, forestry and mining practices are regulated; disturbance of wetlands, fish habitat and archeological sites is prohibited; municipal by-laws restrict land uses in innumerable ways; and many other kinds of regulations and restrictions have multiplied, chipping away at the traditional right of owners to use and manage their land as they wish.

Some of these restrictions, such as the prohibition on disturbing fish habitat in the federal *Fisheries Act*, have been in place for a very long time - so long that few present landowners have borne the brunt of their introduction. Many more have been introduced recently, often adversely affecting property values, sometimes significantly. But, in contrast to the provisions for expropriations, compensation for such regulatory restrictions is rare.

In Canada, expropriation laws are consistent with the common law presumption that the government will not take property from its owners without paying compensation. But the courts and governments have historically drawn a distinction between expropriation of property, for which compensation is due, and restrictions on the use of property for some public purpose, for which compensation is generally not payable. Restrictions that might be imposed under the *Species at Risk Act* are of this regulatory type, so compensation for them conflicts with long established policy in Canada.

> "... legislation which restricts the use of property, but does not actually affect the right of possession... partial deprivations, which we believe will be necessary to implement Bill C-33, are a very murky area."
>
> Canadian Real Estate Association

Canadians accept the view that governments should take regulatory action when necessary to advance the public good, and our laws reflect this. But land use regulations, like almost all regulations, though they may benefit the public generally, produce advantages for some individuals and disadvantages for others. Both gains and losses have traditionally been left in the hands of those affected, because of the difficulty of assessing them, the cost of compensating losses and the impracticality of measuring gains.

Moreover it is widely accepted that governments are entitled to make regulatory decisions requiring individual sacrifices for the public good. The compensation provisions in the *Species at Risk Act* should not, in my opinion, be seen as a repudiation of this view of the proper role of government. Rather, they reflect an attempt to soften the impact where individual landowners would otherwise be forced to make extraordinary sacrifices to protect endangered species.

All this suggests a need for extreme care in developing compensation arrangements for the *Species at Risk Act*. Because such regulatory intrusions on property are not usually compensated in Canada, the arrangements for compensation in this case imply a significant shift in policy. The precedent has implications not only for federal endangered species policy but also for other policies that affect property rights, and for governments other than the federal government.

"... the most important feature of any legislation must be its ability to encourage cooperative on the ground by all stakeholders."

Mining Association of Canada

Additional Reasons for Caution

The precedent of compensation for a regulatory intrusion is just one — albeit the major one — of several reasons for caution in this matter. I deal with others later in this report. But I want to preface my recommendations by emphasizing two other considerations that have influenced my conclusions, but were not always recognized by those who made representations to me.

One of these is that compensation for infringement of property rights, and indeed the whole endangered species policy, touches on a complicated and sensitive area of overlapping federal, provincial, territorial and aboriginal authority. This panoply of jurisdiction and administrative responsibility creates a potential danger of conflict with and sensitivity to federal initiatives in this area. Moreover all provinces and territories, as well as the federal government, are actively involved in managing wildlife and wildlife habitats, with significant programs, staff and other resources engaged in this work. This calls for especially close cooperation among governments to implement their policies effectively and efficiently — a challenge I return to later in this report.

Finally, a unique complication arises from the linkage, in the *Species at Risk Act*, between compensation and the arrangements for cooperative efforts. To protect critical habitats, the *Act* emphasizes voluntary stewardship programs, supported when needed with government incentives. Almost all those I consulted, including other governments, aboriginal, and agricultural organizations and resource industries, support this approach, on the grounds that cooperative effort will be less costly, less intrusive, and more effective than coercive regulation. Cooperation takes advantage of the landowners' intimate knowledge of the land in identifying and protecting the habitats of endangered species, and in doing so is the most effective means of protection.

It follows that all elements of the species at risk policy, including the provisions for compensation, should complement and strengthen the voluntary arrangements. This presents a challenge, because compensation in the event of failure of cooperative arrangements might be seen by landowners as offsetting the threat of such failure and the regulatory intervention that might follow from it, perversely reducing the incentive to cooperate. Worse, unless provisions for compensation are carefully crafted, they might invite attempts to access government funds rather than protect endangered species.

The objective of engaging landowners and resource users in cooperative solutions as much as possible calls for careful design of the whole program; to strengthen and facilitate voluntary actions, encourage intergovernmental cooperation, and complement other land and resource policies. At a minimum, compensation should not be provided in a way that encourages reliance on regulatory restrictions to protect critical wildlife habitats.

Principles for Compensation

I have already emphasized the break from long established government policy implied by the provisions for compensation for regulatory infringement of property in the *Species at Risk Act*. These provisions do not deny the reasons for the traditional reluctance of governments in Canada to compensate owners for diminution of their property values resulting from land use regulation. However, they do suggest a need to refine our traditional ideas about the sacrifices that landowners can reasonably be expected to make and how we approach the issue of sharing the costs associated with land use regulation. The following principles follow an obvious progression and, together, provide a substantial framework for a policy on compensation.

"The need for the payment of compensation in SARA is based on the principle of 'fairness'. Canada's commitment to ensuring biodiversity and the protection of species at risk is a societal value shared by all Canadians."

Alberta Chamber of Commerce
Land and Resource Partnership

1. All species must be protected. This starting point is clearly established in our international and national commitments, noted earlier.

2. The critical habitats of endangered species can be better protected through voluntary effort than by coercive governmental controls. This preference for cooperative arrangements, reflected in the *Species at Risk Act*, is widely supported by landowners and resource users not only because it is more respectful of their property rights but also because it is more effective.

