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**Landholders, Habitat
and
Species at Risk Legislation
in the Canadian Context**

**by
Fiona Boulet**

A Masters' Degree Project
submitted to the Faculty of Environmental Design
in partial fulfilment of the requirements for the degree of
Master of Environmental Design (Environmental Science)

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This MDP is dedicated to my friend Pam whose perseverance demonstrated that we can all do what we believe in, to Aren and Nolan for giving me reason to believe, and to all my friends who continued to believe in me even when I was losing faith in myself.

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*We are stewards of the land and we want to save the species,
but not to the point of going broke.*

Interview Respondent #2

Executive Summary

Canadian legislators and interested stakeholders are currently involved in a lengthy debate surrounding the development of national species at risk legislation. Many provinces have created independent Acts to address this issue within their own jurisdictions, and the federal government has introduced proposed legislation to provide a national framework. This project encompasses a discussion of the current Canadian legislative situation to protect species at risk as it relates to agricultural landholders in the southwestern region of Alberta.

The binding theme of this Masters Degree Project is that national species at risk legislation is a timely tool in the fight to protect Canada's biodiversity, and that any such legislation must incorporate effective methods to protect species' habitat. In addition, if species at risk legislation includes an effective method to protect the habitat needs of species, then that legislation will have some affect upon private land and leaseholders. Specifically, the project attempts to reconcile the apparent conflict between local agricultural landholders and endangered species legislation by providing a list of recommendations. These recommendations are designed to overcome the concerns and fears of local landholders, while still working within the current federal policy and initiatives.

The project has been guided by the following question: *What legislative and policy options can be used to encourage landholder participation in the protection of habitat within species at risk initiatives and legislation?* In order to reach an appropriate solution, a series of steps was followed. The project begins with an intensive literature review of the issues and debate involving species at risk protection. The literature review leads to an evaluative analysis of several Bills and Acts designed to protect species at risk, as well as to a compilation of key informants for the project. Key informants were involved in the development of a questionnaire that was then taken to local landholders interested in being interviewed for the project. The overall synthesis of the project led to a list of topics that were then compiled into the final recommendations. These recommendations suggest two approaches. The first approach recommends federal authorities make a greater effort to provide desired information regarding species at risk protection and legislation to local landholders. The second approach recommends minor changes be made to the text of the proposed legislation before such legislation is passed by Parliament.

Project Abstract

Prepared in partial fulfilment of the requirements
of the Master of Environmental Design degree
in the Faculty of Environmental Design, the University of Calgary

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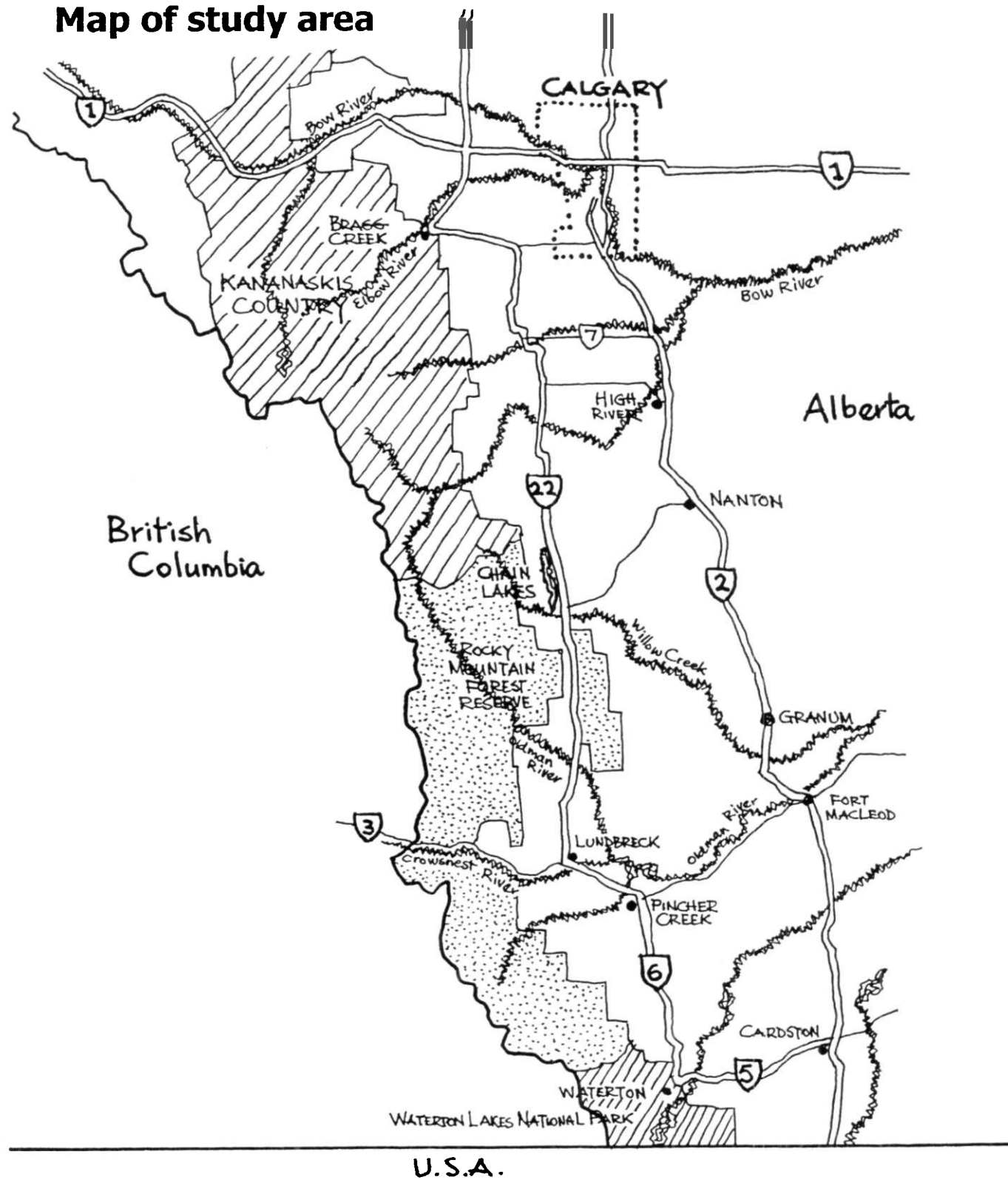
Supervisor: Dr. W.A. Ross

Canadian endangered species legislation has been a topic of debate and discussion amongst government officials and interested stakeholders for close to ten years. While there are multiple interests represented in these discussions, a prevalent re-occurring interest surrounds the capacity for large agricultural landholders to work within the realms of such legislation. This study investigates the debate surrounding the anticipated application of proposed national species at risk legislation upon landholders in southwestern Alberta. The project examined landholder concerns, interests, and fears surrounding the recently proposed federal *Species at Risk Act* (the SARA, Bill C-5). The study incorporated an extensive literature review, the evaluation of several current statutes and proposed bills, discussions with key informants, and 17 semi-structured personal interviews.

This MDP culminates with a list of recommendations developed through the process of the research and intended to offer solutions to the problems encountered within this debate. The recommendations include the need for landholders to have access to information regarding the needs of species at risk, and information detailing available methods to avoid convictions under the legislation. In addition, the recommendations include suggestions for federal authorities to improve their credibility in the eyes of the landholders through minor changes to the proposed federal legislation. Thus, the intent here is to encourage landholder support of Canadian species at risk legislation through changes to national legislation and policy.

Key Words: Canadian environmental law, compensation, endangered species protection, landholder rights, species at risk, stewardship, wildlife law.

Map of study area



Chapter 1

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1.1 Chapter Summary

This chapter introduces the Masters Degree Project (MDP) and provides a description of the methodology followed. The MDP is introduced through an explanation of the guiding question for the project. The introduction includes a brief outline of the situation for species at risk in Canada followed by a description of the current federal government's approach to address the protection of these species. A detailed section on methodology concludes the Chapter.

1.2 Introduction to Masters Degree Project

The intervention component of this project is guided by the following question

- *What legislative and policy options can be used to encourage landholder participation in the protection of habitat within species at risk initiatives and legislation?*

This MDP develops a list of topics¹ with regards to landholder interests and concerns surrounding the protection of habitat for species at risk. To achieve this objective, the relationship between habitat protection of species at risk and the need for landholder support is illustrated. The researcher then analysed several existing Acts and proposed Bills that have been developed to address the issue of species at risk protection. Collectively this legislation includes proposed Canadian national legislation, provincial statutes specific to endangered species protection, provincial statutes where endangered species protection is addressed within other legislation, and the national legislation in the U.S. Within these analyses, only those

¹ A detailed explanation of those topics is provided in Section 6.2 of this project.

provisions capable of affecting the rights or interests of agricultural landholders were explored. The end result of this MDP is a compilation of recommendations² capable of addressing the perceived and real concerns of local agricultural landholders through federal species at risk legislation and policy. The recommendations provided in this MDP were developed in accordance with the political ability of federal authorities to implement those recommendations. That is, the recommendations address the concerns of agriculture landholders from within the parameters of the authority and political ability of the federal government.

1.2.1 Description of Topic

The United States Endangered Species Act (the ESA)³ has provided U.S. citizens with more than twenty-five years of experience with federal endangered species protection legislation. In contrast, Canadian federal legislators began officially developing legislative protection for endangered species as recently as the early-1990s⁴. Continued development of such legislation is presently occurring amongst federal and provincial delegates, as well as a host of other players. Two previous bills⁵ introduced to Parliament were not ratified because each time Parliament was dissolved when the nation went into an election. A third attempt is currently moving through the approval stages of Parliament. Bill C-5 was introduced in February of 2001 and has now passed second reading. It is presently being examined by the Parliamentary

² The recommendations are provided in Section 6.4 of this project.

³ Endangered Species Act of 1973 (Pub.L.93-205, 81 Stat. 884, December 28, 1973).

⁴ Amos, William, Kathryn Harris, and George Hoberg. 2001. "In search of a minimum winning coalition: the politics of species at risk legislation in Canada." In Beazley, Karen and Robert Boardman (eds.). 2001. Politics of the Wild: Canada and endangered species. Oxford Press: Toronto.

⁵ Bill C-65 was introduced in 1996 and Bill C-33 was introduced in 2000.

Standing Committee on Environment and Sustainable Development, and the federal Minister of the Environment intends to bring Bill C-5 back to Parliament for third reading this fall.⁶

Commitment by the federal government for the development of legislated protection for Canada's species at risk has been demonstrated through the 1992 international *Convention on Biological Diversity*. The *Convention on Biological Diversity* recognizes that the conservation of biological diversity is a shared and global concern and it encourages signatories to conserve ecosystems and natural habitats, and to protect and restore populations of species. As one of the first of over 170 nations to ratify the agreement, Canada has agreed (among other things) to dedicate resources to the development of national strategies for the conservation of biological diversity.⁷ Another illustration of Canadian political commitment to the importance of this issue can be found in the *National Accord for the Protection of Species at Risk* (the *National Accord*)⁸ where all provincial and federal governments agreed to work together on legislation designed to protect species at risk. The government representatives agreed to "commit to a national approach for the protection of species at risk . . . [where] the goal is to prevent species in Canada from becoming extinct as a consequence of human activity."⁹

⁶ Environment Canada Website: www.ec.gc.ca

⁷ Convention on Biological Diversity Website. August, 2001. <http://www.biodiv.org/convention>.

⁸ In 1998, a National Accord with the clear intent of developing legislative protection for species at risk across Canada was signed by all provincial, territorial, and federal governments in Canada: The National Accord for the Protection of Species at Risk.

⁹ The National Accord for the Protection of Species at Risk, 1998

Recent surveys of the Canadian public have demonstrated public support for the development of species at risk legislation,¹⁰ an interest that could encourage political will. There is also a concern shared amongst conservation biology experts on the need to protect critical habitat as a mandatory step towards achieving the goal of species at risk protection.¹¹ The combined efforts of Canadian provincial and federal governments, along with the interest of the general public and several stakeholder groups, is encouraging the federal government to continue to work towards securing legislated national protection for Canada's species at risk. Habitat protection is one of the central issues in the planning process of the proposed legislation,¹² and various options for encouraging voluntary participation from local landholders remain key components of the government's current initiative.¹³

The direction the government is following involves political partnership with the provinces and territories, and cooperative action with other stakeholders, including local landholders.¹⁴ This cooperative approach is supported by the multi-disciplinary groups working to develop such legislation, such as the Coalition for Endangered Species.¹⁵ The cooperative approach is also

¹⁰ Environment Canada Website. December, 2000. Located at <http://www.ec.gc.ca/nature/splash.htm>.

¹¹ Meffe, G. and Carroll C.R. 1997. *Principles of Conservation Biology*. Wilson, Edward O. 1992. *The Diversity of Life*. Spellerberg, Ian F. (ed.). 1996. *Conservation Biology*.

¹² Bill C-5. *Species at Risk Act* (proposed). c.2001.

¹³ Environment Canada, Fish and Wildlife. August, 2001. "Species at Risk: Backgrounders." Department of Environment: Ottawa, ON.

¹⁴ Anderson, David, the Honourable Minister of the Environment. 1999. Letter to the Editor of the *Calgary Herald*. 29 October 1999. A30.

¹⁵ Members of this Coalition include representatives from national environmental organizations as well as representatives from several major industries.

supported by many organizations representing agricultural landholders as outlined in their 2001 submissions to the Parliamentary Standing Committee.¹⁶

In the United States, landholders tend to approach the process of endangered species recovery planning with some level of resentment.¹⁷ The U.S. legislation includes minimal opportunities for landholders to claim compensation when portions of their land are designated as endangered species' habitat. A lack of compensation has meant that U.S. landholders have been negatively affected once their lands were designated as habitat and they were required to alter land use practices. Such designations have occurred on both public and private landscapes forcing private landholders to restrict some of the activities on their land.¹⁸ Cooperative endangered species management can be successfully implemented in Canada by avoiding the landholder conflicts experienced in the U.S. This will be achieved if Canadian legislation addresses the interests and needs of landholders by providing some form of incentive opportunities for landholders whose land-use options may be restricted due to the application of regulatory provisions upon critical habitat identified on their land.

The evaluative work within this project provides a synthesis of the major elements of the research: literature review and analyses, key informant interviews, and respondent interviews. This synthesis develops a list of recommendations appropriate for government representatives

¹⁶ Canadian Cattlemen's Association. April, 2000. "News Release: Cattle producers pleased with co-operative approach of species at risk legislation." Canadian Cattlemen's Association: Calgary, AB.

¹⁷ Stockland, Peter. "Green meanies play political protection game." 1999 October 28. *The Calgary Herald*. p.A17.

¹⁸ Hollingsworth, Dennis. 1998. "Protecting Endangered Species: Alternatives to Legislation." Paper presented at Fraser Institute Conference on April 15, 1998.

when designing and implementing species at risk legislation. These recommendations encompass a need for improved communication between federal representatives and agricultural landholders, as well as potential minor changes to Bill C-5 itself. It is hoped that the recommendations will be valuable for the successful development of species management and recovery by providing incentives to local landholder participation in species at risk conservation efforts. This Masters Degree Project therefore offers a greater potential for encouraging landholder support of the anticipated Canadian legislation. It is the author's intent to offer the results to others examining issues regarding the effects of species at risk initiatives and legislation upon landholders. This list will include editors of agriculturally-oriented publications, and representatives of the federal Minister of the Environment.

Given the current challenges facing species at risk, this Masters Degree Project attempts to reconcile two potentially conflicting interests. Many agricultural landholders appear opposed to government interventions designed to protect landscapes and critical habitat for species at risk.¹⁹ These landholders frequently fear that heavy-handed government legislation may be used to supersede their own ability to make decisions regarding their landholdings.²⁰ In opposition, many conservationists believe that without specific habitat protection defined explicitly within legislation, species at risk will gain no effective protection.²¹ The issue here is that if protective species at risk legislation includes the protection of adequate habitat in

¹⁹ Cooper, Barry and David Bercuson. 1999. "Friend of nature set to stomp on landowners' rights." In the *Calgary Herald*. 27 October 199. A26.

²⁰ Canadian Cattlemen's Association. February, 2001. "News Release: CCA reacts to proposed species at risk legislation." Canadian Cattlemen's Association: Calgary, AB.

²¹ Wild Canada.net: National website for species at risk. August, 2001. www.wildcanada.net/.

accordance with the interests of the environmental community, then such legislation will have some impact upon the lands of private land and leaseholders. The results of this project attempt to contribute towards a compromise between these interests through the development of a list of options capable of addressing the concerns of the landholders and therefore reinforcing the protection of critical habitat when such is identified on private lands.

1.3 Methods

1.3.1 Evaluative Case Study

The strategy²² chosen for this applied research project is that of an evaluative case study, an academic evaluation within a case study. The rationalization for this choice is as follows. As explained by Robson,²³ the method of "[e]valuation is . . . concerned with describing and finding the effects of a particular . . . policy or program." Since this project is attempting to determine specific aspects of species at risk protective legislation, and apply that knowledge to actual legislation, evaluation is the chosen method. With regards to the case study, the researcher examined a specific group of individuals representative of a case study. The evaluation of the legislation was then applied to the needs of the case study group. The decision to follow a strategy of a case study is reinforced by Yin²⁴ who considers case studies to be the appropriate method "when 'how' or 'why' questions are being posed . . . and when the focus is on a contemporary phenomenon within some real life context." Because the researcher is attempting

²² Robson, Colin. 1993. *Real World Research: A Resource for Social Scientists and Practitioner-Researchers*. Blackwell Publishers Inc.: Malden, MA.

²³ Ibid. p.171.

²⁴ Yin, Robert K. 1984. *Case Study Research: Design and Methods*. Sage Publications: Beverly Hills, CA. p.13.

to determine "how" landholders can best be encouraged to protect private lands for wildlife and support species at risk protective legislation, a case study offers an appropriate framework for this project. The current development of species at risk protective legislation illustrates the contemporary nature of this topic as it fits within today's political climate in Canada.

1.3.2 Literature Review

From the initial information compiling, to the final evaluation phase, literature review has been an integral part of the process for this MDP. In order to effectively respond to the project question: *What legislative and policy options can be used to encourage landholder participation in the protection of habitat within species at risk initiatives and legislation?*, an extensive review of the available literature was necessary. The literature review was enhanced by the findings from the interviews and discussions with both key informants and interview respondents, and the final evaluative and analytical process.

The objectives of the literature review were as follows.

1. The initial objective was to determine what the literature says about the interests of landholders, and where those interests may be challenged by habitat protective legislation. As a result of this literature review, a list of potential interests was compiled. This list formed the framework for the discussions with key informants, and for the development and design of the interview questions.