3. Fairness requires sharing the cost. The benefit of protecting endangered species accrues to society as a whole, so those with rights to land needed for this purpose should not have to bear all the cost. Moreover, when measures needed to protect endangered species are costly, voluntary effort can be expected only if the costs are shared.

4. When restrictions on land use to protect the habitats of endangered species impose significant costs or losses on landowners, sharing the burden calls for compensation of the landowners by government. This is not to say that landowners should not be expected to make any sacrifice to protect endangered species on their land, but rather they should not be expected to make "extraordinary" sacrifices.

The above four principles are consistent with the language in the *Species at Risk Act* and the general policy underpinning the legislation. Together they provide the rationale for the provision of public financial support for voluntary actions and for compensation where compulsory measures to protect critical habitats are imposed. In the course of my consultations with interest groups, commentators suggested that compensation arrangements should be designed with attention to a variety of other considerations as well. Among these, I recommend the following:

5. Private property rights must be respected, and established laws and policies on expropriation recognized.

6. The roles to be played by different orders of government must be consistent with their constitutional responsibilities, and the authority of federal and provincial governments must be respected within the spirit of their joint Accord for the Protection of Species at Risk.

7. Policies, programs and procedures should be clear, transparent, and provide as much certainty as possible.

8. Administrative arrangements should be simple, avoiding costly procedures and burdensome compliance requirements.

9. Administrative machinery for compensation should be based, as much as possible, on existing structures and procedures.

10. All arrangements should be designed to promote voluntary, cooperative measures.

I have found all these principles to be widely supported by landowners, resource industries, aboriginal groups, environmental organizations and governmental agencies. My proposals for compensation arrangements in the remainder of this report are designed to help the endangered species program work effectively, while adhering to these principles as closely as possible.

Bearing in mind the limited role intended for compensation, the preference for voluntary arrangements not involving compensation, and the principles for compensation policy proposed above, I now turn to more specific issues of eligibility, the assessment of losses and compensation, settlement of disputes and related matters.

The *Species at Risk Act* (s. 64) states that the Minister may pay compensation to a person for "losses suffered as a result of any extraordinary impact" of restrictions necessary to protect the critical habitat of wildlife species. It goes on to say, however, that compensation is payable "in accordance with the regulations". For this purpose, the Governor in Council may enact regulations prescribing "the methods used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation to be paid in respect of any loss" and "the terms and conditions for the payment of compensation". The *Act* refers, somewhat awkwardly, to regulations to prescribe the "methods used for determining" these key features of the compensation scheme. However, the meaning and substance of eligibility, the amount of compensation to be paid and other issues must be determined as well, and my assignment includes recommendations about how they should be addressed. The *Act* itself offers little guidance on these matters, and in formulating my advice to the Minister, on the following pages, I have considered not only the words of the *Act* but the underlying purpose of the legislation.

"Limiting a landowner on what he can do on his own land is a very significant undertaking and an action that should not be engaged lightly or frivolously."

Municipal District of Clearwater (Alberta)

Eligible Persons

The first question is who should be eligible for compensation? The principles outlined above, especially that of fairness and the need to share the burden, suggest that private landowners should be eligible for compensation when actions taken under the *Species at Risk Act* significantly impair the value of their land. Compensation should apply also to lands owned by aboriginal people or held in trust for them as reserve lands, as discussed below.

The question of compensation for infringements on Crown land is much more complicated. It is also extremely important, because most land and water in Canada is owned by the Crown in the right of provinces and the federal government, with much of the latter administered by territorial governments. Moreover, in most regions of Canada, the forest, mining and petroleum industries operate mainly on these Crown lands under leases, licenses, and permits issued by these governments. Ranchers, too, often depend on grazing rights on Crown land.

Whether compensation under the *Species at Risk Act* should be paid where federal restrictions are applied to Crown land attracted much discussion in my consultations, especially those with representatives of resource industries and provincial and territorial governments. Most spokespersons for resource industries argued that the principle of fairness demands that compensation be extended beyond private landowners to those who depend on rights to use Crown land and resources. Those with opposing views held that a landlord could surely alter the terms on which a tenant could use a property, and a governmental landlord had a responsibility to do so when a public need demanded. Moreover, private owners of land are not usually compensated for such intrusions, and the case for the Crown to compensate itself, as owner, is surely weaker. And there is little precedent in either federal or provincial policies to provide compensation to the other order of government, or to tenants on its land.

Compensation for restrictions on the use of Crown lands would present a variety of problems. If federal compensation were provided where provincial Crown land was occupied by someone holding rights to the resources on or under it in the form of a license issued by a provincial agency, who should receive the compensation, the landlord or the tenant? How should the losses be assessed, especially when the license allows for regulatory changes? How would payments for resource rights – sometimes, as with petroleum leases, paid in advance – be taken account of?

Quite apart from these practical problems, if the federal government were to proceed unilaterally with compensation affecting provincial Crown lands the impact could be disruptive to federal-provincial coordination and cooperation. The federal regulatory intrusion on provincial and territorial management of land and resources could be aggravated by compensation arrangements that affect the contractual relationships between those governments and their licensees. Such action would hardly be consistent with the Accord for the Protection of Species at Risk, endorsed by all provinces and territories as well as the federal government, committing them to cooperate, establish complementary programs and share responsibility for protecting species at risk.