2. A second objective was to determine what the important legal and legislative issues are with regards to landholder rights and abilities and the protection of wildlife habitat on their lands. Specifically, what political policies and what legislation could affect the implementation of the habitat protective sections within species at risk legislation. This objective dealt with current relevant Canadian legislation, including wildlife protection legislation and endangered species legislation existing in several provinces, as well as national legislation in the U.S.

3. The third objective of the literature review was to determine appropriate individuals and agencies for the researcher to contact for discussions with key informants. Key informants included representatives of agencies currently working with agricultural landholders on the issue of habitat protection or endangered species legislation. The literature review provided the background to determine who the experts in the field are, and which organizations were involved in the political process of developing national species at risk legislation.

The process for the literature review was as follows.

1. Information sources included (but were not limited to):

- Periodicals, journals, texts, and conference notes;
- Websites and other internet resources;
- Personal communications with individuals and groups involved in species at risk legislation and stakeholder decision-making with a focus upon local landholder interests;
- Reviews by non-government organizations and government representatives;
- Stakeholder committee reports and agriculturally-based publications; and

- Legal decisions and legislation (existing and proposed).
2. Criteria used to select resources was as follows:
- Relevance to current discussions regarding federal and provincial species at risk protective policy and legislation in Canada;
 - Applicability to study group and geographical region;
 - Credibility of author, agency (or source);
 - Current publication date; and
 - Availability of text.
3. The topics of the literature review included (but were not limited to) the following:
- Canadian environmental legislation (federal and provincial);
 - Endangered species law, legislation and protection;
 - Ranching, cattle range, grazing;
 - Landholder interests impacted by the U.S. Endangered Species Act;
 - Options for landholder recovery (i.e. compensation, stewardship, trusts); and
 - Stakeholder issues in future legislation.

1.3.3 Legal Analysis

The literature review provided the researcher with the knowledge necessary to select the most applicable and relevant legislative provisions and political initiatives within North America. The review and analysis of these individual provisions contributed to the final recommendations

found in Chapter 6. Each Act or Bill offered a unique method of applying habitat protections upon private landholdings. The Acts and Bills analysed in this project include:

- The proposed federal Species at Risk Act (the SARA), Bill C-5;²⁵
- Two provincial Acts designed specifically to address species at risk protection;²⁶
- The applicable legislation in Alberta where an older Act has been amended in order to address issues of endangered species protection.²⁷

Although successive federal Ministers of the Environment have introduced several Bills to Parliament with the intention of enacting endangered species protective legislation, the researcher has only analysed one of these. Bill C-5 is the current Bill being developed by the federal Minister of the Environment. This Bill incorporates numerous changes since the 1996 Bill (C-65), and a similar Bill (C-33) that was introduced in 2000. The researcher has chosen to analyse Bill C-5 because she believes it best represents the current policy of the federal government, and is therefore the most reflective of what is likely to become national species at risk legislation in Canada.

Over half of the provinces (Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Saskatchewan) now have independent and separate statutes designed to address species at risk protection in their jurisdictions. In addition, Newfoundland is in the

²⁵ Bill C-5 *Species at Risk Act*. C.2001.

²⁶ *The Endangered Species Act*. S.M.1993. *Endangered Species Act*. S.N.S.1999.

²⁷ *The Wildlife Act*. S.A.1984.

process of developing the same.²⁸ For the purposes of this project, the researcher chose to analyse two of the provincial statutes: Nova Scotia and Manitoba. Each of these statutes includes provisions that ensure that they apply to both public and private land within the province. Manitoba's legislation was one of the first separate endangered species statutes to be approved by a Canadian province, and Nova Scotia's is one of the most recent. The researcher believes that review of these two Acts should illustrate any changes in the provisions and focus of provincial endangered species legislation that might have resulted over several years of debate surrounding federal legislation. Because the study is in Alberta, it is clearly appropriate to analyse the situation in Alberta as well. To achieve this, the researcher analysed recent amendments to Alberta's *Wildlife Act*. These amendments represent the Alberta government's chosen method of addressing commitments made under the *National Accord* to protect species at risk in Alberta.

Each Act or Bill was examined against a pre-determined set of criteria and the results were then compiled in order to compare the legislation for each of the jurisdictions examined. In order to facilitate later comparisons and analyses, the researcher developed a Criteria Template for analyzing current and proposed legislation. The criteria and an explanation of each are provided below.

²⁸ Hazell, Stephen. 2000. Internal document for the Canadian Parks and Wilderness Society.

1.3.3.1 Criteria and rationale for legislative analyses

(i) The **purpose and preamble** can both be used for interpretation purposes if the legislation and/or infractions under the legislation are interpreted by a Court of Law. Either of these provisions represent a statement of intent or policy on the part of the government, and set the tone for the legislation's implementation and interpretation. The researcher wanted to determine if the purpose or the preamble illustrates political commitment to protecting species at risk, and if there is political commitment towards assisting landholders when regulations may be applied to their land.

(ii) Through an analysis of the **application of the legislation**, the researcher was able to determine if the prohibitions of each Act or Bill apply on private lands as well as public lands. This part of the analysis also included an examination of each Act or Bill's definition of "species," "habitat," and "critical habitat." Definitions of these terms will influence the scope that is given to these concepts under each Act or Bill. In turn, this will define how extensive habitat protection might be.

(iii) The existence of a **paramountcy** provision illustrates where each Act or Bill sits within the hierarchy of legislation for that jurisdiction. That is, how does the authority under these Acts relate to the authority given under other legislative provisions? Paramountcy also indicates the level of government commitment to the legislative scheme, and whether activities that have been approved under other statutes may be superseded by the regulations under the Act or Bill being examined here.

(iv) How much a government must do, **what the relevant government is bound to** under the Bill or Act is equally as important as the number of activities that government authorities may choose to do. The researcher needed to determine if the government is bound to any actions regarding habitat protection that could affect landholder use. This also indicates whether the government is bound to act under the legislation, and whether that government can be called to account for its own actions.

(v) The **prohibitions** within each Act or Bill were compared to determine if there was consistency, and also what activities are prohibited with regards to any designated habitat. The breadth of the prohibitions is indicative of the level of commitment to habitat protection found within the provisions. In addition, the researcher determined if there exist built-in mechanisms whereby the landholder may apply for an exemption in order to continue with his/her current land-use management.

(vi) An examination of the **enforcement** provisions provided the researcher with an opportunity to compare and contrast sanctions, including fines within each of these Acts or Bills. Understanding the potential enforcement ramifications is key to landholders' capacity to plan their land-use practices.

(vii) By analyzing **mechanisms that specifically address landholder needs**, the researcher determined which landholder mechanisms seem to hold the greatest promise with

regards to protecting the interests of such landholders. This analysis included an examination of the various tools in the form of incentives or opportunities that governments have developed in order to support the needs of landholders.

The results of the legislative analyses are presented in Chapter 4.

1.3.4 Meetings with Key Informants and Respondent Interviews

The researcher explored the issues through a process of literature review, analytical evaluation, key informant interviews, and respondent interviews in order to develop a set of qualitative data. The distinction was made between key informant interviews and interview respondents so that the researcher could attain assistance from representatives of appropriate organizations (key informants) during the process of developing the interview questions, as well as for contact information of others whom the key informants recommended for the study. That is, the researcher felt the interview questions would improve through a compilation of recommendations made by others in the field, and that determining respondents for the interviews would best be achieved through the advice of other people knowledgeable of local agricultural landholders.

Initially, the researcher approached seven organizations for assistance with this study. Of that list, representatives from five of the organizations offered their assistance. The key informants for this project represented the following organizations: Canadian Cattle Association, Canadian Parks and Wilderness Society, Canadian Rockies Wolf Project, Southern Alberta Land Trust

Society, and Western Stock Growers Association. These key informants were asked to provide the following support for the project:

- Editing and personal comments on the initial list of interviewing questions;
- A list of potential contacts for the researcher to begin respondent interviews; and
- Confirmation that the researcher's final list of respondents was appropriate and complete in their opinion.

Each of the key informants was not able to commit to all of the requests and instead assisted as was feasible for them. The researcher ensured that several of the key informants assisted with each of the her requests.

Key informants were chosen due to their representation of an agency or organization that the researcher determined to be involved in the current process of federal species at risk legislation and/or involved with landholders in the study region. For example, the Canadian Cattle Association, the Canadian Parks and Wilderness Society, and the Western Stock Growers Association all sent submissions to the Parliamentary Standing Committee on Resources and the Environment with regards to the two most recent federal Species at Risk Bills (Bills C-33 and C-5). Each of these organizations has also sent various materials and information regarding the proposed federal legislation to their membership, memberships that include some of the interview respondents. The two other organizations, the Canadian Rockies Wolf Project and the Southern Alberta Land Trust Society are working in the study region and discussing landscape protection and wildlife issues with local agricultural landholders. The researcher believes that

interviews with respondents from these different organizations encompassed a broad range of perspectives with regards to landholder issues and legislated protection of species at risk.

The chosen questioning technique for the interviews was purposive sampling.²⁹ Recognized for giving effective results in case studies, this approach bases the selection for interview choice upon the researcher's judgement.³⁰ Prior knowledge of the issues surrounding landholders and habitat protection in combination with species at risk legislation was of the greatest importance to the researcher. For this reason, the interview choices were based on the author's literature search firstly, and secondly upon recommendations from other informants (key informants first, followed by interview respondents secondly). Determination of statistical significance was not a priority. The researcher also wanted to ensure an open process so that respondents could feel free to expand upon any issues pertinent to them. Thus, the personal interviews with informed respondents were more conducive to the needs at hand than surveys would have been because the researcher was interested in the opinions, beliefs and fears of interview respondents. Semi-structured interviews offered the researcher some structure and consistency for all of the interviews, but permitted respondents an opportunity to discuss issues beyond narrowly dictated parameters.

There is a national flavour to the MDP due to the research topic of federal species at risk legislation. However, the researcher chose to limit the interview respondents to a specific

²⁹ Walker, Robert. 1985. *Applied Qualitative Research*. Gower Publishing Company: Hants, England. p.6.

³⁰ *Supra*, Notes 20,21.

geographic area within Alberta's Southeastern Slopes region. The specific border of the chosen area are Waterton Lakes National Park to the south, the southern Kananaskis region to the north, the Rocky Mountains to the west, and Highway #2 to the east. Details surrounding the pre-determined geographical restrictions are discussed in Chapter 2 and the Map of the Study Area is on page 5.

There is no attempt made to suggest that the people chosen as key informants or interview respondents for this project are representative of all landholders in Canada, nor even of Alberta. It is suggested, however, that a recommendation for intervention that applies to this region may well be applicable elsewhere. Most of the holders of large landscapes within this designated region maintain livestock in the form of range ranching. This is not a lucrative way of life and can be very difficult financially. At the same time, these people and their livestock experience various conflicts due to natural inhabitants of the region, and have had direct contact with the politics surrounding environmental and conservation issues. Many of the local landholders are attracted to this lifestyle for non-monetary benefits including living close to the natural land.³¹ The combined interest of the general public, interested land developers and environmental organizations has meant that many of the agricultural landholders have been involved in stakeholder discussions regarding conservation initiatives on the land related to species at risk issues, as well as conflicts with individuals and organizations challenging their land-use

³¹ Greenaway, Guy (Southern Alberta Land Trust Society). 1999. Personal Communication.

practices.³² The interview respondents tend to (i) be knowledgeable about current conservation issues and species at risk protection initiatives, (ii) have personal experience of conflicts with species within the natural surroundings, and (iii) hold an appreciation of the natural world. For these reasons, the researcher believes that the agricultural landholders of this region make good contacts for this MDP.

Before all interviews, each participant was provided with an interview consent form accompanied by background information specific to this Masters' Degree Project.³³ Anonymity was guaranteed and subjects were encouraged to realize that they could withdraw from the project at any time. In order to confirm accuracy, the researcher provided a printed copy of the notes taken during each interview. Respondents were given full opportunity to confirm their opinions and to clarify any apparent misconceptions; two respondents contacted the researcher to clarify minor details.

1.3.4.1 Interview questions and rationale

The questions developed for interviews with the respondents supplemented the evaluated information from the literature review with the comments provided by key informants. The researcher also left the opportunity to expand the interview questions if it became apparent from the comments of respondents that the researcher had inadvertently overlooked a pertinent

³² Several of the key informants and the interview respondents have sat at roundtable discussions, including the Alberta government's Special Places program.

³³ A copy of these sheets is provided in Appendix 1.

issue. This opportunity was not required because no respondent identified an issue that he/she believed integral to the discussion, and that had not been covered during the interview.

Please note that a complete analysis of the interview results can be obtained through the Chair of the researcher's supervisory committee. To ensure confidentiality of all interview respondents, requests for this information must be made to Dr. W.A. Ross in the Faculty of Environmental Design.³⁴ An explanation of the questions used for the respondent interviews follows here.

The researcher began with a brief opportunity for the respondent to talk about his/her landholdings. Each respondent was asked about the landscape he/she managed (whether it was privately held land, public leases, or both), and how long the individual had been ranching in the area. The purpose of this discussion was to begin the process, and to ensure a comfort level for both the researcher and the respondent. Such discussions also provided the opportunity for respondents to speak freely about their landholdings and lifestyle, something that they were frequently proud to speak about.

Question One	Part A -- Where has your knowledge regarding federal endangered species legislation come from? Part B -- What do you know about the Endangered Species Act of the U.S.? Part C -- Does your information provide you with the complete spectrum of viewpoints regarding the SARA? And, are you concerned about the bias presented in the information you depend upon?
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Question 1, and its subsets, were designed to determine the familiarity of the key informants with regards to the anticipated legislation and the major sources of their information.

Respondents were asked where their knowledge of the SARA came from (industry sources, the federal government, friends, media, . . .) and what sources of information they tended to rely upon. Respondents were also asked about their knowledge and understanding of the U.S. Endangered Species Act. Thirdly, they were asked to comment on the perspective of the material they relied upon, and if they were concerned about a bias to their understanding of the SARA. The responses from these questions assisted the researcher by providing background information as to the biases of the study group, the major information sources for them, and their general knowledge about Bill C-5 itself. One of the tools the federal government may choose to use is that of education. Responses to this question led to recommendations regarding the preferred sources of information for the respondents, and therefore the best mediums for the federal government to locate their information.

Question Two	Part A -- Have you noticed a change in the wildlife distribution in your area over the last 10 to 20 years?
	Part B -- Do you know what species are listed as at risk in this area, and can you recognize them?

In Question 2 the researcher asked the respondents about wildlife on their land. The researcher wanted to learn about local wildlife and conflicts the respondents have experienced with respect to their agricultural practices and their way of life. In addition, the researcher was interested in the respondents' knowledge about current listed species to determine the likely capacity of such landholders to recognize listed species. If Bill C-5 becomes law, landholders will need to know if and when listed species are on their land and what the habitat needs of those species are in order to avoid infractions. This question served a dual purpose. Not only did the researcher learn about the wildlife and each respondent's ability to identify species at risk, the question

³⁴ These records will be maintained at the University for a total of two (2) years only.

tended to put the respondents further at ease. Many of them chose this question as an opportunity to speak freely about the landscape they manage, and to tell stories of their experiences. They appeared to appreciate an opportunity to share their wealth of knowledge.

Question Three	Part A -- If the federal government chooses to take the lead and work with local landholders on initiatives to protect endangered species, what do you think it should do to gain your cooperation? Part B -- What are your thoughts on working with other organizations (agricultural groups, community groups, or environmental groups)?
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Question 3, and its subsets, was intended to determine the interest and capacity of the respondents to work with the federal government and other organizations. If the federal government implements conservation programs under Bill C-5, it would be beneficial to know the willingness of agricultural landholders to work with federal representatives, as well as the willingness of these people to work with other stakeholders.

Question Four	What, if anything, is your biggest concern about the legislation as it is? Can you recommend a way for this to be corrected?
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Through Question 4, the researcher hoped each respondent would give his/her own personal view as to the greatest problem with Bill C-5 as they see it. By not offering the respondents a list of choices at this point, the researcher was not influencing the respondents to choose any particular issue.

Question Five	Part A -- What practices do you currently follow that make your land more suitable to wildlife? Part B -- What do you think are the greatest obstacles preventing others from doing the same?
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Question 5 consisted of two distinct parts. The first was intended to determine the respondents' natural interest and commitment to conservation concerns on their land. The second part of

this Question was designed to produce a list of perceived restrictions that are currently faced by landholders when they attempt to address conservation issues on their lands.

Question Six	Part A -- What do you think about the fines that are currently in the legislation? Do you think that fines are necessary to this legislation, or could the government do something different? Part B -- Have you read about the issue of "due diligence" in the legislation, and what do you think? Part C -- The way the Bill is currently written, there is no specific distinction between intentional and accidental damage. Do you see this as a concern?
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The issues discussed in Question 6 are issues that appear prominently in the literature surrounding landholder interests and conservation issues. The researcher wanted to ensure that each respondent spoke about each of the three issues: fines, the issue of due diligence as a defense, and the distinction between intentional and accidental infractions under Bill C-5.

Question Seven	Issues of compensation are frequently discussed. Would you like to comment specifically on compensation under the SARA?
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Compensation is another key feature of the available literature on the topic. Through Question 7, the researcher wanted to make certain that all respondents had the opportunity to speak about compensation.

Question Eight	I would like to speak to as many local landholders as I can. Can you recommend three people who you believe are knowledgeable about the current process of federal species at risk legislation, and that are agriculturally-based landholders in this area?
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In order to develop a defensible list of interview respondents for this project, in Question 8, respondents were asked to provide recommendations of other suitable individuals for this project. This provided the researcher with two key features. Firstly, new names provided additional interview respondents who in turn were contacted. Secondly, the names provided the researcher with an end point for the interviews; once the respondents were no longer providing

new names, it was determined that an appropriate number of interviews had been completed. Specifically, the researcher completed the interviewing process in accordance with the following pre-determined criteria.

- Names of other respondents received at interviews were people already contacted;
- If a recommended contact had not responded to four (4) telephone messages, that contact was removed from the list of potential respondents;
- Any individual who was contacted and chose not to participate was removed from the list.

A final list of options to address landholder concerns was provided and each respondent was asked to rate these on a scale of 1 to 5 (where 1 represented an option the respondent felt would discourage his/her participation, and 5 represented an option that he/she would find clearly encouraging). The list of options was intended to ensure that the responses within the earlier part of the interview were consistent, to ensure that the respondent had spoken about each issue that was of concern to him/her, and to offer a final opportunity for the respondent to discuss any other issues. The options provided are listed below and the discussion regarding the results of the Option Table is provided in Chapter 5.

Options discussed with interview respondents are as follows.

- Tax changes whereby land used less intensely would be taxed at a reduced rate;
- Public recognition of initiatives on your land to protect species at risk;
- Fines or jail terms in the event that a species at risk is killed or injured on your land;
- Provisions enabling some form of land swap for land designated as critical habitat;

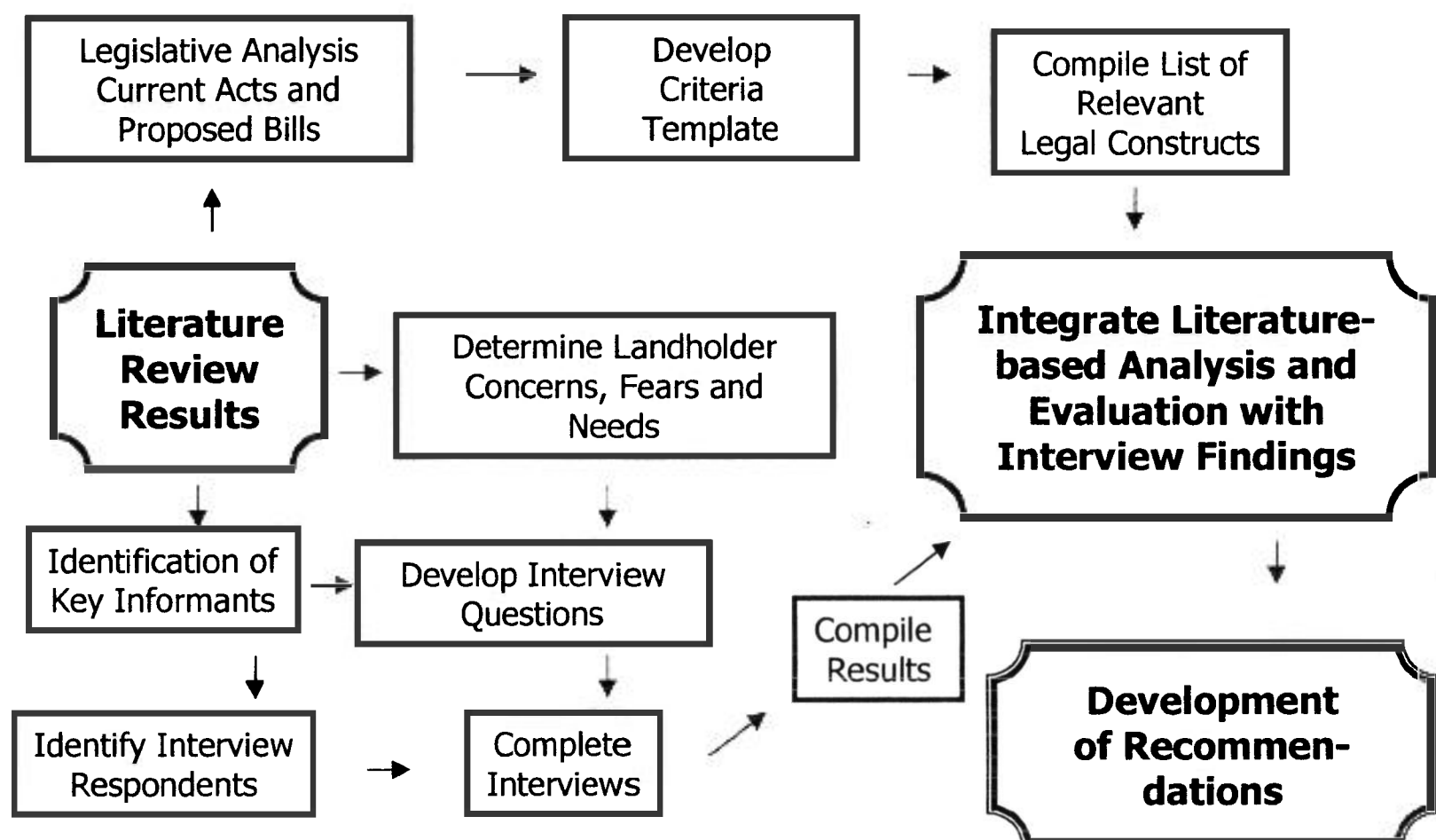
- Some, but not full compensation;
- Assistance from local authorities for conservation initiatives on your land;
- Assistance from provincial government authorities for conservation initiatives on your land;
- Assistance from federal government authorities for conservation initiatives on your land.

At the conclusion of each interview, the respondent was asked if he/she would like to add any further comments, or if he/she felt that the researcher had omitted any significant issue of concern. While some respondents spoke further at this point, none recommended that another significant issue be incorporated into the interview questionnaire.

1.3.5 Synthesis and Recommendations

This MDP builds upon the premise that effective national species at risk legislation must incorporate supportive mechanisms to encourage habitat protection on both publicly and privately held lands. The project results, those gleaned from the literature review, evaluation and analysis, and the interview process, are compiled into a synthesis in Chapter 6. The synthesis was developed into a list of nine most relevant topics (Section 6.2.4) to be addressed. These topics coloured the final project recommendations because each topic was incorporated into the final project recommendations. The recommendations are listed according to two approaches: (i) an emphasis upon education and information sharing between federal authorities and landholders, and (ii) addressing some of the topics through minor changes to the text of the current proposed legislation, Bill C-5. The final recommendations are provided in a summary table (Section 6.4.3).

1.3.5.1 Project Flow Chart



Chapter 2 -- Project Scope and Rationale

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2.1 Chapter Summary

This Chapter highlights the connection between species survival and the maintenance of a consistent habitat. The effects of human activities upon the landscape are discussed in terms of habitat loss and fragmentation, which are issues of concern for species at risk today. This discussion leads to the recognition that Canada's protected landscapes may not be adequate to ensure the security of species at risk. If Canada's current protected regions are inadequate to protect species at risk in the long term, then legislated protection must apply to private lands. The Chapter then concludes with a discussion of the project scope and the parameters designed for the study.

2.2 Project Rationale

Species naturally adapt to fit the local and current conditions of their habitat. With natural environmental change the ranges of local species will shift as a result of increased opportunities or increased predation, and as a response to changes in the landscape or the climate. Because natural change occurs very slowly, except in the case of major incidents like earthquakes and volcanic eruptions, species' responses to natural change are generally very gradual.³⁵ Human influence has changed the nature of environmental changes and increased the rate of such changes. This increased rate has led conservation experts to conclude that the major threat to biological diversity and species at risk throughout the world, is habitat degradation and loss.

³⁵ Primack, Richard B. 1993. *Essentials of Conservation Biology*. Sinauer Associates, Inc.: Sunderland, MA. p.111.

These experts have concluded that the most important means of protection is through the protection of natural habitat itself.³⁶ This leads to the conclusion that species at risk protection without parallel protection of required habitat would likely be of minimal significance.

Human-caused habitat alteration can be conceptualized into two components: the reduction of the total available habitat (habitat loss), and the apportionment of a larger landscape into more isolated patches (habitat fragmentation).³⁷ Such alteration will result in direct habitat loss when intensive and large-scale human activity has replaced the natural habitat. Examples of habitat loss then include the draining of wetlands, the damming of streams, or the development of large scale industrial or urban infrastructure. In these situations, human activities have replaced the natural landscape. Habitat fragmentation can be less visually evident as it often results from the incremental erosion of a large continuous landscape into a patchwork of disconnected pieces.³⁸ Although a single large area may have provided for the needs of a secure population of a given species, once that large area has been broken into multiple fragments the case may be entirely different. If none of the fragments are capable of supporting that population independently, and each smaller fragment is now disconnected from the others, the population of that given species' is at greater risk of for extinction. As human populations have grown, and our technology has provided greater capabilities to affect the landscape, human pressures in the

³⁶ Ibid. p.115.

³⁷ Noss, Reed F. and Blair Csuti. 1997. "Habitat fragmentation." In Meffe, Gary K., C. Ronald Carroll, and Contributors. *Principles of Conservation Biology*, 2nd Ed. Sunderland, MA: Sinauer Associates, Inc. p.269.

³⁸ Supra, Note 35,36. p.131-4.

form of habitat restrictions for wildlife has become the most important factor pushing species at risk towards extinction.³⁹

Natural spaces throughout Canada are being reduced in size by the multiple pressures placed upon them by human residences and activities. The landscapes where Canadian wildlife presently exists are facing more and more restrictions such that these landscapes are becoming islands in a sea of human activities. As each of these islands becomes more isolated from adjacent wildlife inhabited landscapes, the risk of extinction increases whereby "[t]he number of today's endangered, threatened, and vulnerable species reflects the continuing incremental loss of habitat over extensive regions in Canada."⁴⁰ Habitat loss is at the root of the survival or the extinction for almost all species that are currently at risk in Canada. In fact, the national listing agency for species at risk, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), lists habitat restrictions as the major threat for over 80 percent of the species at risk as of 2001.⁴¹

Canada has many protected regions in the form of national and provincial parks. However, conservation biologists and other experts contend that these "sanctuaries of biodiversity" may not be adequate to sustain Canada's natural heritage. With regards to this concern, there is

³⁹ Many organizations and individuals have commented about the affects of habitat protection on species at risk. The Canadian Nature Federation provides some general comments on this topic on its website. August, 2001. www.cnf.ca

⁴⁰ Mosquin, T., Whiting, P.G. and D.E. McAllister. 1995. *Canada's Biodiversity*. Ottawa, ON: Canadian Museum of Nature.

⁴¹ Website: www.cosewic.gc.ca As at January 30, 2000.

considerable interest in landscape linkages whereby protected spaces are surrounded by secure landscapes capable of providing a transition zone for wildlife to move between the protected spaces.⁴² This MDP builds on the premise that protected spaces and current natural areas are not secure for species at risk in perpetuity. Further, these remaining natural spaces will not be secure without effective legislation and supportive mechanisms to encourage habitat protection on both publicly and privately held lands. The theme of this MDP is that national species at risk legislation is a timely tool in the fight to protect Canada's biodiversity, but that any such national legislation must incorporate effective provisions to protect species' habitat on private lands in order to succeed in protecting Canada's biodiversity.

2.3 Project Scope

The researcher has attempted to restrain the MDP from expanding beyond the specific issue of this project through the following restrictions on scope. The upcoming national species at risk legislation ensures a national flavour to this MDP, although the geographical focus is within the province of Alberta. As discussed below, the described geographical restriction is supported both ecologically and politically.

⁴² Theberge, John B. 1995. "Vertebrate species approach to trans Park Boundary Problems and Landscape Linkages." In Herman, Tom B., Soren Bondrup-Nielsen, J.H. Marin Willison, and Neil W.P. Munro. 1995. Ecosystem Monitoring and Protected Areas. Wolfville, NS: Science and Management of Protected Areas Association.

The geographical focus is limited to Alberta's Southeastern Slope region, from Waterton Lakes National Park at the south to the northern limits of the Kananaskis region to the north, and from the mountains to the west to Highway #2 on the east. Key informants and interview respondents⁴³ were limited to this geographical region, but the literature review encompassed appropriate writings from sources beyond these limitations.

This landscape represents an area that remains relatively ecologically intact and capable of supporting a diversity of species.⁴⁴ Due to a crossover of many different landscapes, this region incorporates both the northern tip of the range of many southern species, and the southern tip of the range of species that continue farther north. Within this area is some of the "best remaining habitat for species eliminated or drastically reduced in numbers elsewhere,"⁴⁵ including large carnivores like cougars and grizzly bears, a large variety of migratory and non-migratory birds, plus some of the most rare plants in Alberta.⁴⁶ Parts of this region are particularly unique because of the meeting of the grasslands with the foothills and the combined ecosystems that result. This region continues to provide habitat for a great number of plant and animal species and, although human impacts are readily visible, effective management

⁴³ The distinction between key informants and interview respondents, as well as the researcher's need for each, is explained fully in Section 1.4.4.

⁴⁴ Foreman, Dave. 1997. "Connections: Proceedings from the first Yellowstone to Yukon Conservation Initiative." Held in Waterton Lakes National Park, October of 1997.

⁴⁵ Willcox, Louisa. 1998. "The Wild Heart of North America: A New Perspective." In *A Sense of Place: Issues, Attitudes and Resources in the Yellowstone to Yukon Ecoregion*. Canmore, AB: Yellowstone to Yukon Conservation Initiative.

⁴⁶ Canadian Parks and Wilderness Society Website. August, 2001. www.cpawscalgary.org/castle/index.html.

procedures could feasibly ensure secure wildlife habitat for a diversity of species into the future.⁴⁷

Since this region is still home to both large and varied wildlife species, it provides the framework for landholders to experience conflicts with wildlife and habitat protection. For example, landholders who operate cattle ranch operations continue to be challenged by conflicts between their operations and the plant and animal life in the region.⁴⁸ Examples of such conflict includes the native death camas (*Zygadenus Gramineus*) which is fatally poisonous to cattle at certain times of the year, instances of depredation by wolves, cougars, and grizzly bears, and conflicts with elk and deer populations through competition for cattle-feed and damage to fences. Because of the importance of this region ecologically, it is also the site of a great deal of interest from the environmental movement. For example, areas within this region are important to the campaigns of the Castle Crown Wilderness Committee, the Canadian Parks and Wilderness Society, the Central Rockies Wolf Project, Ducks Unlimited, and the Alberta Wilderness Association, amongst others.⁴⁹ Human activities are generally increasing in this region, with a particular interest in subdividing large properties for the development of country residential homes.⁵⁰ An examination of these concerns and the creation of recommendations for

⁴⁷ Gadd, Ben. 1998. "The Yellowstone to Yukon: a Physical Overview." In *A Sense of Place: Issues, Attitudes and Resources in the Yellowstone to Yukon Ecoregion*. Canmore, AB: Yellowstone to Yukon Conservation Initiative.

⁴⁸ This became readily evident during the interviews because most of the respondents discussed conflicts they have encountered with regards to wildlife and their livestock.

⁴⁹ All of these groups have projects or are committed to this region as at July, 2001.

⁵⁰ The Southern Alberta Land Trust Society website. August, 2001. www.salts-landtrust.org.

landholder cooperation with habitat protection initiatives represents an important tool in the current efforts to protect this important region.

2.4 Chapter Conclusion

The number of Canada's endangered, threatened, and vulnerable species reflects the continuing incremental loss of habitat throughout the varied regions of Canada's landscape. Canadians share responsibility for ensuring that species do not become extinct due to human activities and all governments have a role in this matter. Although development of species at risk protective legislation is only one step in the protection of Canada's species at risk, it is an integral step. The researcher believes that the governments of Canada need to be proactive in order to ensure Canada can successfully maintain such natural diversity and wealth by implementing national legislation. For such national legislation to be truly effective, the legislation must apply to both public and private lands.

3.1 Chapter Summary

Canada's southern neighbour has almost 30 years of experience with an independent statute intended to protect species at risk in the U.S. This Chapter illustrates relevant legislative provisions that have affected the planning, management, and use of privately held or managed lands in the U.S. All sides of the debate in Canada have reflected upon the strengths and/or weaknesses of this legislation. For example, conservation organizations often recommend a similar command and control approach be applied to Canadian legislation,⁵¹ and property rights advocates warn that parallel legislative provisions in Canada will lead to the destruction of species at risk in Canada.⁵² The federal Minister of the Environment, David Anderson, recognizing the polarized views and the animosity surrounding debates on the ESA, has promised to create Canadian legislation that avoids these concerns by addressing the needs of all stakeholders.⁵³

Section 3.2 illustrates pertinent aspects of the application of, and the content of the *Endangered Species Act* (the ESA)⁵⁴ of the United States. The researcher accomplished this through two steps. A review of the available literature discussing how applications under the ESA have affected landholders and their properties begins the section. Review of these writings is

⁵¹ The organization, Scientists for Species, expressed this view publicly on 10 September, 2001. More information is available on their website at <http://www.scientists4species.org>.

⁵² Smith, Danielle. 2000. "Common law at risk in federal species protection act." In *Calgary Herald*. May 22, 2000. p.A10.

⁵³ Anderson, David. 1999. Address to private meeting in Calgary. September 1999.

⁵⁴ Endangered Species Act. L.93-205, 81 Stat. 884, December 28, 1973.

appropriate because such literature has provided some of the fodder for the fears and concerns of the landholders in this study.⁵⁵ The second step was to highlight and explain the specific provisions within the ESA that have had the greatest effect upon agricultural landholders.

3.2 The U.S. Endangered Species Act (the ESA)

Introduced as law in 1973, the *Endangered Species Act* of the U.S. is unique amongst legislation in the U.S., and amongst wildlife legislation throughout the democratic world. Unlike other U.S. legislation, which provide that agencies take action only "where practicable,"⁵⁶ the ESA contains no such qualifiers. Under the ESA, protection of listed species takes precedence over human needs,⁵⁷ and the designation and listing process must consider conservation as a priority even to the exclusion of socio-economic interests.⁵⁸ Because of the strong protective provisions that command government authorities to action, the controversial U.S. Supreme Court decisions, and the public debate overall, the ESA is looked upon as a model that can be assessed and improved upon with regards to Canada's plan to implement similar legislation. It is with this in mind that the following limited literature review of the ESA is provided for this MDP.

⁵⁵ Only one of the interview respondents said that he had not read about negative affects the ESA has had on ranchers. The others had all been privy to literature that highlighted such negative stories.

⁵⁶ Barker, Rocky. 1993. *Saving all the Parts: Reconciling economics and the Endangered Species Act*. Island Press: Washington, DC. p.19-20.

⁵⁷ Fitzsimmons, Allan K. 1999. *Defending Illusions: Federal protection of ecosystems*. Rowman & Littlefield Publishers, Inc.: Boulder, CO. p.129.

⁵⁸ Rolston, Holmes III. "Life in jeopardy on private property." In Kohm, Kathryn A. (ed.). 1991. *Balancing on the Brink of Extinction: The Endangered Species Act and lessons for the future*. Island Press: Washington, DC. p.64.

Debates surrounding issues of wildlife and wilderness protection are frequently polarized with one side arguing that the public good is served through the legislated protection of species and spaces, and the other arguing against the need for inclusive legislation capable of affecting land-use decision-making on privately-held lands. The predominant literature on the U.S. Endangered Species Act illustrates this polarization through a wealth of material written to represent each side of the debate. Because of the scope of this project, the discussion of the ESA here is limited to issues pertaining specifically to landholder rights and authorities.