"All governments hold responsibility for the protection and recovery of species at risk, and each government must fulfill its responsibility..."

Species at Risk Working Group

In view of all these considerations, I have concluded that there should be no issue of compensating the owner of the land when restrictions are applied to Crown land. If it were federal land or water, the federal government would, in effect, be compensating itself, contrary to its long established policy of not doing so, and serving no useful purpose. Nor should provincial and territorial governments be compensated for restrictions on Crown land or water owned or managed by them. These governments have direct responsibility for the stewardship of these resources, and have agreed to take measures to protect endangered species on them. The federal government, under the *Species at Risk Act*, is responsible for ensuring that these measures are adequate. In these circumstances, it would be inappropriate for the federal government to compensate provinces or territories whose measures it found inadequate.

There remains the question of whether compensation should be available to private holders of rights in the form of leases, licenses and permits on Crown lands. The answer, in each case, should turn on whether the regulatory restrictions impair the legal or contractual rights of the private holder.

Leases, licenses and permits issued by governments are contracts, and the rights and duties of each party are set out in the agreements themselves, in the legislation governing them, and sometimes in established policies and precedents. Often, they set out conditions in which the government may alter or cancel the agreement. Some specify circumstances in which compensation will be paid.

The forms of tenure developed by provincial, territorial and federal governments in Canada to provide private users with access to Crown land and resources are varied and complicated. However, almost all of them limit their holders to one form of land use, such as forestry or mineral development; they provide for regulations to govern those activities; they are issued for fixed terms; and they require some form of payment to the Crown. While the Crown holds title to the land, the tenants, in some mineral and forest tenures, own the resources on or under it. More often, the Crown retains ownership of the resources until the lessee or licensee harvests them.

"The overwhelming majority of species in Canada fall within the legislative jurisdiction of the provinces and territories."

Council of Forest Industries

For present purposes it is important to recognize that the rights of the holders of these tenures vary widely. The terms and conditions of these contracts, and the legislation governing them, often leave the government considerable scope for adding regulatory restrictions on the way the holders may carry out their harvesting or other activities, without encroaching on their contractual rights. For example, the limited terms of leases and licenses usually give the government an opportunity to alter their terms and conditions when and if they are renewed. The term of some tenures is as short as a year or even less. Long-term forest licenses often require, at regular intervals, short-term management plans or harvesting authorizations which provide more frequent opportunities to incorporate new policies. And some forms of tenure allow the Crown continuing wide discretion in regulating resource management practices.

Where regulatory restrictions needed to protect endangered species can be applied without impairing the private holders' legal rights under these tenures, no compensation should be paid. But this will not always be the case. And when they impair the tenants' contractual rights, causing a significant loss in the value of those rights, the holders should be eligible for compensation.

Compensation should be paid strictly to people who have a legal interest in the land subjected to the regulatory controls. This is not to say that others will not be adversely affected - contractors, employees, local communities and others, even taxpayers may suffer direct or indirect losses. But measurement of all the economic effects — positive as well as negative — that might ripple through a community or region would be unmanageable. In any event, the objective is to deal fairly with people whose property rights are infringed, which does not require an attempt to offset all other effects on other people and their interests. Moreover, I have found no precedent, even in expropriation law, for compensation to people who have no property rights infringed.

These secondary and indirect effects on local communities and businesses might be serious in some cases, calling for governmental assistance. But this should be provided through programs directed toward rural and regional economic adjustment, of the kind recently implemented to assist distressed fisheries and agricultural communities. Transition programs, involving support for training, relocation and development projects, unlike compensation policies, can be tailored much more to particular circumstances and needs, and involve local communities much more in their delivery.

"Effective co-ordination is essential for meeting our sustainable development challenges - governments are not very good at it."

Commissioner of the Environment and Sustainable Development, 1999.

Other alternatives to compensation for regulatory restrictions may be suitable in particular circumstances. As noted earlier, the government may expropriate land for public purposes under the *Expropriation Act*. The *Species at Risk Act* authorizes it to purchase land from willing sellers. And where rights to Crown land are held in the form of leases or other usufructuary rights, the government might offer to buy them at market prices (just as it has sometimes purchased and retired commercial fishing licenses) without invoking regulations and compensation.

Eligible Losses

The second question is what kind of infringements on property should be compensated. The *Act* refers to "losses", and I infer that compensation should be payable for certain types of losses. As noted above, these losses should be confined to diminution in the value of the compensated persons' property rights, and flow directly from restrictions on the use of their property, not from restrictions on the property of others. Finally, the losses must "result" from the imposition of the regulatory restrictions referred to in the *Species at Risk Act* (s. 64). This implies that the cost or loss be identifiable, reasonably certain and measurable, or at least capable of reasonable estimation.

The *Act* requires more than simply a loss resulting from a regulatory restriction; the loss must result from an "extraordinary impact" of these measures. Many commentators emphasized the importance of clarifying the meaning of "extraordinary" in this context. The customary meaning of this adjective is "outside the usual order", or "exceptional". Here it is applied to the impact of the regulations, which I take to refer to the losses suffered. Accordingly, I suggest this be interpreted to mean that compensation may be provided where regulations have a significant adverse impact on the value of the property. This means that it is not enough to demonstrate a loss resulting from the regulatory restrictions; the impact must be so significant as to be "extraordinary".