3.2.1 The ESA: A Literature Review

The ESA has survived for over a quarter-century, but that time has not been without condemnation by various sectors of society. In 1973, a time of intense public environmental sentiment, the protection of American icons like grizzly bears and bald eagles was strongly supported.⁵⁹ This public sentiment and support encouraged the government of the time to develop broad legislated protection for endangered species on both public and private lands. However, it has been suggested that had private property advocates, commercial interests, and even many subsequently affected government agencies presented a cohesive opposition to the ESA, the final design of the ESA might have been quite different.⁶⁰

⁵⁹ Supra, Note 56. p.19.

⁶⁰ Rohlf, Daniel J. 1989. The Endangered Species Act: A guide to its protections and implementations. Stanford Environmental Law Society: Stanford, CA. p.25.

Since the introduction of the ESA, "a large body of law has developed which deals with the procedural requirements of judicial review under the ESA."⁶¹ The first major court battle over the ESA involved the building of the Tellico dam in 1978.⁶² Here, "[t]he U.S. Supreme Court ruled that if the building of the Tellico Dam jeopardized the survival of the tiny snail darter, then [the dam] could not be built."⁶³ The tone set through the interpretation of the Tellico Dam case⁶⁴ has been maintained in many other cases where the law's purposes and policies were interpreted. That is, the goal of conservation has regularly been placed as a goal not to be superseded by any other goal, even for the most worthy of goals, including economic and community interests and needs.⁶⁵ The Tellico Dam decision illustrated that according to the ESA, no costs were too high to save any U.S. species that was listed as being endangered under the ESA.⁶⁶

Two court challenges involving the habitat of Hawaii's endangered palila finch⁶⁷ also appear frequently in the literature. In these cases, it was argued that populations of feral grazing animals (owned by the State of Hawaii) were restricting the overall palila population because the

⁶¹ Ibid. p. 181.

⁶² TVA vs. Hill, 437 U.S. 153 (1978).

⁶³ Supra, Note 56.59. p.20.

⁶⁴ Supra, Note 62.

⁶⁵ Littel, Richard. 1992. Endangered and Other Protected Species: federal law and regulation. The Bureau of National Affairs, Inc.: Washington, DC. p.3.

⁶⁶ This case is routinely quoted in the literature. The fish in question, a three inch snail darter, was thought to inhabit only the region to be flooded by the dam. Spending on the dam prior to the court case had already reached \$100 million, making many people feel that saving the small fish was not worth the economic ramifications. The fish was later found to be not uncommon.

⁶⁷ Palila v. Hawaii Dept. of Land and Natural Resources. 118 FRD 125 (D. Hawaii 1987).

grazers ate plants necessary for the birds' survival.⁶⁸ The State of Hawaii was held responsible for the damage done by its goats because the goats' grazing had damaged habitat that, had it been untouched by the goats, could have served as nesting sites in the case of a successful re-population of palila finches. Two important principles regarding the definition of harm to an endangered species emerged from the palila decisions.⁶⁹ These decisions confirmed that both direct and indirect negative affects to designated critical habitat of a listed species, as well as landscape activities that prevent recovery of an endangered species, fall under the definition of "harm" in the ESA. Under the ESA, one cannot kill an endangered species, but one cannot negatively alter the habitat either. And, the property owner is responsible for damage done by his/her property (in this case, livestock). In other words, "a landowner might violate the ESA without directly encountering a species member, but merely by substantially altering the habitat of the species."⁷⁰

3.2.2 Relevant Legislative Provisions

The primary restrictions regarding land-use are invoked by two provisions in the ESA: Section 7 (Interagency Cooperation), and Section 9 (Prohibited Acts).⁷¹ Under these provisions, private landholders can be prevented from determining the use of their own land if such land falls within an area designated as critical habitat. Under the ESA, authorities must regulate against

⁶⁸ Supra, Note 60,61. p. 63-5.

⁶⁹ Ibid. p. 64-7.

⁷⁰ Meltz, Robert, Dwight H. Merriam, and Richard M. Frank. 1999. The Takings Issue: Constitutional limits on land use control and environmental regulation. Island Press: Washington, DC, p.393.

⁷¹ Supra, Note 57.

activities that have been determined capable of damaging the habitat of a listed species. That is, in cases where habitat is designated, government authorities must take action by applying prohibitions to all lands (public and private) within the designated habitat. Landholders within the area of a designated critical habitat have been prevented from developing on these lands, from grazing their livestock on these lands, and even from crossing these lands.⁷²

Section 7 has affected individuals and corporations to a greater extent than any other provision in the ESA.⁷³ The provisions here direct all federal agencies to "refrain from actions likely to jeopardize the continued existence of listed species . . . , directly or indirectly, [or] to reduce appreciably the likelihood of both the survival and recovery of a listed species."⁷⁴ Judicial interpretation of the language within Section 7 has lead the Courts to determine that "saving endangered species . . . [is a] national policy . . . [whereby] endangered species protection [is] paramount in land-management decision making."⁷⁵ Section 7 of the ESA leaves little doubt that the protection of endangered species can affect private landholders.

Citizens of the United States have the ability to ensure government authorities take steps towards the protection of listed species through provisions provided in Section 11 of the ESA. Section 11 ". . . allows any person to maintain an action against another person, including

⁷² Supra, Note 70.

⁷³ Supra, Note 60,61,68,69,71. p.29.

⁷⁴ Ibid. p. 148.

⁷⁵ Wondolleck, Julia M. 1988. Public Lands Conflict and Resolution: Managing national forest disputes. Plenum Press: New York, NY. p.134.

governmental entities . . . , alleged to be in violation of any provision of the . . . [ESA].⁷⁶

Private citizens and non-governmental organizations have taken the opportunity to challenge government agencies when clear steps to protect certain listed species have not been taken. A provision similar to Section 11 was in the federal proposed legislation of 1996, Bill C-65. That section was removed before either of the Species at Risk Acts (Bill C-33 and Bill C-5) were introduced to Parliament. Thus, although such a provision is no longer included within the proposed Canadian federal legislation, Section 11 of the ESA continues to incite distrust and fear amongst Canadian landholders.⁷⁷

Provisions within Section 9 provide for "a broad prohibition of the taking of endangered species anywhere in the United States,"⁷⁸ and makes it illegal for anyone (whether government authority or individual citizen) to engage or attempt to engage in any activity that will "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect . . ."⁷⁹ a listed species. Section 9 also includes "a requirement that no federal agency may jeopardize the continued existence of an endangered species; . . . and [provides for] the elimination of limits on land acquisition funds that could be used to purchase endangered species habitat."⁸⁰ Although not as publicly controversial as Section 7, there have been times when the provisions in Section 9 have

⁷⁶ Supra, Note 60,61,68,69,71,73,74. p. 182.

⁷⁷ Several interview respondents noted this as a concern during the interview and feared that such a provision was still part of the Canadian legislation.

⁷⁸ Kohm, Kathryn A. (ed.). 1991. Balancing on the Brink of Extinction: the Endangered Species Act and lessons for the future. Island Press: Washington, DC. p.15.

⁷⁹ Supra, Note 56,59,63. p.31.

⁸⁰ Supra, Note 75. p.15.

reinforced the fact that the protection of critical habitat can affect private landholdings.⁸¹ When critical habitat designations have been placed on private lands, landholders have experienced some level of related hardships because of restrictions to their ability to determine land-use activities. Some writers have interpreted this as "a double use of 'take' -- where the 'taking' of life and species is set against the 'taking' of property."⁸² That is, if a landholder "takes" a listed species, or damages the critical habitat, government authorities will then "take" the landholder's land. This viewpoint has in turn intensified the polarization of the debate in both the U.S. and in Canada whereby Canadian landholders fear the "taking" of their property if their lands are found to support species at risk.

"Without secure ownership and assurance that they can benefit from investments in conservation, there is little incentive for many property owners to do so."⁸³ This problem is compounded by the possibility that, not only will the landholder not benefit from conservation initiatives, but the landholder may in fact experience serious financial ramifications. For example, a rancher could be planning to introduce his grazing animals into a certain region early in the year in order to rest other pastures. That plan would be superseded if the rancher was required to wait until a species of endangered migratory birds had finished nesting in May. By the time the rancher's stock was removed from the initial grazing lands, those lands could

⁸¹ Shogren, J.F. (ed.) 1999. Private Property and the E.S.A.. University of Texas Press: Austin, TX.

⁸² *Supra*, Note 55. p.48.

⁸³ *Supra*, Note 81. p.263.

require a great deal of time to recover from the unavoidable overgrazing the lands experienced. The problem could be compounded in the study region if the landholder is forced to continue his stock grazing on lands where death camas (*Zygadenus Gramineus*) is common.⁸⁴ This lack of capacity to plan one's own management program has created a fear in American landholders whereby some choose to remove listed species from their land, or damage the natural habitat, before regulations are applied under the ESA. There is a well known response amongst landholders in the U.S. when they believe that endangered species on their land may be discovered by government authorities. Labelled the "shoot, shovel, and shut-up" response, U.S. landowners have been known to remove endangered species from their land in order to avoid the possibility of ESA provisions being applied to their land. Because the socio-economic effects "fall on a small segment of the population: those who own lands reached by [ESA] programs, . . . and those whose livelihoods depend directly or indirectly on the ability of people to use these lands for economic purposes,"⁸⁵ many landholders are concerned that they will not receive adequate support and recognition from their political representatives. Thus, the "shoot, shovel and shut-up" response has developed as a method for landowners to ensure they will not face serious financial ramifications due to endangered species on their land.

The designation of critical habitat itself holds another issue of potential concern for landholders. Authorities are not bound by the legislation to designate critical habitat, and such designations

⁸⁴ Several of the interview respondents have lost cattle which fed on death camas because the respondent had failed to move the herd before the plant sprouted.

⁸⁵ Supra, Note 57,71. p.265.

are not initiated frequently.⁸⁶ However, a designated critical habitat can be extensive because it can incorporate "a listed species' present habitat, as well as additional areas for reasonable population expansion."⁸⁷ That is, the designation of critical habitat can extend into regions where a species no longer exists, applying prohibitions to a landscape that is currently unused by the species in question, but that is suitable for that species. It is important to note however, that each designation of critical habitat, and the accompanying application of prohibitions to a particular landscape, must consider the "economic impact and any other relevant impact."⁸⁸ Thus, while "[c]onsideration of human objectives . . . is specifically prohibited when making decisions regarding listing, take, and jeopardy, . . . [such consideration] is required when making decisions regarding critical habitat."⁸⁹ The Secretary will determine whether or not to exclude a particular landscape from being part of a designated critical habitat through the consideration of the social ramifications related to designated critical habitat.⁹⁰ In this way, landholders have a built in balance designed specifically to incorporate their needs and to reduce the effect of an endangered species listing upon their landscape and ultimately upon their livelihood. This built-in balance is disregarded within much of the available literature describing landholder hardships due to the application of ESA provisions on private lands.

⁸⁶ Critical habitat is not a mandatory part of the listing process under the ESA and needs only to be designated when it is considered "prudent" with respect to an individual species. Meltz, et al. (1999) notes that the Federal Wildlife Service has made critical habitat designations for only a small portion of listed species.

⁸⁷ Supra, Note 60,61,68,69,73,74,76. p.31.

⁸⁸ Supra, Note 67,69. p.392.

⁸⁹ National Research Council. 1995. *Science and the Endangered Species Act*. National Academy Press: Washington, DC. p.148.

⁹⁰ Supra, Note 60,61,68,69,73,74,76,87. p. 56.

A 1981 amendment to the ESA addressed some of the landholders' concerns over critical habitat designations by permitting the incidental taking of a listed species, with the condition of a pre-arranged and approved habitat conservation plan. If critical habitat is designated, and if such designation may restrict the current use of the land in question, this offers a fall-back option for landholders. However, landholders must develop a habitat conservation plan that includes methods for mitigating negative affects on the listed species in question, and demonstrates that the negative affects that may result will not put the species' population recovery program at risk. Once implementation of an approved habitat conservation plan is apparent, "an exemption from the prohibition against injuring or killing the specified endangered species is granted."⁹¹ For example, with a habitat conservation plan that has been approved by the Federal Wildlife Service, "problem wolves that are reintroduced into an area and that repeatedly prey on livestock may be taken provided that the survival of the species and the overall recovery program is not jeopardized."⁹²

There are several support mechanisms under the ESA to assist landholders. True, the ESA compels "all federal departments and agencies [to] seek to conserve threatened and endangered species . . . [through] such measures . . . [as] habitat acquisition and maintenance."⁹³ However, the ESA also "authorizes courts to award costs of litigation, including

⁹¹ Honnold, Doug, Jerome A. Jackson, and Suellen Lowry. "Habitat Conservation Plans and the protection of habitat." 1997. In *Conservation Biology*. Vol. 11, No.2, April 1997. p.297.

⁹² *Supra*, Note 75.80. p.19.

⁹³ Donahue, Debra. L. 1999. *The Western Range Revisited: Removing livestock from public lands to conserve native biodiversity*. University of Oklahoma Press, Norman Publishing. p.224.

reasonable attorney and expert witness fees, to any party to a suit brought under the statute's citizen suit provision."⁹⁴ Section 5 of the ESA also authorizes the acquisition of lands through funds available under the 1965 Land and Water Act." These awards are somewhat restricted because, for a parties to be eligible to receive such funds, the parties must demonstrate that their actions, or their land, will support and further the goals of the ESA. Thus, although landholders can, and have been, negatively effected by restrictions applied to their land due to provisions of the ESA, efforts have been made to mitigate some of the landholder concerns.

3.3 Chapter Conclusion

It may be that cooperative solutions do not always attract media attention making the irreconcilable conflicts surrounding the ESA better known publicly. The right to develop one's own property is a fundamental aspect of property ownership in the Western World (a right that is specifically protected through the Constitution of the United States), ensuring that any potential challenges to this right will be controversial. This issue has ensured a flourishing of writing surrounding the threats to individual property rights through application of the ESA, writing that has in turn incited an apparently exaggerated fear amongst Canadian landholders who anticipate similar restraints being applied to them under Canadian legislation.

⁹⁴ Supra. Note 60,61,68,69,73,74,76,87,90. p. 201.

Two major issues of contention for landholders are apparent within the literature. The first issue is one of financial security where concerned landholders are fearful of unanticipated and extensive costs involved with the protection of endangered species on their land. The second issue relates to the capacity of landholders to define their own land-use management plans and to plan accordingly. The overall theme of the ESA of the United States permits government authorities to determine what is best for all endangered species throughout the U.S. The provisions not only permit such government authority, but they ensure it. Given that the Canadian federal Minister of the Environment continues to emphasize an open collaborative process for the Canadian legislative counterpart,⁹⁵ the most applicable lessons to be gleaned from the U.S. experience may be what not to do in the Canadian context.

⁹⁵ The Environment Canada homepage. May, 2001. www.gc.ec.ca.

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4.1 Chapter Summary

Federal, provincial and territorial ministers have been considering and developing various forms of species at risk protective legislation for the past several years. On the heels of the international *Convention on Biodiversity* in 1992 and the Canadian *National Accord* signed in 1998, some governments have supported their commitments with completed legislation and others continue to work towards those goals. The provinces of Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Prince Edward Island, and Nova Scotia all have independent statutes to address the protection of species at risk. Unlike these provinces, Alberta has chosen to amend an existing wildlife statute.⁹⁶ The federal government is continuing to work towards the completion of and implementation of an independent statute to protect species at risk across Canada. This Chapter examines the most recently proposed federal Bill (Bill C-5 - the SARA), two current provincial statutes (Nova Scotia's *Endangered Species Act* and Manitoba's *Endangered Species Act*), and one amended wildlife act (the Alberta *Wildlife Act*).

As explained in the Methodology Section of this MDP (Section 1.4.3), the decision to examine these Acts and Bills took into account several relevant concerns. Because Bill C-5 is the current proposed legislation of the federal government, and it has incorporated many of the concerns expressed by various stakeholders in the past. The researcher believes that Bill C-5 is reflective of what is most likely to become national species at risk legislation. Both the Nova Scotia and

⁹⁶ Hazell, Stephen. 2000. Internal document for the Canadian Parks and Wilderness Society.

the Manitoba statutes contain provisions capable of applying prohibitions to private land. In addition, because Manitoba's legislation was enacted in 1993 and Nova Scotia's in 1999, the researcher believes that these two Acts should illustrate any changes in the provisions or focus of provincial legislation that may have resulted due to the past several years of debate over federal legislation. Finally, an examination of the situation in Alberta is provided. That is, an analysis of recent amendments to the Alberta *Wildlife Act* (those amendments that apply to endangered species) follows the analysis of the independent endangered species statutes.

Each Act or Bill has been examined against a pre-determined set of criteria, the details and rationale for which are provided in Chapter 1, Section 1.4.3.1. The examination of the federal Bill is found in Section 4.2, and the examination of the various provincial statutes encompasses Section 4.3. In accordance with the Template, only provisions that have been determined to be capable of affecting the rights and authorities of agricultural landholders are analysed. Further, because of the utilization of the Criteria Template, comparisons and conclusions appropriately follow the analysis in Section 4.4.

The Criteria are explained fully in Section 1.4.3 of this MDP and brief descriptions are provided with each analysis in this Chapter. The Acts and Bills analysed in this Chapter include:

- The proposed federal *Species at Risk Act* (the SARA), Bill C-5;⁹⁷
- Two provincial Acts designed specifically to address species at risk protection;⁹⁸
- The applicable legislation in Alberta where an older Act has been amended in order to address issues of endangered species protection.⁹⁹

4.2 Proposed Federal Legislation

Despite being the first industrialized nation to sign the 1992 *Convention on Biodiversity* in Rio de Janeiro¹⁰⁰, the federal government is still working towards legislated protection for Canada's endangered species. Shortly after this Convention, policy-makers began planning for national endangered species legislation, as well as working with provincial and territorial government representatives.¹⁰¹ To their credit, all federal, provincial and territorial governments have now committed to a national approach for the protection of species at risk in Canada.¹⁰² The *National Accord* represents a political commitment with regards to developing legislation to protect Canada's species at risk.

⁹⁷ Bill C-5 *Species at Risk Act* (proposed). C.2001.

⁹⁸ *The Endangered Species Act*. S.M.1993. and *Endangered Species Act*. S.N.S.1999.

⁹⁹ *The Wildlife Act*. S.A.1984.

¹⁰⁰ Amos, William, Kathryn Harris, and George Hoberg. 2001. "In search of a minimum winning coalition: the politics of species at risk legislation in Canada." In Beazley, Karen and Robert Boardman (eds). 2001. *Politics of the Wild: Canada and endangered species*. Oxford Press: Toronto.

¹⁰¹ Ibid.

¹⁰² *The National Accord*. 1998.

In 1994, the federal government began a process intended to result in the development of national legislation to protect endangered species.¹⁰³ After a series of stakeholder interviews and discussions, legislation was introduced to Parliament in 1996 in the form of the *Canadian Endangered Species Protection Act* (the CESA, Bill C-65). Among other concerns and challenges, the dissolving of Parliament for a national election in 1997 prevented the CESA from becoming law. After another round of interviews, roundtables and public discussions, proposed legislation was again introduced in 2000 as the *Species at Risk Act* (the SARA, Bill C-33). National elections in 2000 brought Bill C-33 down as well. The next Bill (again the SARA, but Bill C-5) was introduced to Parliament early in 2001. The Parliamentary Standing Committee on the Environment and Sustainable Development is currently compiling information from written and oral submissions made to them by a wide array of stakeholders. Representatives from the federal Environment Minister's Office have committed to addressing the recommendations of the Standing Committee through adjustments made to the legislation late in 2001.¹⁰⁴

4.2.1 The SARA -- Bill C-5 introduced in 2001

This most recent proposed legislation, Bill C-5, is similar to the previously proposed legislation (Bill C-33) introduced in 2000. The researcher analysed only the latter of the federal Bills, the

¹⁰³ Supra, Notes 97.

¹⁰⁴ Serdula, Claire (Executive Member, Canadian Parks and Wilderness Society). June, 2001. Personal communication. Ms. Serdula had spoken directly to the Minister's Western Assistant.

SARA (Bill C-5). Debate surrounding this legislation remains polarized and intense, Bill C-5 will not come into force without extensive opposition and continued debate. Clearly, subsequent to the completion of this project, federal species at risk legislation will continue to evolve.

i. The **Purpose Statement and Preamble** represent a statement of intent or policy on the part of the relevant government and set the tone for the legislation's implementation and legal interpretation.

The purpose of Bill C-5 is specific to the protection and management of Canada's species at risk.¹⁰⁵ Canada commits to providing for the recovery of and the effective management of species at risk. In addition, Bill C-5 commits government authorities to work towards the prevention of additional risks likely to negatively affect listed species in the future.

The Preamble of Bill C-5 is more inclusive and extensive than the purpose statement. The government indicates its support of everything from scientific research to landholder compensation, from international political agreements to shared involvement with other levels of government in Canada, and from citizen involvement to the inherent values of protecting Canada's species at risk.

Of specific relevance to this project, the interest groups representing agricultural landholders have encouraged certain changes appropriate to their memberships. For example, the Preamble

¹⁰⁵ *Supra*, Note 97,103. S.6.

recognizes the importance of stewardship initiatives with regards to the protection of habitat, and the value of community knowledge and socio-economic interests within the design and implementation of recovery plans for wildlife at risk.¹⁰⁶ The concern of landholders with regards to financial resources is now also noted within the Preamble through the statement (new to Bill C-5 and not found in Bill C-33): "there will be circumstances under which the cost of conserving species at risk should be shared."¹⁰⁷ This does not determine any specific amounts landholders may receive, but it does recognize their concerns surrounding costs that may be associated with the protection of species at risk on private lands.

ii. The **Application of the Legislation** illustrates the authority provided under each Act or Bill and provides guidance on how the legislative provisions might apply on private lands. An examination of each Act or Bills' definition of "species," "habitat," and "critical habitat" illustrates the scope of habitat and how habitat designations may affect landholders.

Application of the provisions within Bill C-5 will begin within areas of clear federal jurisdiction, including national parks, offshore marine areas, and the northern territories.¹⁰⁸ Under the *Constitution Act, 1867*, federal legislative authority also includes the following heads of authority¹⁰⁹: (i) seacoast and inland fisheries, including fresh and marine fish and marine mammals;

¹⁰⁶ Ibid. Preamble.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid. Section 59.

¹⁰⁹ National Environmental Law Section – Canadian Bar Association (NELS). 2000. "Submission on Bill C-33: Species at risk Act." Submission provided to Parliamentary Committee on Resources and the Environment (September of 2000).

(ii) migratory birds under the international *Migratory Birds Convention Act*,¹¹⁰ where federal power can affect activities within non-federal lands, (iii) trans-boundary species which migrate or range across provincial, territorial, or international boundaries, and (iv) the criminal law power which can be used to apply to national purposes including security, health and morality.¹¹¹ Therefore, application of the prohibitions in C-5 may extend beyond areas of clear federal jurisdiction depending upon the circumstances and according to specific federal orders made by the Governor in Council.

Secondly, federal species at risk legislation may apply to geographic locales beyond specific federal jurisdiction, but application to such other areas would require the federal Cabinet to make an order to protect a listed species on such identified lands.¹¹² Thus, after a species at risk is listed by COSEWIC,¹¹³ and that species' critical habitat is determined,¹¹⁴ Bill C-5 can provide protection for the species on those areas beyond direct federal jurisdiction. In these cases, the Minister has the authority to choose to extend the region of protection beyond the federal boundaries. The Bill also provides for compensation of those affected by "extraordinary

¹¹⁰ The MBCA was repealed and replaced in 1994. It currently applies to all migratory birds as listed in the *Migratory Birds Convention Act*. The Act is binding upon all provincial and federal governments and explicitly authorizes the control and management of *protection areas* for migratory birds and their nests. As noted in Donihee, John. 2000. "CIRL Occasional Paper #9: The evolution of wildlife law in Canada." Canadian Institute of Resource Law, University of Calgary: Calgary, AB. p.59.

¹¹¹ In *Hydro Quebec*, the court determined that federal legislation with regards to prohibitions against toxic substances was not *ultra vires* of federal jurisdiction even though provincial jurisdiction was affected. The National Environmental Law Section of Canada believes that protection of species at risk in Canada could rely on a similar argument. This view is supported by the Sierra Legal Defence Fund.

¹¹² *Supra*. Note 97,103,105-108.

¹¹³ The acronym, COSEWIC, stands for the Committee on the Status of Endangered Wildlife in Canada. Members of this body are responsible for determining the status of species at risk in Canada. Currently, the list is not related to any legislation, it will only become law in accordance with the provisions of the *Species at Risk Act*.

¹¹⁴ *Supra*, Notes 97,103,105-108,112. Section 59.

impacts" due to the protection of critical habitats on non-federal lands.¹¹⁵ However, "extraordinary impacts" are not explicitly defined within Bill C-5.

Thirdly, the jurisdiction of C-5 can be extended beyond federal lands in the event that provincial legislation is inadequate. Labelled as the "federal safety net," federal legislation will apply to provincial or private land where the federal Minister determines that current provincial or territorial legislation does not protect the listed species being considered. For example, the federal listing organization (COSEWIC) may determine that the grizzly bear is endangered throughout Canada as a whole. If the Alberta listing organization does not come to the same conclusion, and therefore does not list the grizzly bear in Alberta, then grizzly bears would be protected only under the provisions of Bill C-5. In such a case, the federal Minister would have the authority to apply the Bill C-5 provisions to protect grizzly bears in Alberta. However, the federal Minister would not be required to do so.

The definition for "habitat" is reasonably broad as it is defined as an "area or type of site where an individual or wildlife species naturally occurs or formerly occurred and has the potential to be reintroduced." "Critical habitat" is then defined as landscape that is "necessary for the survival or recovery of a . . . species and that is identified as the species' critical habitat in the recovery strategy or in an action plan . . ." The definition for "wildlife species" that may be protected is

¹¹⁵ Donihee, John. 2000. "CIRL Occasional Paper #9: The evolution of wildlife law in Canada." Canadian Institute of Resource Law, University of Calgary: Calgary, AB. p.62.

also broad. A "wildlife species" is "an animal, plant or other organism, other than a bacterium or virus, that is wild by nature . . ." The provisions under Bill C-5 support the protection of large landscapes in cases where the designated critical habitat encompasses a naturally extensive range for the survival of a listed species. Such listings and habitat designations could result in restrictions being applied to large portions of landscapes that are currently under private management. Again, the provisions are discretionary and such designations rest upon the final decision being made by the appropriate Minister.

iii. Provisions that Relate to Paramountcy illustrate how the authority provided under the Act or Bill relates to the authority provided under other legislative provisions. Paramountcy also indicates the level of government commitment to the legislative scheme in question.

Paramountcy is not specifically noted within the provisions of Bill C-5. Thus, the legislation does not provide the authority for a federal Minister to override other Acts of Parliament.¹¹⁶ However, if the Minister believes the authority available to him/her through other federal legislation would improve the capacity of an action plan, that Minister may choose to utilize those other powers. Similar authority is available to the federal Minister to enhance protection of critical habitat or residence whereby Section 76(1) permits this Minister to add restrictions to agreements, permits, licences, and similar documents. Thus, the federal Minister of Culture could choose to develop an action plan for the critical habitat of the Banff Springs snail (*Physella johnsoni*)¹¹⁷

¹¹⁶ Supra, Notes 97,103,105-108,112,114. Section 55.

¹¹⁷ The Banff Springs snail exists only in the hot springs of Banff National Park. More information on this species at risk can be found at the Banff National Park Website at <http://www.worldweb.com/parkscanada-banff/snail.html>.

under the powers given him/her through the *National Parks Act*, the SARA, or both Acts combined.

iv. The **Provisions that Bind the Government to Action** illustrate whether the government is bound to any actions, whether the government can be called to account for its own actions, and whether any provisions that bind the government to action have the ability to affect landholders.

Section 5 of Bill C-5 binds the government of Canada, or that of a province, to the provisions within this federal Bill. With regards to designating critical habitat, the Minister is bound to make a recommendation for a listed threatened or endangered species¹¹⁸ and for an emergency listing.¹¹⁹ However, the Minister is only bound after several requirements are met. Firstly, requirements rely upon the Minister's opinion as to whether or not an "imminent threat" to the survival of that species exists. For example, before being bound by Section 61 and making an emergency designation of critical habitat, the Minister must consult with the local provincial and/or territorial Minister to determine that (a) there are no current federal provisions protecting the portion of critical habitat in question, and that (b) there is no protection provided under provincial or territorial authority. Thus, while the federal Minister is bound to make an emergency recommendation, the other requirements within Section 61 allow that same Minister some flexibility in making such a determination.

¹¹⁸ Supra, Notes 97,103,105-108,112,114,1116. Section 61.

¹¹⁹ Ibid. Section 29. This is applicable in cases where "the Minister is of the opinion that there is an imminent threat to the survival of a wildlife species . . ."

The federal Minister is also bound with regards to the development of a recovery strategy¹²⁰ and the subsequent action required to implement such a strategy.¹²¹ Once "the competent"¹²² minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy . . . must include . . . (c) identification of the species' critical habitat . . . [and] examples of activities that are likely to result in its destruction."¹²³ The Minister is then required to cooperate with other governments,¹²⁴ but this requirement is also filtered by the remainder of the text of Section 39. Here, such cooperation is required only "to the extent possible," and by the authority given to the Minister to determine which organizations are "directly affected" by the recovery strategy and therefore should participate in discussions. Once critical habitat has been designated, Section 63 binds the Minister to provide a report explaining the steps that have been taken to protect critical habitat defined in either a recovery strategy or action plan. Again, this is not an absolute requirement, and the report is only necessary if the Minister believes that critical habitat remains unprotected 180 days after the implementation of the recovery strategy or action plan that identified the critical habitat in question. In other words, under Bill C-5, the clauses that might bind the Minister to action are not absolute because there is some level of discretion applied to each of them.

¹²⁰ Ibid. Section 37. A recovery strategy is the plan intended to secure the recovery of a listed species after that species is listed on the COSEWIC list.

¹²¹ Ibid. Section 47.

¹²² The term "competent minister" has been used in the text of the federal Bill to encompass various individuals. That is, the competent (or relevant) Minister may be a provincial Minister, or one of several federal Ministers depending upon the government authority and the species in question.

¹²³ *Supra*, Notes 97,103,105-108,112,114,116,118-121. Section 42(1).

¹²⁴ Ibid. Section 39.

v. The breadth of the **Prohibitions** within each Act or Bill are indicative of the level of governmental commitment to habitat protection.

Two sections (Section 32 and Section 33) cover actions that are prohibited under Bill C-5.

Prohibitions against the taking of species are similar to those found in other endangered species protective legislation.¹²⁵ Acts such as the killing, harming, harassing, capturing, buying, or selling of species at risk are explicitly prohibited with regards to species that are listed as endangered, extirpated, or threatened. There are also prohibitions against habitat damage,¹²⁶ and specifically against "the destr[uction of] any part of the critical habitat of a listed . . . species . . ."¹²⁷

The protection of habitats under Bill C-5 requires some further examination as habitat is protected through a system of patchwork quilts delineated within individual sections of the Bill. Habitat, defined in the Bill as "the area or type of site where . . . [a] wildlife species naturally occurs . . . ," is protected within the automatic prohibitions. However the landscape that each species needs to survive beyond such a "site," the critical habitat, is not automatically protected under this Bill. Initially, critical habitat that has been identified and specified by the Governor in Council is protected from destruction or damage if that habitat is within federal lands and clear federal jurisdiction.¹²⁸ When such specified critical habitat is outside federal lands, that habitat

¹²⁵ Ibid. Section 32.

¹²⁶ Ibid. Section 33.

¹²⁷ Ibid. Section 61(1).

¹²⁸ Ibid. Section 58.

is protected from destruction under Section 61. An important qualifier to the protection of habitat beyond federal lands lies within Section 59. This provision states that the decision to protect habitat outside federal lands is for the Minister, thereby leaving the designation of critical habitat on privately held lands to the discretion of the Minister.

vi. The Enforcement Provisions and Penalties under the Bill or Act illustrate the potential enforcement ramifications and how enforcement and penalties may be applied to landholders.

Enforcement begins with inspection, and Section 86 provides government representatives with the capacity to obtain a warrant " . . . authorizing an enforcement officer to enter a place other than a dwelling-place . . ."¹²⁹ Therefore, once it has been determined that there is reasonable likelihood of a contravention against a listed species, authorities can enter all buildings and properties (other than dwellings) as part of their investigation.

According to Section 97, the demonstration of due diligence is required on the part of the accused of committing an act prohibited under Bill C-5. In very general terms, to demonstrate due diligence, the individuals or corporations being charged must demonstrate they took all reasonable steps to avoid damaging the species or habitat in question, and that the steps they took are similar to steps that others in their situation would have taken. That is, the steps they

¹²⁹ Ibid. Section 86(6).

took to avoid the incident are equal to or greater than those considered standard within the industry.¹³⁰

Maximum fines are significant under this Bill. For example, on a summary conviction, a corporation is liable for a maximum fine of \$300,000, and an individual is liable for a maximum fine of \$50,000 and/or a one year prison term. Of note is that most of the landholders in the study region are incorporated. Thus, the higher fines may not be reserved for multinational organizations, but could also affect family businesses.¹³¹ Fines are cumulative,¹³² both in terms of a continuing offence (a case where a person continues to commit an offence over the course of more than one day), and in terms of cumulative offences (a case where more than one individual of one or more species is negatively affected). And, after the summary conviction, fines for indictable offences reach a corporate maximum of \$1,000,000 and an individual maximum of \$250,000.

The sentencing considerations listed within Section 102, include factors such as ". . . (b) whether the offender was found to have committed the offence intentionally, recklessly or inadvertently; [and] (c) whether the offender was found by the court to have been negligent or incompetent or to have shown a lack of concern with respect to the commission of the offence."

¹³⁰ The issue of due diligence under the legislation will be explored further in Chapter 6 as it is as a major concern for the interview respondents and key informants.

¹³¹ Greenaway, Guy (Executive Director, the Southern Alberta Land Trust Society). May, 2001. Personal communication. This was also confirmed by many of the interview respondents.

¹³² *Supra*, Notes 97,103,105-108,112,114,116,118-121,123-129. Section 97

Both of these statements offer some flexibility with regards to fines and/or jail terms to practicing and reasonably careful agricultural landholders who take precautions to avoid injuring species at risk.

vii. The **Mechanisms for Conservation on Private Land** hold the greatest promise with regards to protecting the interests of landholders. This analysis includes an examination of the various legislative tools in the form of incentives and opportunities that governments have developed in order to support the needs of landholders.

The federal Bill provides many opportunities for the Minister in question (the "competent" Minister) to work with others. For example, with regards to developing conservation agreements, the "minister may, . . . if he or she considers it appropriate to do so, enter into an agreement with any government in Canada, organization or person to provide for the conservation of a species at risk."¹³³ The preparation of recovery strategies¹³⁴ and management plans¹³⁵ is slightly stronger in this regard as these sections actually require consultation with landholders and others whom the Minister believes to be directly affected by the strategy. Consultation in these cases has a small qualification however. Because such consultation is required only "to the extent possible," as determined by the Minister.

When listed species are found on privately held lands or when such lands become designated as protected habitat, permits can be issued to authorize an activity prohibited under Bill C-5. The

¹³³ Ibid. Section 11.

¹³⁴ Ibid. Section 39.

¹³⁵ Ibid. Section 66.

authorization of such an activity could benefit the landholder in question by permitting him/her to continue with activities that would otherwise be prohibited. Such permits can only be issued under conditions where the Minister "is of the opinion that . . . (b) the activity benefits the species or is required to enhance its chance of survival in the wild; or (c) affecting the species is incidental to the carrying out of the activity."¹³⁶ Therefore, once a species is listed, and that species' critical habitat is designated as being on private land, the landholder in question must demonstrate either that their chosen land-use will be beneficial to the habitat, or, at the very least, the effect of their chosen land-use upon the habitat will be minimal.

Stewardship,¹³⁷ although often discussed by the Minister of the Environment when presenting issues regarding Bill C-5, is not explicitly defined within the proposed legislation. Through Section 11, federal authority permits the "competent minister . . . [to] enter into an agreement with any . . . organization or person to provide for the conservation of a species at risk, . . . [including] (c) developing and implementing recovery strategies, action plans and management plans; [and] (d) protecting the species' habitat . . . "¹³⁸ Recovery plans "must be prepared in consultation with any landowners . . . whom the . . . minister considers to be directly affected by the [recovery] strategy . . . "¹³⁹ Direct acquisition of lands¹⁴⁰ is provided for whereby the

¹³⁶ Ibid. Section 74(1).

¹³⁷ Landholders within this study group appear to understand the term stewardship differently than do those developing the provisions within Bill C-5. A discussion surrounding this issue is provided in the final Chapter in Section 6.3.3.

¹³⁸ Supra. Notes 97,103,105-108,112,114,116,118-121,123-129,132-136. Section 11(27).