This suggests a threshold for losses eligible for compensation — sufficiently high to meet the criterion of "extraordinary" but not so great as to amount to de facto expropriation. Other considerations, as well, support the application of a threshold for compensable losses in this case. One is that the loss in property value or income resulting from restrictions to protect critical habitat may, in many cases, be small, within a range that might reasonably be expected to be borne by property owners in the interests of good land stewardship. The established policies among governments in Canada of providing, under usual circumstance, no compensation for regulatory restrictions on land use strengthens the case for some threshold, at least. And the objective of strengthening incentives for voluntary arrangements suggests a need for caution in cushioning the effect of failure to find cooperative solutions.

"There are no readily available models to turn to for guidance in determining principles that should guide the compensation scheme."

Environment Canada

The question is how high should a threshold be? Because the *Species at Risk Act* presents a new approach to compensation for regulatory restrictions on land use, there are few models to offer useful guidance. The only relevant Canadian example is Nova Scotia's recent *Endangered Species Act* (S.N.S. 1998 c. 11), which requires the provincial government to compensate owners of private land where it restricts the way they may use their land in order to protect species at risk or their core habitats.

The compensation requirement applies only when the owner is actually using the land in the restricted way when the restrictions are applied. With this qualification, owners are entitled to full compensation. If the parties cannot agree on the amount of the loss, the owner may refer this question to the Nova Scotia Utility and Review Board, which will resolve it using the principles of valuation embodied in Nova Scotia's expropriation procedures. Without expressing any view on the suitability of this regime for use in Nova Scotia, I find it inappropriate in some respects for the purposes of the *Species at Risk Act*. For one thing, it restricts circumstances in which compensation will be offered. For another, it does not limit compensation to cases of "extraordinary" losses. Full compensation for all regulatory restrictions would not only be inconsistent with the *Species at Risk Act*, it would undermine any incentives for engaging in voluntary habitat protection arrangements.

A handful of southern and Rocky Mountain states in the United States have developed policies for compensating landowners for regulatory restrictions that have a significant impact on the value of their land, but not a severe enough impact to constitute a de facto expropriation or, in the language of American constitutional lawyers, a "regulatory taking". These regimes, in Florida, Louisiana, Texas, Mississippi and North Dakota, are described in a recent article in the Journal of Forestry by Professor D. Zhang (1996).

All provide some threshold to qualify for compensation. Florida's legislation limits compensation to cases where land use regulations impose an "inordinate burden". In the other states, the threshold is expressed in terms of the percentage by which the property value is diminished — 20 per cent in Louisiana, 25 per cent in Texas, 40 per cent in Mississippi and 50 per cent in North Dakota. Beyond the threshold, full compensation is provided.

> "... the government must focus on the systems that will encourage landowners to voluntarily protect habitat for endangered species. After all, 'one volunteer is worth ten pressed men'."
>
> Private Forest Landowners Association

For reasons I explain below, I believe the *Species at Risk Act* calls for a lower threshold than the U.S. examples above, one that reflects a true public commitment to sharing the extraordinary losses that would otherwise fall on some landowners as a result of regulations to protect endangered species. At the same time, once the threshold is met, rather than full compensation, a system for sharing the losses would be more appropriate.

In my opinion, the threshold should be in the order of 10 per cent of the value of the property. Loss of more than 10 per cent of one's property value will satisfy the condition of "extraordinary" as I have defined it.

Such a threshold will ensure that the public shares with landowners the burden of onerous land use restrictions necessary to protect endangered species, and respond, as well, to the other considerations noted above. Accordingly, I recommend that compensation, on the basis of the sharing formula described below, be provided where regulatory restrictions under the *Species at Risk Act* result in losses exceeding 10 per cent of the value of the affected land or of the net returns from it.

Amount of Compensation

The next question is the amount of compensation that should be paid when this eligibility criterion is met. The general guidelines have already been suggested: compensation should be sufficient to ensure that the public shares substantially in the burden of protecting critical habitats, but it should be directed to extraordinary losses and not be so generous as to weaken incentives to finding cooperative stewardship arrangements.

The traditional all-or-nothing compensation associated with de facto expropriation should be avoided. A recent United States Supreme court decision on "regulatory takings" (Lucas v. South Carolina Coastal Council (1992), 505 U.S. 1003) illustrates the problem:

It is true that in at least some cases the landowner with 95 per cent loss will get nothing while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5 per cent of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations (505 U.S. page 1019, note 8).

The compensation provisions of the U.S. states referred to above, which offer full compensation for the diminution of property values beyond a threshold of 20 to 50 per cent, have the same all-or-nothing shortcoming, though determined at a lower level of loss to the property owner. The policy objective of the public sharing of extraordinary losses resulting from regulatory restrictions would not be well served by such all-or-nothing arrangements. Once the loss reaches the threshold I have recommended above, the public should share the cost. This does not mean that landowners must be compensated in full, as they would be if their property were expropriated, but they should be compensated for a substantial share of the loss in value resulting from restrictions on the use of their land to protect endangered species.

"Compensation should be based on the actual amount of lost income or decline in market value resulting from restrictions imposed under the Act"

Canadian Cattlemen's Association

Once we move from an all-or nothing entitlement to the principle of cost sharing we must confront the question of the appropriate shares to be borne by the landowner and the public. In the absence of precedents or other guidance to suggest that one should bear more than the other, I recommend equal sharing. More specifically, I propose that landowners eligible for compensation should receive 50 per cent of the losses exceeding the 10 per cent threshold for diminution in the value of their property. This formula is a significant, yet cautious departure from the traditional policy of no compensation for such losses. It will assure landowners that the public will bear a substantial portion of any extraordinary losses that would otherwise fall on them as a result of regulations to protect endangered species, but not so large a share as to encourage a preference for regulation and compensation over cooperation. (Accordingly, I see no need to limit compensation to the amount of incentive payments offered to landowners, as suggested in the government's discussion paper — a procedure which, in any event, would interfere with fair and consistent sharing of losses.)