¹³⁹ Ibid. Section 39.

¹⁴⁰ Ibid. Section 62.

"minister may enter into an agreement with any person . . . to acquire any lands or interests in lands . . ." However, the purchase price for such an agreement is not defined or clearly directed within Bill C-5. All of these opportunities to include stakeholders in the process of species at risk protection involve some level of Ministerial discretion.

To address financial concerns of landholders faced with habitat protection prohibitions on their lands, Section 13 permits the Minister to "enter into an agreement with . . . any organization or person to provide for the payment of contributions towards the costs of programs and measures for the conservation of wildlife species . . ."¹⁴¹ Further, Section 64 specifically provides the Minister with the authority to pay compensation. Although there is a clear indication that there will be funding available, and "[t]he proposal indicates that legislation will be accompanied by stewardship funding and incentive programs. . . , it is not specific about what types of incentives will be available. More importantly, [Bill C-5] says nothing about how much total funding will be provided."¹⁴² Compensation is a tool available to government authorities in order to encourage landholder (and other stakeholder) support of the legislation, but it is a tool to be used at the Ministers' discretion.¹⁴³

Of particular interest with regards to Bill C-5 seems to be the discretionary nature of the Bill in general. Everything from stakeholder involvement, to the designation of critical habitat, to the

¹⁴¹ Ibid. Section 13(1).

¹⁴² Elgie, Stewart (Sierra Legal Defense Fund). 2001. "Analysis of the federal species at risk act." Unpublished.

provision of compensation, remains at the discretion of the Minister. The result of the analysis of Bill C-5 were compiled and examined with the results of the analyses for each of the provincial statutes examined. This compilation is found in Section 4.4.

4.3 Existing Provincial Legislation

The following analyses highlight the relevant provisions within the chosen provincial statutes.

The independent endangered species statutes from Nova Scotia and Manitoba were examined initially. These were followed by an analysis of the legislation that covers the protection of species at risk in Alberta: the *Alberta Wildlife Act*. Each Act has been examined against the same pre-determined set of criteria explained in Section 1.4.3.1 and the comparisons and conclusions regarding these analyses are presented in Section 4.4 of this Chapter.

4.3.1 Provincial Legislation -- Nova Scotia

Endangered Species Act (1999)

The *Endangered Species Act* of Nova Scotia¹⁴⁴ was brought into force in May of 1999. The legislation appears to encompass many of the concerns that have become prevalent during the debates over federal legislation. After only two years in force, it has brought no recorded infractions and is considered untested legislation.¹⁴⁵ Listed species in Nova Scotia change in

¹⁴³ Supra, Notes 97,103,105-108,112,114,116,118-121,123-129,132-136,138-141. Section 64.

¹⁴⁴ *Endangered Species Act*. 1999. Government of Nova Scotia.

¹⁴⁵ Rounthwaite, Ian. 2001. Speaking at round table discussion of the Parliamentary Standing Committee on Environment and Sustainable Development. 5 June 2001.

accordance with COSEWIC's designations because listings from COSEWIC automatically apply in accordance with this Act. The most recent additions of species at risk occurred in the COSEWIC listing of April, 2001.¹⁴⁶

i. The **Purpose Statement and Preamble** represent a statement of intent or policy on the part of the relevant government and set the tone for the legislation's implementation and interpretation.

The purpose of Nova Scotia's legislation provides for the listing, protection and conservation of local species and their habitats.¹⁴⁷ The purpose is then complemented and strengthened by a list of goals including the prevention of any species becoming extinct or extirpated due to human activities,¹⁴⁸ how such prevention is "a key component of a broader strategy to maintain biodiversity and to use biological resources in a sustainable manner."¹⁴⁹ Of interest here, is the fact that "the importance of promoting the purposes of the Act primarily through non-regulatory means such as co-operation, stewardship, education and partnerships instead of punitive measures . . ."¹⁵⁰

¹⁴⁶ The Department of Natural Resources, Nova Scotia: <http://www.gov.ns.ca/natr/>

¹⁴⁷ Supra, Note 141, Section 2(1).

¹⁴⁸ Ibid. Section 2(a).

¹⁴⁹ Ibid. Section 2(b).

¹⁵⁰ Ibid. Section 2(g).

ii. The **Application of the Legislation** illustrates the authority provided under each Act or Bill and provides guidance on how the legislative provisions might apply on private lands. An examination of each Act or Bills' definition of "species," "habitat," and "critical habitat" illustrates the scope of habitat and how habitat designations may affect landholders.

Provisions within this legislation apply to the entire province of Nova Scotia, including federal and provincial public lands, and private lands. The Species-at-risk Working Group, created within this legislation,¹⁵¹ will provide guidance to the provincial Minister. Specifically, this Group "shall . . . provide advice respecting the conservation and management of species at risk, and their habitats, in the province."¹⁵² The Minister shall then designate critical habitat¹⁵³ with a geographical range that may include both public and private lands.¹⁵⁴

Relevant definitions provided within the legislation are equally extensive. For example, the definition of "species" applies to "a plant, animal or other organism, and includes one or more populations of a species, and the eggs, larvae or other forms of developmental life of a species and any part of an individual of a species . . ."¹⁵⁵ General "habitat" is defined as including land, water or air,¹⁵⁶ and "core habitat"¹⁵⁷ is defined as "habitat that is essential for the long-term survival and recovery"¹⁵⁸ in accordance with that species being designated pursuant to Section

¹⁵¹ Ibid. Section 9.

¹⁵² Ibid. Section 10(e).

¹⁵³ Ibid. Section 15.

¹⁵⁴ Ibid. Section 16.

¹⁵⁵ Ibid. Section 3(p).

¹⁵⁶ Ibid. Section 3(i).

¹⁵⁷ Nova Scotia's Endangered Species Act provides a definition for *core habitat* and not one for *critical habitat*. Because the definitions for each term is similar within the legislation analyzed here, the researcher is using these two terms synonymously.

¹⁵⁸ *Supra*, Notes 144, 147-156. Section 3(b).

16. Because, according to the definition in the legislation, "critical habitat" includes more than the area a species currently exists in, designated "critical habitat" can also encompass lands that a species could expand its range into.

iii. Provisions that Relate to Paramountcy illustrate how the authority provided under the Act or Bill relates to the authority under other legislative provisions. Paramountcy also indicates the level of government commitment to the legislative scheme in question.

Section 5 is explicit with regards to paramountcy. "Where there is a conflict or inconsistency between this Act and regulations made pursuant to this Act, and any other enactment or a municipal by-law, regulation or authorization, this Act and the regulations prevail."¹⁵⁹ This *Endangered Species Act* will take precedence in cases of conflict with other Acts of the Legislature. Paramountcy in this case demonstrates the Nova Scotia government's commitment to the protection of endangered species.

iv. The Provisions that Bind the Government to Action illustrate whether the government is bound to any actions, whether the government can be called to account for its own actions, and whether any provisions that bind the government to action have the ability to affect landholders.

Under Section 4, the governments of Canada and Nova Scotia, as well as all individuals who represent each of these governments, are bound to this Act.¹⁶⁰ The Act establishes "the Species-at-risk Working Group" (the Group) to research and provide recommendations to the

¹⁵⁹ Ibid. Section 5.

¹⁶⁰ Ibid. Section 4(1) and (2).

Minister.¹⁶¹ Further, to ensure support of the work done by the Group, under Section 15 the Minister is bound to take their recommendations and "appoint a recovery team and prepare a recovery plan for the species."¹⁶² Under this endangered species legislation, merely creating a group of qualified individuals to advise the Minister is inadequate. Unlike the Ministers in Manitoba and Alberta who need only create an endangered species study group, the Minister in Nova Scotia must address some of the Group's recommendations.

As with other similar legislation, the Minister is provided with supportive provisions to encourage discussions amongst various stakeholders and to enter into agreements with those involved in the needs of the Act.¹⁶³ This legislation encourages some support for landholders who, after their lands become designated under the legislation, are forced to change their land use practices. In cases where "private lands are designated as core habitat . . . [or] are subject to an order of the Minister, . . . the Minister . . . shall compensate the owner of the private lands for the loss imposed upon [the landowner for] that use."¹⁶⁴ Specifics with regards to compensation are not addressed here, but the fact that the Minister is bound to the provision of compensation is worth noting.

¹⁶¹ Ibid. Section 9(1).

¹⁶² Ibid. Section 15(1)(a) and (b).

¹⁶³ Ibid. Section 6(3).

¹⁶⁴ Ibid. Section. 16(7).

v. The breadth of the **Prohibitions** within each Act or Bill are indicative of the level of governmental commitment to habitat protection.

Prohibitions against damage to a species are listed within Section 13 and the usual list is noted.

"No person shall (a) kill, injure, possess, disturb, take or interfere with or attempt to kill, injure, possess, disturb, take or interfere with an endangered or threatened species or any part or product thereof; . . ."¹⁶⁵ Prohibitions against damage to a species' "specific dwelling place" are then described under section 13(b). The prohibitions that are somewhat unique to this legislation are found under section 17 where it is stated that "no person shall destroy, disturb or interfere with or attempt to destroy, disturb or interfere with lands proposed to be designated as core [or critical] habitat during the time referred to . . . and for a period of thirty days thereafter."¹⁶⁶ This provision provides for assurance that potential critical habitat will not be disrupted during the research process to determine critical habitat designations, nor will that habitat be disrupted after such designations are finalized. Therefore, landholders may be affected by interim restrictions applied to their lands, even in cases where those same restrictions are removed once further research is completed.

vi. The **Enforcement Provisions and Penalties** under the Bill or Act illustrate the potential enforcement ramifications and how enforcement and penalties may be applied to landholders.

¹⁶⁵ Ibid. Section 13(1).

¹⁶⁶ Ibid. Section 17(2)(c) and (4).

Enforcement under this legislation involves the placing of high fines whereby a summary conviction for a corporation may lead to a maximum fine of \$1,000,000, and the same conviction for an individual may lead to a maximum fine of \$500,000.¹⁶⁷ The individual may also face a prison term of up to six months.¹⁶⁸ In cases where more than one species or specimen is involved, or where the infraction occurs over multiple days,¹⁶⁹ the fines and/or jail terms are considered to be continuing offences and are therefore cumulative. An individual in either of these situations could face multiple fines and/or multiple jail terms in accordance with each individual of a listed species and/or each day the infraction occurred.

Conservation officers, along with anyone representing the Minister of the Department of Natural Resources, are given broad access to private lands whereby they "may enter upon any lands without being liable for trespass."¹⁷⁰ In the case of damage caused to property however, these individuals are not exempt.¹⁷¹

In cases where landholders are charged with violations against the Act, Section 23(3) states that ". . . no person shall be convicted of an offence under this Act or the regulations if the person establishes that the person exercised all due diligence to prevent the commission of the

¹⁶⁷ Ibid. Section 22(1).

¹⁶⁸ Ibid. Section 22(1)(b).

¹⁶⁹ Ibid. Section 22(3) and 22(4).

¹⁷⁰ Ibid. Section 7(6).

¹⁷¹ Ibid. Section 7(6).

offence." This ensures that, if a landholder is confident s/he can prove due diligence, s/he need not worry about a conviction under the Act.

vii. The **Mechanisms for Conservation on Private Land** hold the greatest promise with regards to protecting the interests of landholders. This analysis includes an examination of the various legislative tools in the form of incentives and opportunities that governments have developed in order to support the needs of landholders.

Several sections within this Act seem to anticipate concerns of private landholders. For example, the Minister "may enter into agreements, co-operative arrangements or working relationships with any person who owns, or has an interest in, lands that have been identified in a recovery or management plan as habitat or core habitat . . ."¹⁷² In appointing a recovery team, the Minister "shall include an appropriate diversity of expertise,"¹⁷³ and balance scientific knowledge with experience on the land. Secondly, in developing a recovery plan, this recovery team "shall (a) identify the needs of and threats to an endangered or threatened species; . . . [and] (d) identify the costs and benefits of the options,"¹⁷⁴ among other things. Although the Minister is authorized to designate core habitat on private lands, this authority can only be practised when the "Minister is satisfied that the core habitat of the endangered species on public lands is not sufficient to meet the recovery needs."¹⁷⁵ That is, private lands may be designated as critical habitat, but public lands must be considered first.

¹⁷² Ibid. Section 16(1).

¹⁷³ Ibid. Section 15(2).

¹⁷⁴ Ibid. Section 15(4).

¹⁷⁵ Ibid. Section 16(4).

For landholders who are required to change their current land-use practices, the "Minister may, upon application, issue a permit to a person authorizing the person to possess, disturb, take or interfere with an endangered or threatened species for (a) scientific purposes . . . ; [or] (b) the protection of human health or safety."¹⁷⁶ Permits available to agriculturally-based landholders under Nova Scotia's *Endangered Species Act* are restricted in similar ways to permits that may be available under the federal Bill.

After private land has been designated, there are some options provided within the legislative provisions. For example, the need to ensure open communication initially is addressed through Section 17 which requires the Minister to publish information regarding designated habitats, as well as to "provide a notice to each registered owner of the lands."¹⁷⁷ The "Species-at-risk Conservation Fund" is established under Section 8 of the Act, where the Minister is authorized to spend "money from the Fund for . . . (d) the acquisition of land for . . . any . . . purpose related to species at risk."¹⁷⁸ The precise amount or form of compensation provided to any affected landholder is at the discretion of the Minister.¹⁷⁹ However, in cases of disagreement over compensation, Section 16(9) provides the landholder with the option of referring his/her concerns to the provincial Utility and Review Board for complete reviews.

¹⁷⁶ Ibid. Section 14 (1)(b).

¹⁷⁷ Ibid. Section 17(1).

¹⁷⁸ Ibid. Section 8(3).

¹⁷⁹ Ibid. Section 17.

Of particular interest with regards to the *Endangered Species Act* of Nova Scotia seems to be the text within the purpose of the Act that emphasizes voluntary compliance over regulatory enforcement right from the start, the existence of the Conservation Fund and the certainty of compensation, and the number of provisions that bind the government to action. The result of the entire analysis of this legislation was compiled and examined with the results of the analyses for each of the provincial statutes examined.

4.3.2 Provincial Legislation -- Manitoba

The Endangered Species Act (1993)

The legislation in Manitoba is older than that of Nova Scotia. Designed in advance of the commitments made for the *National Accord*, Manitoba's legislation clearly applies to private lands. The Act appears fairly broad in its capacity to address issues and concerns with regards to the protection of species at risk. At the time of writing, an Endangered Species Advisory Committee has been created under this Act, and that committee is in the process of designating another 23 species under the legislation.¹⁸⁰ Other than the creation of the Committee and several species designations, activities with regards to this legislation are limited.

¹⁸⁰ Manitoba Department of Conservation Website: <http://www.gov.mb.ca/natres/wildlife>.

i. The **Purpose Statement and Preamble** represent a statement of intent or policy on the part of the relevant government and set the tone for the legislation's implementation and interpretation.

The Preamble of the Manitoba legislation recognizes that plant and animal species in Manitoba can be at risk of extinction due to "untempered" activities by people, but does not note any directives to address this situation. Those directives are provided within the Purpose where it states that the legislation is intended (a) to ensure the protection and to enhance the survival of endangered and threatened species in the province; (b) to enable the reintroduction of extirpated species . . . ; and (c) to designate species.

ii. The **Application of the Legislation** illustrates the authority provided under each Act or Bill and provides guidance on how the legislative provisions might apply on private lands. An examination of each Act or Bills' definition of "species," "habitat," and "critical habitat" illustrates the scope of habitat and how habitat designations may affect landholders.

Application of this legislation is broad as it "applies to species wherever occurring in Manitoba, including species on private lands."¹⁸¹

This legislation offers broad definitions for both species and habitats. For example, "habitat" is defined as "an area of land, water or air that contains the natural resources on which a species depends for its life cycle."¹⁸² This definition is broader than definitions that focus upon precise and limited areas such as a den or nest site. The definition of "species" is not limited by

¹⁸¹ *The Endangered Species Act*, 1993, Government of Manitoba, Section 3(1).

¹⁸² *Ibid.* Section 1.

taxonomic group nor life cycle stage, instead it is defined to mean "a variety, race, breed, individual kind or other taxonomic type of plant or animal life and includes a population of one or more species and the eggs, larvae or other forms of developmental life of the species."¹⁸³

iii. Provisions that Relate to Paramountcy illustrate how the authority provided under the Act or Bill relates to the authority under other legislative provisions. Paramountcy also indicates the level of government commitment to the legislative scheme in question.

The issue of paramountcy is clear and concise whereby if "a provision of this Act conflicts with a provision of another Act of the Legislature, this Act prevails unless the other Act expressly provides that the other Act prevails."¹⁸⁴

iv. The Provisions that Bind the Government to Action illustrate whether the government is bound to any actions, whether the government can be called to account for its own actions, and whether any provisions that bind the government to action have the ability to affect landholders.

The Crown is bound only to the establishment of the Advisory Committee (s.6(1)) to advise the minister on issues relating to the purposes of the Act, listings, and designations of species and their habitat needs. This Advisory Committee is required to report every two years on the status of endangered species in the province. Such reports have been filed in accordance with this provision.

¹⁸³ Ibid. Section 1.

¹⁸⁴ Ibid. Section 2(2).

Actual designation and listing of species at risk is at the discretion of the Lieutenant Governor in Council (s.8) who "may, by regulation, declare the species an endangered species."¹⁸⁵ The Lieutenant Governor in Council has similar discretion with regards to designating threatened (s.8(2), extirpated (s.8(4), and extinct species (s.8(3). Section 9 then provides the Lieutenant Governor in Council with the option of making regulations respecting habitats for listed species. The Minister is given the authority to, "for the protection or reintroduction of [a species], . . . enter into an agreement with respect to (a) the conduct of biological investigations; (b) the implementation of remedial programs; and (c) the preparation of biological status reports on species; . . ."¹⁸⁶ Thus, prohibitions may be applied after the designation of a species at risk, but such prohibitions are not immediate, nor mandatory.

v. The breadth of the **Prohibitions** within each Act or Bill are indicative of the level of governmental commitment to habitat protection.

Prohibitions with regards to individuals within the species are similar to prohibitions found in the other Acts or Bills analysed here. These include killing, injuring, possessing, disturbing or interfering with¹⁸⁷ a species at risk. Some of the prohibitions listed to protect habitat include damage, destruction, obstruction or removal of a natural resource on which an endangered species, a threatened species or an extirpated species that has been reintroduced depends for its life and propagation.¹⁸⁸

¹⁸⁵ Ibid. Section 8(2).

¹⁸⁶ Ibid. Section 5.