Many of those I consulted during my investigation urged me to draw on existing administrative structures, assessment principles and procedures rather than invent new ones. I am receptive to this advice, and believe it should apply to the principles upon which compensable losses are evaluated. The overriding objective should be to determine, in unbiased fashion, the diminution in fair market value of property that results from the regulatory restrictions imposed to protect critical wildlife habitat.

This task can best be left to independent experts in property valuation, following the principles they normally use for this purpose. These widely accepted principles are reflected in the federal *Expropriation Act*, but an even more relevant model is that of the Ecological Gifts Program, recently developed by Environment Canada. Under this program, landowners may voluntarily accept restrictions on the use of their land to protect its ecological attributes in return for certain tax benefits. The restrictions have many similarities with the proposed regulatory restrictions on critical wildlife habitats contemplated by the *Species at Risk Act*. These covenants, easements and servitudes will require appraisals of their fair market value, which will be performed by independent, accredited appraisers.

The arrangements for establishing the fair market value of restrictions on land use under the Ecological Gifts Program are fair and reasonable. The mandate of the program is similar to that of the species at risk program, and it is organized to provide consistency across the country.

The valuation principles and procedures under the Ecological Gifts Program have recently been reviewed by a panel of experts. Their recommendations appear to me to be equally applicable to determination of losses in fair market value resulting from restrictions on land use under the *Species at Risk Act*, and I recommend that they be adopted for this purpose as well.

It may be advisable to consult the group of experts that reviewed the Ecological Gifts procedures to determine whether their application to this other purpose calls for minor modifications in the valuation technique.

Process

Losses eligible for compensation must be assessed fairly through an open, professional process at arm's length from government. It must be a process in which both the affected party and the government have confidence, so that dissatisfaction and appeals will be minimized.

Having examined existing structures and policies relating to property appraisal, expropriation, arbitration, mediation and related matters, I have concluded that the administrative machinery under the Ecological Gifts Program for establishing fair market values, and the process for dealing with appeals, are well designed and suitable for the purposes of compensation under the *Species at Risk Act*. Again, it would be prudent for the Minister to consult the experts who recommended the procedures for the Ecological Gifts Program, so at to properly adapt them to the Species at Risk program.

"...it is essential that any new proposal be integrated into the existing land use management processes...."

Union of B.C. Municipalities

A number of those who made representations to me expressed concern about being prosecuted for violation of regulatory restrictions while they were engaged in negotiations over compensation. Their argument was that it would be unfair for them to bear the burden of the restrictions until they received the compensation. While I have some sympathy with this argument, an unqualified exemption from prosecution while negotiations are ongoing would be imprudent. In my view, the Ministry should exercise its discretion not to prosecute landowners who do not adhere to land use restrictions, and who are entitled to compensation, for a reasonable period of negotiation over the compensation. This restraint should not apply if there is an immediate danger to the species at risk or its habitat, in which case the landowner should be notified of the Ministry's intention to prosecute unless the prohibited use of land ceases.

Forms of Compensation

While compensation is usually thought of in terms of money, it can take other forms as well. Land swaps, exchanges of rights to land, access to other resources, reimbursement of fees paid for resources, concessions on fees or credits against fees payable on other resources, governmental assistance, rezoning and a host of other possibilities afford alternatives to monetary settlements and may be more attractive, less disruptive and less costly in some circumstances.

Farmers and ranchers emphasize the dislocation of operations when their land base is reduced in size, even if the loss itself is compensated. Their economic viability can be better protected by replacing the lost land. Similarly, if the land base of a forest operation is reduced to protect an endangered species, its viability may be restored most effectively by replacing its timber supply from elsewhere. First Nations, also, emphasize their preference for compensation in the form of land rather than money.

Compensation in forms other than money is recognized and provided for in compensation law. Importantly, however, the receiver of the compensation must be willing to accept the alternative form — it cannot be imposed by the government. Thus the government is typically required to make a cash offer first. The person receiving compensation may accept the offer or agree to consider alternatives.
I recommend this procedure for present purposes (with special arrangements for aboriginal lands, discussed below).

"There is plenty of room for the development of creative solutions which will not necessarily cost the program hard dollars. Public recognition, timing concessions in the granting of rights, rights swaps and tax concessions are all instruments available to the government to achieve its goals."

Land and Resource Partnership

The wider the range of alternatives available for compensation, the greater the scope for a mutually agreeable settlement. I recommend no restrictions on the form of compensation; indeed, the regulations should encourage consideration of all feasible alternatives. Where compensation is in forms other than money, appraisals must, of course, extend to the compensation-in-kind as well as to the value of losses to be compensated.

Related Matters

Whenever governments impose restrictions on the use of land and resources they should ensure that appropriate adjustments are made under other policies. For example, if new regulations diminish the value of a farmer's land or improvements on it, property tax assessments should recognize this. If a mining company, operating under governmental requirements to carry out certain work, is prohibited from doing so by regulations to protect wildlife habitat, it should be exempted from those requirements without penalty.
A company that paid in advance for resource rights that it is later prohibited from extracting should be refunded its payments. And if a forestry company is prohibited from harvesting the volumes of timber required by government-approved management plans (which sometimes apply to private lands) they should be similarly excused.

These examples are only illustrative of a wider variety of related measures. While administration of other policies extends beyond my terms of reference, fairness requires that they be harmonized whenever governments restrict landowners' freedom to use their land and resources to protect endangered species.

Coordination With Provinces And Territories

The *Species at Risk Act* makes an extraordinary commitment to coordinating federal measures for the protection of endangered species with those of provincial and territorial governments, and to cooperating with aboriginal people, landowners and other interest groups as well. When the critical habitat for an endangered or threatened species is identified, each jurisdiction involved is expected to take measures to protect it — the federal government on federal land and the provinces and territories on lands within their borders. But the *Act* also empowers the federal government to take regulatory action on provincial and territorial lands, and if, after consulting the appropriate provincial or territorial minister, the Minister concludes that no other protective provisions are in place he/she is obliged to recommend such measures to the Cabinet. Thus, while the *Act* provides protection for species at risk and their critical habitats everywhere in Canada, it recognizes the provinces' authority over much of Canada's land and resources, including many forms of wildlife, and seeks to coordinate federal efforts to protect species at risk and their critical habitats with the efforts of provincial and territorial governments.

The federal government is also pledged, through the intergovernmental Accord, to cooperate with the provincial and territorial governments in this area, and to adopt complementary legislation and programs. Moreover, provincial and territorial ministers are members of the Canadian Endangered Species Conservation Council which is responsible for coordinating the programs of the various governments represented on it. The Council also provides general direction to the scientific committee responsible for identifying endangered species, and the members of that committee are selected in consultation with provincial and territorial governments as well. Clearly, the federal program is intended to function with the close cooperation and involvement of provinces and territories; the absence of that cooperation and involvement would present a major obstacle to the federal policy.

Practical Need for Cooperation

Close working relations among governments in this matter are imperative for more pragmatic reasons also. One of these is that they are all involved in protecting endangered species, and cooperation will be essential to avoid duplicating effort or, worse, frustrating each others' efforts. As I noted earlier, most of the forestry, mining, petroleum, hydroelectric and other resource industries in Canada operate under leases and other temporary forms of tenure issued by provincial and territorial governments. These governments also regulate the use of water and discharges of waste into water. The various forms of rights employed by provincial and territorial governments to provide access to resources gives them means to ensure the protection of critical wildlife habitat not available to the federal government. For the same reason, close cooperation with provinces will facilitate the negotiation of voluntary stewardship arrangements with landowners to protect critical habitat, thus minimizing the need for federal regulatory restrictions and compensation.

I have already noted, also, that the most suitable form of compensation is likely to vary in different circumstances, but the range of available alternatives would be much narrower without the involvement of provincial governments. Furthermore, most provincial governments have programs involving stewardship arrangements with landowners and others that could be disturbed by a separate federal program based on different fiscal arrangements. And most provinces also have supporting arrangements involving such measures as tax relief, land dedication and re-classification, which will affect the impact of any federal intervention.

So far only one province, Nova Scotia, has legislation providing for compensation for restrictions to protect endangered species on private land, but others are considering such arrangements and some may well adopt compensation policies in the future. The prospect of both federal and provincial governments providing compensation in similar circumstances obviously demands reconciliation.

Finally, all provinces and territories have endangered species programs and activities of their own, with personnel and resources devoted to objectives similar to those of the federal program. Failure to take advantage of the supportive effort already in place would be wasteful to say the least.

"We are concerned that the federal legislation clearly recognize and be coordinated with provincial regulation."

B.C. Cattlemen's Association

So many elements of the federal species at risk program intersect with provincial and territorial activities it is difficult to visualize its smooth and efficient implementation without clear intergovernmental working arrangements to ensure the federal effort complements the provincial and territorial. And the specific issue of compensation raises a variety of concerns on the part of these governments; if not clearly resolved, they are potentially fractious enough to impede the species protection efforts of all.

Anxiety about the possibility of uncoordinated federal, provincial and territorial programs was expressed repeatedly in my consultations. The forest and mining industries are especially concerned that this will aggravate the uncertainty, cost and delay of complying with governmental requirements. Provincial governments fear duplication of administrative procedures and conflicting federal and provincial programs.

Fortunately, work has already begun on a bilateral agreement that might be entered into between the federal government and each of the provinces and territories, an agreement that will set out the arrangements for implementing their commitments under the 1996 Accord and the requirements of the *Species at Risk Act*. The agreement is intended to clarify how the governments will work together, minimize overlap and duplication, make efficient use of available staff and resources, and harmonize programs. Although the objectives and commitments will be similar for all jurisdictions, the operational aspects of the agreements will vary to accommodate specific circumstances and needs. It can be expected that these agreements will define, among other things, the way the federal government will implement the "safety net" provisions of the *Species at Risk Act*.

Officials working on the draft bilateral agreements have advised me that, with sufficient effort, they could complete their work within six months or so. And federal, provincial and territorial ministers, meeting as the Canadian Endangered Species Conservation Council in August, unanimously endorsed the effort, providing the needed political support.

"...the species at risk program has been a prime example of what can be accomplished when provinces, territories and the federal government collaborate to address a national need. ...these relationships can be further strengthened as we proceed to negotiate bilateral agreements to implement the species at risk program."