¹⁸⁷ Ibid. Section 10.

¹⁸⁸ Ibid. Section 10(c).

vi. The **Enforcement Provisions and Penalties** under the Bill or Act illustrate the potential enforcement ramifications and how enforcement and penalties may be applied to landholders.

The Act does not mention forms of defense for individuals charged under the Act. But, contravention of regulations are described in section 13 where "[a] person who contravenes subsection 10(1) [prohibitions] is guilty of an offence . . ." ¹⁸⁹ Each day that a contravention continues is considered a separate offence ¹⁹⁰ so that if a landholder is unaware of the existence of a species at risk on his/her land, that landholder could theoretically commit multiple offences during routine agricultural work.

As in most of the other legislation, there is a distinction between the maximum fines payable by individuals as compared to the fines payable by corporations, whereby a summary conviction for an individual has a maximum of \$5,000, and the same conviction for a corporation carries a maximum fine of \$50,000. ¹⁹¹

¹⁸⁹ Ibid. Section 13(1).

¹⁹⁰ Ibid. Section 14.

¹⁹¹ Ibid. Section 13.

vii. The **Mechanisms for Conservation on Private Land** hold the greatest promise with regards to protecting the interests of landholders. This analysis includes an examination of the various legislative tools in the form of incentives and opportunities that governments have developed in order to support the needs of landholders.

If the Minister deems it necessary, Section 7 permits the Minister to "... on behalf of the Crown in right of Manitoba, acquire real property by purchase, lease or expropriation."¹⁹² The Act does not state when property might be purchased, leased or expropriated and therefore does not provide for concise expectations of landholders. All expropriations for the purposes of protecting species at risk are governed by Manitoba's *Expropriation Act* and fall within predictable guidelines along with other situations of expropriation in the province.

Permits can be obtained in order to allow a person to affect a listed species.¹⁹³ However such permits will only be approved for "scientific purposes or for purposes related to the protection or reintroduction of ... species."¹⁹⁴ Options within this provision may not support agricultural landholders who would have to prove that their land-use practices are beneficial to the listed species and its habitat. In contrast, there is a provision designed specifically to allow developments to obtain permits in order to continue without being affected by the *Endangered Species Act*.¹⁹⁵ Section 12(1) permits the Minister to "exempt an existing or proposed development from the application of [the] Act if the minister is satisfied that (a) protection ... of the species or the habitat is assured; or (b) appropriate measures are established ... to

¹⁹² Ibid. Section (7)1.

¹⁹³ Ibid. Section s.11(1).

¹⁹⁴ Ibid. Section.11(1).

¹⁹⁵ Ibid. Section 12.

reduce to a minimum the impact of the development upon" the listed species or its habitat. Therefore individuals wishing to develop landscapes may find it slightly easier to receive an exemption permit than individuals wishing to maintain an agriculturally-based lifestyle on that same landscape.

The fact that many of the provisions within the Endangered Species Act of Manitoba are discretionary, yet the Act is clearly high on a hierarchy of authority provided under various provincial statutes, is unique amongst other analysed legislation. The prohibition statement regarding the "removal of a natural resource on which . . . a species . . . depends" is also unique, but may be of little importance. The removal of an integral natural resource would likely also fall under the conditions of other legislative provisions that prohibit damage to critical habitat. Also of interest with regards to this Act is that, at the time of writing no charges have been laid under the legislation and recorded in official documentation. One might expect some infractions over eight years and it could be surmised that the Minister's discretion has been interpreted as not requiring any action under the legislation. The result of the entire analysis of this legislation was compiled and examined with the results of the analyses for each of the provincial statutes examined as well as the federal proposed legislation.

4.3.3 Amended Provincial Wildlife Legislation -- Alberta

The Alberta *Wildlife Act* (1984)

The legislation in Alberta does not involve a separate Act designed to formally protect species at risk. Instead, the Alberta government has amended its current wildlife legislation in order to comply with political commitments made under the *National Accord*. The Alberta *Wildlife Act* was designed to coordinate and control the sustainable taking of fish and game species through hunting, fishing, and trapping regulations and related prohibitions. Similar to other North American wildlife legislation of the early 1900s until the 1950s, this legislation (initially entitled the Game Act) was introduced with an emphasis upon the management and regulation of game hunting and fishing, the removal of natural threats to agriculture through predator control mechanisms, the licensing of trapping of fur-bearing species, and specific conservation initiatives such as game preserves. The addition of endangered species protections, accompanied by the promotion of conservation, entered the Wildlife Act provisions in 1984. In early 2001, Alberta's Endangered Species Conservation Committee (a multi-disciplinary group of appointed individuals established under the endangered species provisions) published its first report about the status of endangered species in Alberta.¹⁹⁶

- i. The **Purpose Statement and Preamble** represent a statement of intent or policy on the part of the relevant government and set the tone for the legislation's implementation and interpretation.

Alberta's legislation has no specific purpose statement, nor a Preamble.

ii. The **Application of the Legislation** illustrates the authority provided under each Act or Bill and provides guidance on how the legislative provisions might apply on private lands. An examination of each Act or Bills' definition of "species," "habitat," and "critical habitat" illustrates the scope of habitat and how habitat designations may affect landholders.

The capacity to protect habitat on private lands is not specifically addressed in the amended provisions of the Alberta Wildlife Act. However, ". . . considerable [protection] of wildlife habitat could be achieved under regulatory power in the *Wildlife Act*."¹⁹⁷ For example, "The Minister may . . . [establish] wildlife sanctuaries and . . . habitat conservation areas."¹⁹⁸ The Minister may also control and manage "wildlife sanctuaries, habitat conservation areas, migratory bird lure sites and wildlife control areas,"¹⁹⁹ and s/he may determine the requirement for "wildlife habitat and the restoration of habitat that has been altered."²⁰⁰ In addition, the Minister is responsible for "respecting the protection of endangered species . . . , importation and exportation of, or trafficking in endangered organisms."²⁰¹ While all of these regulations are applicable to private lands, application to private lands is clearly at the Minister's discretion.

Directives and controls are available for the provincial government with regards to management on leased lands in Alberta as well. In addition, although it is not common practice, the Minister has the ability not to renew agricultural leases.

¹⁹⁶ This report is available on line at <http://www.gov.ab.ca/env/fw/riskspecies/index.html>

¹⁹⁷ Elder, P.S. 1996. "Biological diversity and Alberta law." In *Alberta Law Review*, Vol.XXXIV, No.2, 1996. p.331.

¹⁹⁸ *The Wildlife Act*, 1984. Government of Alberta. Section 96(1)(b).

¹⁹⁹ *Ibid.* Section 96(1)(r).

²⁰⁰ *Ibid.* Section 96(1)(u).

Covered within the definition of "endangered species" are endangered animals, invertebrates, plants, algae and fungi, and fish.²⁰² The definition for endangered species is comprehensive and it provides the Minister with the authority to designate a huge variety of species.

iii. Provisions that Relate to Paramountcy illustrate how the authority provided under the Act or Bill relates to the authority under other legislative provisions. Paramountcy also indicates the level of government commitment to the legislative scheme in question.

There are no provisions within this Act that would establish any paramountcy with regards to the Minister's authority to take action in order to protect endangered species under the *Wildlife Act*. That is, regulations applied under the amendments to the *Wildlife Act* may not stand up in cases where detrimental activities have been approved under other legislation. Specifically, agricultural landholders holding grazing leases may remain unaffected because the approved activities (cattle grazing) are permitted under other legislation.

iv. The Provisions that Bind the Government to Action illustrate whether the government is bound to any actions, whether the government can be called to account for its own actions, and whether any provisions that bind the government to action have the ability to affect landholders.

Most of the provisions that can be applied to endangered species are at the discretion of the Minister. The only provision that is not discretionary is the establishment of an Endangered

²⁰¹ Ibid. Section 96(1)(z).

²⁰² Ibid. Section 1.

Species Conservation Committee.²⁰³ The Committee's role includes, "to advise the Minister about endangered species and to make recommendations to the Minister with respect to (a) the preparation and the adoption by the Minister of recovery plans for endangered species, (b) organisms that should be established as endangered species, (c) endangered species and biodiversity conservation, and (d) any other matters respecting endangered species on which the Minister requests its advice."²⁰⁴ The committee is not responsible for enforcing any provisions within the Act, and there are no binding provisions that require the Minister to take action with regards to any recommendations made by this committee.

v. The breadth of the **Prohibitions** within each Act or Bill are indicative of the level of governmental commitment to habitat protection.

Provisions that relate to prohibitions surrounding the possession or taking of wildlife species are found within many sections of the *Wildlife Act*.²⁰⁵ Those provisions would apply to any designated endangered species and would protect a species from possession or trafficking. Likely because this legislation was initially designed to incorporate big game management and removals, there is no specific provision for the protection of endangered species from killing, hunting or trapping. Instead, the emphasis is on which game species can be hunted, when, and where. Prohibitions relating to the protection of habitat are not generic, and such provisions can be found in association with the designation of various conservation areas only. Critical habitat

²⁰³ Ibid. Section 9(1).

²⁰⁴ Ibid. Section 9(1).

²⁰⁵ Ibid. Sections 54, 57, 58, 59, 61.

of species at risk is not protected under this Act, unless that critical habitat coincides with a provincially protected area.

vi. The **Enforcement Provisions and Penalties** under the Bill or Act illustrate the potential enforcement ramifications and how enforcement and penalties may be applied to landholders.

Wildlife or conservation officers²⁰⁶ "may, without a warrant, enter on or pass over any land in the execution of [their] duties."²⁰⁷ Such officers are not authorized to enter "any building, tent or other structure or [to] search or seiz[e] any property on the land"²⁰⁸ unless they "believe that subject animals or endangered organisms may be found at the time of entry, other than the living quarters of a private dwelling . . . "²⁰⁹ Thus, in the event of an expected crime, Wildlife Officers in Alberta have similar capacities to enter private land as their counterparts in Nova Scotia and Manitoba.

Fines under this legislation do not distinguish between corporations and individuals, instead fines are set at "not more than \$100,000 or to imprisonment for a term of not more than 6 months, or both"²¹⁰ for an offence against an endangered species. Penalties and convictions within this legislation are cumulative whereby "each single act of selling, buying, bartering,

²⁰⁶ Ibid. Section 3(1) and (2).

²⁰⁷ Ibid. Section 65(1).

²⁰⁸ Ibid. Section 65(2).

²⁰⁹ Ibid. Section 71(1).

²¹⁰ Ibid. Section 92(4).

soliciting or trading . . . constitutes a separate act of trafficking in wildlife,²¹¹ and fines imposed "involving more than 1 animal may . . . be computed in respect of each animal as though each animal had been the subject of a separate count."²¹²

vii. The **Mechanisms for Conservation on Private Land** hold the greatest promise with regards to protecting the interests of landholders. This analysis includes an examination of the various legislative tools in the form of incentives and opportunities that governments have developed in order to support the needs of landholders.

"The *Wildlife Act* establishes the Fish and Wildlife Trust Fund for "funding . . . prescribed programs for the protection and enhancement of fish and wildlife and their habitats."²¹³ Specific to endangered species, the trust fund can be used to protect species, to protect habitats, and to promote conservation. As well, compensation is to be provided for damage caused by wildlife and for the costs to prevent such damage.

Of interest with regards to Alberta's legislation is the fact that it is not independent specific legislation, and that application to private lands is accessible through the regulations rather than through specific provisions. Almost all of the interview respondents rely upon grazing leases with the Alberta government for additional cattle range. These leases are also vulnerable to alteration at the Minister's discretion. As with the other legislative analyses, the analysis of the

²¹¹ Ibid. Section 61(3).

²¹² Ibid. Section 90.

²¹³ Ibid. Section 6(a).

Alberta *Wildlife Act* is compiled and examined with the results of the other analyses and provided in the next section.

4.4 Summary of Most Relevant Provisions

Each provincial Act, as well as the federal Bill, addresses issues surrounding the protection of species at risk with unique provisions.

The result of the analysis of each of these Acts or Bills is compiled and provided in the following three-page table.

i.	What is included in the Preamble or the Purpose to demonstrate political commitment to species at risk protection and to supporting landholders on private land?
Federal SARA (C-5)	<ul style="list-style-type: none"> • Commits to the protection, management and recovery of species at risk and their habitats; • Recognizes stewardship initiatives and compensation as being important to the process; • Purports cooperative procedures and the value of community knowledge and socio-economic interests.
Nova Scotia E.S. Act	<ul style="list-style-type: none"> • Provides for listing, protection, and conservation of species and their habitats; • Considers this legislation as a component of the province's overall strategy to use bio-resources sustainably; • Purports the importance of non-regulatory means including partnerships, stewardship and education.
Manitoba E.S. Act	<ul style="list-style-type: none"> • Provides for designation, listing, protection, and enhanced survival opportunities for listed species.
Alberta Wildlife Act	<ul style="list-style-type: none"> • Nothing to address conservation issues surrounding species at risk.
ii.	How does this Act/Bill apply on private lands, and what is the scope of integral definitions of "species," "habitat," and "critical habitat"
Federal SARA (C-5)	<ul style="list-style-type: none"> • Binding upon "competent" Minister to federal, provincial or private lands, if authorized by the Minister; • Broad definitions for "species," "habitat," and "critical habitat".
Nova Scotia E.S. Act	<ul style="list-style-type: none"> • Binding upon both federal and provincial governments, applies to private lands only when Minister considers public lands to be "inadequate" for the critical habitat needs of a species; • Broad definitions for "species," "habitat," and "critical habitat".
Manitoba E.S. Act	<ul style="list-style-type: none"> • Binding upon provincial government and applies to species living on either public or private lands; • Broad definitions for "species," "habitat," and "critical habitat."
Alberta Wildlife Act	<ul style="list-style-type: none"> • Applicable to private lands through regulations; • Broad definition for "species," but habitat protection is not provided for within this Act.

**Landholders, Habitat and Species at Risk Legislation
in the Canadian Context**

Fiona Boulet

CHAPTER 4

Current and Proposed Canadian Legislation

iii.	Is paramountcy addressed in the Act/Bill, and what does it mean in this context?
Federal SARA (C-5)	• Paramountcy is not addressed, this legislation could be superseded by other legislation.
Nova Scotia E.S. Act	• This Act prevails unless other legislation states otherwise.
Manitoba E.S. Act	• This Act prevails unless other legislation states otherwise.
Alberta Wildlife Act	• Paramountcy is not addressed, this legislation could be superseded by other legislation.
iv.	What action is the government bound to under this Act/Bill?
Federal SARA (C-5)	• All relevant actions under the Bill are discretionary.
Nova Scotia E.S. Act	• Bound to create advisory committee follow recommendations for creating a recovery team and recovery plan; • Bound to compensate landholders whose lands are designated as critical habitat.
Manitoba E.S. Act	• Bound to appoint an advisory committee, other actions are discretionary.
Alberta Wildlife Act	• Bound to create an advisory committee.
v.	What is prohibited with regards to habitat?
Federal SARA (C-5)	• Habitat prohibitions only apply after discretionary process to designate critical habitat.
Nova Scotia E.S. Act	• Automatic protection of den site when species listed; • Protection of designated critical habitat, as well as proposed designated habitat.
Manitoba E.S. Act	• Habitat prohibitions are not automatic.
Alberta Wildlife Act	• No provisions specific to habitat protection.
vi.	What enforcement provisions would be applicable to landholders?
Federal SARA (C-5)	• Max. summary convictions of \$300,000 (corporate) and \$50,000 (individual); fines are cumulative; • Defence through demonstration of due diligence with sentencing considerations (intent / reckless actions).
Nova Scotia E.S. Act	• Max. summary convictions of \$1,000,000 (corporate) and \$500,000 (individual); fines are cumulative; • Defence through demonstration of due diligence.
Manitoba E.S. Act	• Max. convictions of \$50,000 (corporate) and \$5,000 (individual); fines are cumulative; • No mention of defence options, due diligence would apply automatically.
Alberta Wildlife Act	• Max. convictions of \$100,000 for all; fines are cumulative; • No mention of defence options, due diligence would apply automatically.

vii	Which mechanisms are specifically intended to support the concerns of private landholders?
Federal SARA (C-5)	<ul style="list-style-type: none">• Compensation may be available for those who suffer "extraordinary impacts;"• Landholders may be consulted at all stages of process and stewardship opportunities are encouraged;• Landholders must be consulted with regards to recovery plans;• Exemption permits are available if negative activities support the species at risk, or are merely incidental.
Nova Scotia E.S. Act	<ul style="list-style-type: none">• Management plan and recovery teams must include a "diversity of expertise;"• Critical habitat designations on private lands are a last resort and compensation must be provided;• Landholders may appeal compensation amounts to a separate body;• Exemption permits are available for human health and safety reasons, in addition to scientific reasons.
Manitoba E.S. Act	<ul style="list-style-type: none">• Minister may purchase private lands, but may also expropriate;• Exemption permits are available for scientific purposes.
Alberta Wildlife Act	<ul style="list-style-type: none">• Compensation may be available through a trust fund.

4.5 Chapter Conclusion

One hopes that with the eventual proclamation of federal endangered species legislation in Canada, the protection received by individual species and populations will not be contingent upon the political jurisdiction wherein critical habitat lies. However, different provincial statutes and provisions currently represent a broad range of available protection for species at risk and it may be difficult for the federal Minister to overcome these discontinuities. Included within Bill C-5 is the "federal safety net" whereby Bill C-5 will apply to provincial lands when the federal Minister believes that species protection provided under provincial laws is inadequate. Again, applying the federal safety net is discretionary and the Minister must choose whether or not the application of Bill C-5 is both appropriate and necessary.

There is much to be learned from current and existing Canadian legislation. Each of the Acts and Bills provide various provisions designed to support the needs and interests of landholders. For example, the proposed federal legislation recognizes the importance of stewardship initiatives, compensation, and the value of community knowledge. Nova Scotia has addressed landholder concerns by confirming that private land will only be designated as critical habitat when Crown lands are found to be inadequate. Nova Scotia has also included a provision that makes a government compensation payment necessary when restrictions are applied to private lands. In Manitoba, the legislation provides for exemptions for developments to continue even after the designation of critical habitat has been placed on those lands, a provision that could potentially be expanded to support agricultural landholder needs. The Alberta provisions do not

distinguish between the corporate and individual entities when assigning penalties so that a rancher who has chosen to incorporate a family ranching operation for economic reasons, will not be penalized through major fines that have been designed to apply to corporate multinationals.

The results of the legislative analyses in this Chapter were consolidated with the results of the following Chapter to create the final recommendations in Chapter 6. In order to determine the most appropriate methods to encourage landholder support of federal species at risk legislation, selections from current and proposed Canadian legislative constructs were compiled with the issues determined to be of importance to agricultural landholders.