The Honourable John C. Snobelen
Ontario Minister of Natural Resources

My mandate deals only with the compensation provisions of the *Species at Risk Act*, but these are so interconnected with the provisions for regulatory restrictions on provincial and territorial lands, and the representations made to me on the need for coordination in this area were so strong that I cannot avoid this issue. I am driven to the conclusion that, except on federal lands, important parts of the federal species at risk program cannot work satisfactorily without close integration with provincial and territorial programs, and that it would be inadvisable for the federal government to proceed with them unilaterally, unless it becomes apparent that the current effort to construct bilateral agreements will not bear fruit.

Accordingly, I recommend that the federal government refrain from expending funds under stewardship and incentive programs until a bilateral agreement is in place with the province or territory where the funds are applied. This will sharpen incentives to expedite these agreements as well as avoid conflicts. Further, I recommend that the federal government refrain from unilateral actions under the "safety net" provisions of the *Species at Risk Act*, including the regulatory restrictions that trigger compensation, until these agreements are in place, or until it becomes apparent that such agreements cannot be negotiated.

In view of the mandatory nature of some of the Minister's obligations under these provisions, and depending on progress in establishing these agreements with provinces and territories, it may be desirable to bring certain parts of the *Act* into force at different times.

Special Provisions For Aboriginal Lands

Aboriginal lands are expected to play an important part in the endangered species program, and the provisions of the *Species at Risk Act* dealing with protection of critical habitats specifically recognize the role of aboriginal bands whose lands may be affected, as well as the role of wildlife management boards established under land claims agreements.

Judging from the representations I received from them, aboriginal groups will be eager to cooperate in stewardship programs to protect species at risk on their lands. In almost all cases, aboriginal people have a profound attachment to the land they have historically occupied, adapted to, and depended upon not only for sustenance but also for cultural identity. Accordingly, they are particularly anxious to preserve the natural richness of their traditional lands, including the plants, fish and wildlife on that land.

> "Aboriginal people have a cultural link to the land...and rely on resources for survival... We do not harvest for wealth, we harvest for food."
>
> Ovide Mercredi

The aboriginal leaders I consulted saw the endangerment of species as a recent problem linked to non-aboriginal industrialization. Nevertheless, they indicated that their communities, organizations and governments will assist recovery efforts, supported with governmental funding, both as a means of broadening economic opportunities and as a demonstration of responsible stewardship. This willingness to participate in cooperative measures is likely to minimize the need to impose mandatory controls on aboriginal lands. Nevertheless, the need for regulatory restrictions in some cases must be anticipated, and special arrangements must be made for aboriginal lands.

Special Circumstances

One reason for special attention to aboriginal lands is the unique character of aboriginal interests in land and resources. Both aboriginal rights recognized in common law and treaty rights are protected by the constitution. Both classes of rights can take a variety of forms. They include rights to hunt and fish and engage in other traditional practices as well as title to land. In addition, the precise nature of the legal interests aboriginal people have in land may vary depending on a number of factors. These include whether the lands are subject to traditional aboriginal title or are reserve lands held in trust by the federal Crown for particular aboriginal communities, or have been recognized as aboriginal lands in fee simple under a land claims agreement.

It is fair to say that our understanding of the legal character of many of these interests is evolving. In many cases there is considerable uncertainty about the scope of these interests, the precise extent to which they are subject to constitutional protection, the extent to which governmental restrictions on them can be justified, and the precise nature of the government's obligation to compensate aboriginal peoples for infringement of their rights.

In addition, land claims agreements, a number of which have been concluded in recent years in the northern territories and British Columbia, contain detailed provisions about the aboriginal groups' rights and the responsibilities of wildlife management boards in managing land and resources, including the conservation of wildlife. Some also specify conditions under which compensation will be provided.

We can say with some certainty that the proposed *Species at Risk Act*, and the compensation provisions under the *Act*, cannot displace whatever obligations the federal government has under the constitution in relation to aboriginal and treaty rights. Less clear is whether the *Act's* compensation provisions complement these constitutional rights and obligations, and whether aboriginal interests in lands subject to regulatory restrictions to protect critical habitat may be subject to compensation under the *Act*. If they are, compensation under the *Act* would presumably offset compensation available under a different regime.

Another reason for special attention to aboriginal lands is the different kind of benefits native people typically derive from their lands. Most importantly, these benefits are often not commercial, but have more to do with sustenance, or cultural, ceremonial, medicinal, spiritual and social values. This raises a special problem in appraising the value of losses that might result from restrictions on traditional uses of land; cultural and spiritual values cannot easily be quantified in the monetary terms normally used in appraisals of property values.

The importance of non-commercial values leads, also, to a preference of aboriginal people for compensation in forms other than money, such as access to alternative land or resources. These two issues are related, because the difficulty of assessing the cultural and other non-commercial values aboriginal people derive from their land can be avoided by providing compensation in the form of access to alternative land and resources wherever circumstances permit.

A third, quite separate reason for special provisions for aboriginal lands is the difficulty most native groups have in dealing with governmental bureaucracies and programs. Business organizations and non-aboriginal landowners are generally in a stronger position in terms of expertise, funds and experience, to cope with the challenges of accessing government funds. Although all groups express anxiety about red tape, I have no doubt that aboriginal groups are justified in their fear that, without a special effort to make their access to compensation funds simple, non-technical and transparent, they will be at a disadvantage relative to other claimants, or at best be forced to engage lawyers and consultants to help them secure funds for which they are eligible.

"In order to be fair, the standards and principles to be applied in providing compensation to those who are eligible under the proposed Species at Risk Act must properly address the unique circumstances of Aboriginal Peoples."

Inuit Tapirisat of Canada

Framework Agreement with Aboriginal People

As with the provinces and territories, the federal government needs to negotiate a clear understanding with aboriginal people about how their cooperative relationship will be organized and how it will operate. An aboriginal working group has already begun work on an aboriginal accord on protection of species at risk, with encouragement from the federal Minister.

This aboriginal accord should be given high priority and every effort should be made to have it in place by the time the *Species at Risk Act* is enacted. This agreement should provide the framework for stewardship and incentive programs on aboriginal lands, and define how regulatory and compensation arrangements will be administered when cooperative processes fail.

Compensation

In the event that cooperative stewardship arrangements cannot be negotiated, and the federal government resorts to regulatory restrictions on the use and management of aboriginal lands, the provisions for compensation should parallel, generally, those for private lands outlined earlier in this report. Thus, where aboriginal people have legally recognized interests in land, and regulatory restrictions on land use are put in place under the *Species at Risk Act* to protect critical habitat, the aboriginal group affected should be entitled to compensation in accordance with the principles I set out earlier in this report. But to respond to the special circumstances of aboriginal people and their lands, noted above, the compensation provisions should put greater emphasis on certain arrangements. In particular:

"Compensation can become an easy way out, weakening incentives to find more creative solutions."

Michael d'Eça, for Nunavut Wildlife Management Board

• In assessing the value of losses resulting from regulatory restrictions on the use of land, account should be taken of the unique qualities and strength of aboriginal and treaty rights, which give them a higher value than other forms of rights.

• Careful account should be taken of the cultural and sustenance values aboriginal people derive from their land and resources. These non-commercial benefits, though unpriced and therefore difficult to evaluate in monetary terms, are nonetheless valuable, and often the most precious benefits to the aboriginal communities involved.

• Special effort should be made to identify opportunities for compensating losses of such benefits in forms other than money. These alternatives might include replacing lost access to resources with access to other land or resources, or support for land and resource management projects and economic and social development programs. Broadening the range of possibilities for compensation will not only ease the task of finding a mutually acceptable settlement, but also reduce the problem of quantifying non-commercial values in dollars.

• In considering such alternative forms of compensation, especially support for resource management and development projects, every effort should be made to maximize participation in the work by the aboriginal people themselves, so that they are not only compensated for their losses, but also benefit, incidentally, from the process of compensation.

• The procedures for applying for compensation, and negotiating and administering settlements should be as simple and straightforward as governmental due diligence permits, thus minimizing bureaucratic obstacles to settlements no less favourable then those made with non-aboriginal claimants.

Several aboriginal representatives proposed a separate aboriginal compensation fund be established, to ensure that a fair share of such funding is allocated to aboriginal lands. However, I doubt that such a measure would serve the intended purpose. Compensation, as I have emphasized earlier, is intended to be a minor component of the species at risk policy, provided only when preferred measures fail, and these instances are not likely to be predictable or separately funded. The main thrust of the policy, and most of the funding, will be directed to incentives and stewardship programs; and it is these programs that are likely to offer the best opportunities for aboriginal people when measures to protect habitats or restore endangered species must be taken on aboriginal lands. Accordingly, I suggest the idea of a separate allocation of funds be considered in connection with the funding of these other, cooperative, arrangements.

"... the compensation scheme under Section 64 must fairly address the unique situation of Aboriginal Peoples."

Nunavut Tunngavik Incorporated

Concluding Comment

The provision for compensation in the *Species at Risk Act* enjoys wide support among landowners and other groups likely to be affected by this new legislation. But it is a very general, discretionary provision, which gives rise to considerable anxiety about how it will be interpreted and administered. My proposals in this report are aimed at providing a clear framework of principles and procedures. The challenge has been to find ways to ensure fair compensation for those who would otherwise bear an unfair burden in protecting critical wildlife habitat without weakening the main thrust of the endangered species policy, which is to engage landowners and others in voluntary, cooperative efforts to protect the habitats of species at risk.

At several points in this report I have emphasized the need for caution in developing and implementing the compensation arrangements provided by the proposed *Act*. One reason for this is that the *Species at Risk Act* contemplates compensation only when owners of the affected land do not enter into cooperative arrangements, which, in effect, threatens to weaken incentives to cooperate. Another reason is that providing compensation for environmental controls of this kind is a break from established policies of governments in Canada and implies a precedent with far-reaching implications. A third reason is the need to reconcile the sensitive, overlapping responsibilities and programs of federal, provincial, territorial and aboriginal authorities in wildlife management.

The final reason for special care in developing policy in this area is the prevailing uncertainty about the magnitude of the endangered species problem in Canada, its future trends and the cost of dealing with it. Analysis of the implications of protecting habitats sufficiently to reverse the present trends in species at risk is fragmentary, though some experts predict it will be a daunting task. And although the federal budget earlier this year allocated $180 million over five years to implement the new strategy for protecting species at risk, Environment Canada has not been able, so far, to estimate the cost of compensation or, indeed, of the whole program.

Uncertain, also, is the extent of cooperation and support that will be forthcoming from provincial and territorial governments. All this suggests a need to proceed cautiously. It also suggests the need for a thorough review and evaluation of the program after five years, as the *Act* provides.

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"Legislation and programs should recognize landowner rights and responsibilities and should enable proactive results rather than rely on a punitive approach."

Species at Risk Working Group