5.1 Chapter Summary

In this Chapter the researcher determined the actual concerns of the study group through the results of the respondent interviews. This provided the required knowledge to compile recommendations for legislative and policy changes with regards to the federal Species at Risk Act. Those changes offer the potential to encourage large agricultural landholders to support modified legislation in accordance with policy changes. The discussion and analysis provided in this Chapter build towards a more effective federal Species at Risk Act by offering suggestions to make Bill C-5 more appealing to agricultural landholders.

Section 5.2 encompasses two major sources of influence for the study group. First, the influence of the U.S. Act (the ESA) and its affects upon American agricultural landholders was briefly summarized.²¹⁴ This influence has created certain perceptions and biases amongst Canadian agricultural landholders, perceptions and biases that must be addressed by Canadian authorities in order to effectively encourage local landholder support of Bill C-5. Secondly, much has been written on the SARA²¹⁵ from both the viewpoint of agricultural landholders, as well with agricultural landholders as the intended audience. A literature review is provided here to highlight the main issues presented in such writings. Again, the views presented within this literature have influenced the landholders in this study, and government authorities in Canada

²¹⁴ Please note that a discussion of the relevant provisions of the ESA is provided in Chapter 3. The discussion here is more specific to information found in the resources of agricultural organizations, agriculturally based texts, and comments from both key informants and interview respondents.

²¹⁵ The researcher has compiled literature directed at both Bill C-33 and Bill C-5 in this section due to the similarity of the provisions within these two most recent proposed federal Species at Risk Acts.

need to consider the relevant perceptions and concerns prevalent within the agricultural community.

Section 5.3 explains how the influence of U.S. landholders, and the available Canadian literature was incorporated into the study questions. This section also explains the rationale for developing the question set and the process necessary for such development. The discussion on process is followed by a summary and analysis of the interview results. The summary and analysis illustrates that the major concern of the study group with regards to federal species at risk legislation is some form of assured compensation, that the respondents hold a clear distrust of the federal government and are not interested in working with representatives from Ottawa, and that the respondents have a collective misunderstanding of certain key concepts.

5.2 Landholder Influences

There is a great deal of information about federal species at risk legislation available to Canadian agriculturally-based landholders designed to address their specific needs and interests. The respondents in this study informed the researcher that they, to a large extent, base their information on literature and presentations available through the Canadian Cattlemen's Association, the Western Stock Growers' Association, and the Alberta Cattle Commission.²¹⁶ In the agriculturally-based Canadian literature, there appears to be a common perception that,

²¹⁶ This is the result of responses to Question 1 which specifically asked respondents about their information sources.

with regards to endangered species' habitat, "there are two property rights pertaining to the same piece of land: the public has the endangered species which requires habitat; and, the landowner has the habitat . . . "²¹⁷ That is, the public will gain by the work of the landholder because public interest will be met through the effective conservation management of the land which results in more secure habitat. This leads to a perception that landholders who maintain habitat for species at risk should be financially compensated by the Canadian public. Or, at the very least, they believe they should not be at risk of being penalized for maintaining habitat. This perception is visible among the interview respondents who hold a collective belief that the government should be obligated to pay the majority of costs associated with the protection of species at risk.

All of the views of the respondents are not necessarily based upon balanced arguments and many tend to be based more upon perceptions and suspicions, than upon legal reality. However, it is beyond the scope of this MDP to conduct an analysis of the basis of the respondents' views and concerns. The intent of this MDP is instead to report such views and concerns, and to provide recommendations for addressing these concerns in order to enhance support of federal species at risk protective legislation. Whether the respondents in this study hold real or perceived concerns, those concerns still influence the willingness of the respondents to support federal species at risk legislation.

²¹⁷ Ward, Norman. 2000. "Species at Risk Act (Bill C-33): Submission of the Western Stock Growers' Association (WSGA) to the House of Commons Standing Committee on Environment and Sustainable Development." Western Stock Growers' Association: Fort Macleod, AB. p.4

5.2.1 U.S. influence and anticipated concerns for interviews

The experiences of U.S. landholders under the ESA have varied greatly and a detailed review of all of those experiences is inappropriate here. It is appropriate to include an illustration of the experiences discussed within the agriculturally-based literature because, although each of the Alberta respondents may not understand the American Act explicitly, each of them had heard stories about landholder hardships under provisions of the ESA.²¹⁸ There is little doubt that experiences from the U.S. are influencing the perception and concerns of the study respondents in addition to others involved in the Canadian debate.

The key impact of the ESA on landholders ". . . is the direct-use restraint -- the government's determination that an activity on private land must be barred, or at least modified, to avert injury to wildlife or its habitat."²¹⁹ Once the direct-use restraint has been applied to designated critical habitat on private land, the capacity of the private landholder to manage and determine appropriate use and development has been altered by some amount. Instead of the landholder determining to graze livestock, to cut forests, or to cultivate landscape, the government authorities must determine what activities are appropriate in accordance with the needs of the endangered species in question.

²¹⁸ This is clear through the results of Question 1 where respondents were asked specifically about their knowledge of the ESA.

²¹⁹ Meltz, Robert, Dwight H. Merriam, and Richard M. Frank. 1999. *The Takings Issue: Constitutional limits on land use control and environmental regulation*. Island Press: Washington, DC. p.392.

Multiple stories of landholder hardships have coloured the views of landholders in this study, as well as the writings on the issue of landholder rights and Canadian species at risk legislation. Whether or not such landholder hardships are reflective of the application of the ESA upon private landholdings is not relevant to this study. What is relevant is that Canadian authorities developing Bill C-5 must incorporate mechanisms to overcome the concerns of landholders who fear Canadian legislative provisions will have a similarly detrimental affect upon their capacity to manage their landholdings. Canadian legislators can search out experiences under the ESA of conciliatory and cooperative incidences, but these legislators will have to ensure that Bill C-5 is seen to "respect the . . . rights of the people it needs to help in bringing those species back to viability . . ." ²²⁰ by providing "sufficient incentives for all interested parties to strike creative bargains . . ." ²²¹ Canadian landholders are concerned that the command and control approach of the legislation in the U.S. will be incorporated into Canadian legislation. Therefore, many landholders fear that Bill C-5 will place limits upon their rights as individuals and property managers. On the other hand, "[r]anchers will participate . . . to promote wildlife if economic impacts are shared with the general population" ²²² and if the ranchers do not feel that they are supporting the interests of all other Canadians through their individual efforts.

²²⁰ Madsen, Grant. 1998. "Putting a human face on endangered species legislation." A paper for the Conference held by the Fraser Institute of Vancouver, BC. Held in April, 1998.

²²¹ Tarlock, A. Dan. "Western water rights and the act." In Kohm, Kathryn A. (ed.). 1991. *Balancing on the Brink of Extinction: the Endangered Species Act and lessons for the future*. Island press: Washington DC. p.167.

²²² Manitoba Cattle Producers Association (MCPA). 2000. "Manitoba Cattle Producers Association response to Bill C-33, Species at Risk Act." MCPA: Winnipeg, MB. p.3.

5.2.2 Literature review of influential Canadian media

This section reports the viewpoints of those who have had the greatest capacity to influence the landholders in the study region.²²³ The researcher has examined local media and obtained literature and information from local agricultural agencies and organizations. According to the literature examined here, issues for Canadian landholders tend to revolve around similar concerns as landholders in the U.S.: concerns surrounding financial security and the landholder's capacity to determine land-use. Within the literature the most frequently noted issues of concern to landholders are: (i) compensation for both stewardship and any altered access or land management decisions to landholdings,²²⁴ (ii) the value of fines currently within Bill C-5, (iii) the inclusion of the need for a due diligence defense, and (iv) the lack of a provision that distinguishes between wilful and accidental acts.

It is important to note that not all literature and information available to landholders is written without bias. There are many instances when the text of the legislation is exaggerated or where emphasis is placed upon a feeling of cynicism towards the government. In addition, writers utilise leading and inflammatory terms to accentuate their arguments. For example, in discussing the lack of compensatory provisions, a representative for the Western Stock Growers' Association noted that the "feds can steal your land [because] there are no constitutional

²²³ The most common sources of information came from the Canadian Cattle Association, the Western Stock Grower's Association, and the Alberta Cattle Commission. Information comes to the interview respondents in the form of literature, regular and special meetings, training sessions, and conversations with organizational representatives.

²²⁴ In much of the agriculturally-based literature, and in many of the discussions with respondents, stewardship and compensation issues were discussed together as one topic. This issue is explored further in Section 6.3.

property rights in Canada."²²⁵ While Canada does not have a specific clause protecting property rights within its Constitution, that certainly does not lead directly to an ability on the part of the federal government to "steal" an individual's land. Local, rural newspapers have written articles describing how "taking care of that marauding fox that keeps getting into your hen house might just put you first into bankruptcy and then into the slammer."²²⁶ And the Calgary Herald has noted that a "farmer . . . who plows under the last half-dozen Alberta speckled furbish louseworts while preparing a field might well find himself faced with a criminal charge and defending himself in court from the charge that he knowingly squashed the beasties."²²⁷ This type of exaggeration can lead to incorrect conclusions amongst readers and followers of such literature, conclusions that are found in some of the comments made by interview respondents.

The lack of non-discretionary, and full market value compensation provisions receives the most attention in the agriculturally-based literature. In fact, compensation is so important that "[t]he Western Stock Growers' Association believes . . . that compensation is not about dollars; [but] . . . about principle."²²⁸ This principle is reinforced by the Canadian Cattlemen's Association, which concluded that compensation "is critical to success or failure of efforts to protect species at risk when those species depend on habitat on private land."²²⁹

²²⁵ Pope David. 2000. "Update to Bill C-33." Western Stock Growers' Association: Okotoks, AB.

²²⁶ Gray, Mitchell. 2000. "Taking care of Bambi." In the Didsbury Review. April 26, 2000.

²²⁷ Stockland, Peter. 1999. "Green meanies play political protection game." In the Calgary Herald. Thursday, October 28, 1999, p.A17.

²²⁸ Western Stock Growers' Association. 2001. "Brief to the Standing Committee on Environment and Sustainable Development, Bill C-5." WSGA: Okotoks, Alberta.

²²⁹ Fox, Glenn. 2000. "Principles for fair compensation under the proposed Canadian Federal Species at Risk Act." Canadian Cattlemen's Association: Calgary, AB.

The provisions within Bill C-5 are a concern because "[t]he Minister may . . . provide compensation to any person for losses suffered as a result of any extraordinary impact . . ."²³⁰ Since this provision is discretionary, Bill C-5 requires landholders to rely upon the federal Minister's discretion to determine who will receive compensation, when that compensation will be paid, and how much compensation will be made available. The literature examined provides for a consensus around the fact that, at the very least, "[c]ompensation must be given [as a way of acknowledging] . . . value for caring for species at risk"²³¹ on one's owned or leased land. And that "[t]here should be provisions made to compensate landowners whenever they suffer a loss of income earning capacity . . . even in cases where voluntary stewardship activities have been undertaken."²³²

The proposed maximum for fines under Bill C-5 are frequently discussed in the agriculturally-based literature. Under Bill C-5, maximum fines for summary convictions are \$300,000 for corporations, and \$50,000 for individuals. After summary convictions, fines can increase to \$1,000,000 for corporations and \$500,000 for individuals. Since most of the respondents in the study group have had their ranches incorporated, the literature implies that the largest fines

²³⁰ *Species at Risk Act* (proposed). 2001. House of Commons of Canada. S.62. Please note that the federal Minister of the Environment commissioned Dr. Peter Pearse to produce an academic report regarding compensation and to provide recommendations for Bill C-33. This report is discussed further in Chapter 6, Section 6.3.

²³¹ *Supra*, Note 218. p.6.

²³² Western Canadian Wheat Growers Association. 2000. "Presentation to the House of Commons Standing Committee on Environment and Sustainable Development." WCWGA: Calgary, AB.

would be applicable to them in all cases.²³³ Further, the Bill states that the fines are cumulative when more than one individual of a species is involved, more than one species is involved, or when an activity in question occurs over several days. As expressed in the literature, cumulative fines could be interpreted to mean that an "accidental grass fire, which destroys a patch of endangered plants, could result in unimaginable consequences. . . . [meaning that] the destruction of a single plant could conceivably result in multiple fines for the many seeds which it carries."²³⁴ Through the literature, one learns that a charge incorporating multiple fines of \$1 million would put any Canadian rancher out of business.

The fact that the legislation provides for a due diligence defence²³⁵ is the third issue most frequently highlighted by authors of this literature. The implications of a due diligence defence are explained by a Canadian "think tank" in the following way. In order to safeguard a landholder from being convicted of a crime under the SARA, the landholder ". . . will have to undertake costly periodic environmental audits to tally species types and numbers, and demarcate nests or burrows, food sources and migration trails."²³⁶ A voice for ranchers in the region suggests that "[n]o property owner would place himself in a position where he invited species onto his land knowing that he could so easily be drawn into a judicial nightmare."²³⁷

²³³ This was presented to the researcher through discussions with several key informants and interview respondents.

²³⁴ *Supra*, Note 228.

²³⁵ The legal nature of due diligence defences and the implications is discussed further in Chapter 6, Section 6.3. Briefly, due diligence defences are applied to strict liability cases where criminal intent is not a concern. In these cases, an individual or organization charged must only demonstrate that standard industry procedures and practical care were taken as precautions to avoid the incident occurring. Worth noting is the fact that most Canadian environmental legislation is that of strict liability.

²³⁶ Smith, Danielle. 2000. "SARA could put property owners at risk." In *Calgary Herald*. April 17, 2000. p.A10.

²³⁷ *Supra*, Notes 228,234.

And, an agricultural association in Saskatchewan suggests this clause in the legislation may lead to "the possible criminalization of normal farming practices."²³⁸ While not entirely incorrect, these explanations tend to perpetuate landholder fears by exaggerating the "worst-case" scenario of any due diligence case. In turn, such writers emphasize the potential that Canadian landholders may choose to remove species at risk rather than maintain natural and healthy habitats because the landholders fear criminal charges associated with having species at risk found on their land.

The lack of a specific distinction within the Act with regards to determining a wilful prohibited activity from an activity that is unintentional, is the fourth major concern discussed in the literature. This issue is not represented with the same flair as the three prior issues discussed here, and the literature tends to provide opportunities for compromise and solutions. Thus, the Manitoba Cattle Producers Association "suggests that giving producers information to identify species and habitats of concern should be a first step . . . [and that] clear communication, goodwill, and trust will minimize many problems."²³⁹ This need to freely share information is also supported by other agricultural representatives including the Western Stock Growers' Association and the Canadian Cattlemen's Association. The lack of distinction in Bill C-5 between wilful and accidental acts damaging to species at risk is certainly an issue. In this case

²³⁸ The Agricultural Producers Association of Saskatchewan (APAS). 2001. "Brief to the Standing Committee on Environment and Sustainable Development." APAS: Regina, SK

²³⁹ Supra, Notes 218, 231. p.3.

the available literature tends to emphasize the need for education and the sharing of information so that accidental damage will be avoided.

5.3 Interview process and results

Various stages of the researcher's literature review, analytical evaluation, and key informant interviews led to the formulation of a final group of questions intended to produce a set of qualitative data.

5.3.1 Rationale and process to determine question set

The priority for the researcher was to develop a set of qualitative data capable of providing instruction with regards to the development of national species at risk legislation in Canada. The researcher wanted to learn from agricultural landholders managing large landscapes in southwestern Alberta how they feel about the current process to develop Bill C-5, as well as if they have recommendations capable of making this Bill more palatable to them. To best accomplish this goal, the researcher chose to speak to individuals who manage such landscapes, and are well-versed on the relevant provisions currently within Bill C-5. For these reasons, the researcher chose semi-structured interviews with informed respondents. The structure of the interviews provided some consistency for all of the interviews, and for the recording of the data. The structure also permitted each interview respondent to discuss openly his/her opinions, beliefs, and concerns regarding Bill C-5 because respondents were not limited by precise questions or multiple choice response options.

Initially, and in accordance with the literature review and the analytical evaluations, the researcher developed a list of draft questions designed to determine issues of concern to the study group. In order to avoid bias, and to ensure the researcher incorporated all pertinent issues within each interview, this draft set of questions was examined by several of the key informants. After incorporating the recommendations of the key informants, the researcher developed a final set of questions for the respondent interviews. Questions were then compiled into two sets.

The first set of questions consisted of eight open-ended questions designed to lead to a semi-structured conversation between the researcher and the interview respondent. The second set of questions consisted of several options federal representatives are currently considering as ways to increase voluntary support from landholders, as well as a set of three options to determine the interview respondents' preferred official source of information (federal, provincial, or community representatives). Each interview respondent was asked to rate the set of options on a rating scale of 1 to 5, with 1 representing an option that would discourage their participation in conservation efforts under federal legislation. The researcher notes that this scale did not lead to a technically correct Likert scale, but she believes that the response design was reasonable and similar to a traditional Likert scale. The results here do not provide an average for a random sample. However the results do indicate some important collective viewpoints of the respondents chosen for this study. In addition, the results of this scale were

intended to complement the results of the open-ended questions of each interview. They were not intended to be interpreted independently.

Approximately 50 percent of the interviews were conducted by telephone, and the remainder were conducted on the ranch site. At the end of each respondent interview, the researcher asked the respondent if there were any pertinent issues that had not been addressed within the interview questions. This question was incorporated into the interviews in order to ensure that the researcher did not neglect to discuss an issue of importance to the respondents in the study. As none of the respondents identified a new issue or concept at this point in the interview, the researcher believes that the set of interview questions incorporated all issues of major concern to the interview respondents.

Key informants and interview respondents for the study were chosen in accordance with several of the researcher's needs. The initial literature review highlighted several local organizations involved in the stakeholder discussions surrounding the development of national species at risk legislation. Representatives from three of these organizations (the Canadian Cattlemen's Association, the Canadian Parks and Wilderness Society, and the Western Stock Growers' Association) were key informants for this project and assisted the researcher with the development of the interview questions and with the provision of an initial list of potential interview respondents. Representatives from two organizations working in the study region on issues of landscape protection and wilderness conservation (the Central Rockies Wolf Project

and the Southern Alberta Land Trust Society) also provided the researcher with similar assistance. In addition, some of the key informants assisted the researcher by ensuring the final list of total respondents was appropriate and inclusive. The researcher believes that interviews with informed respondents associated with these distinct organizations encompassed an appropriate range of perspectives for this study. That is, the researcher was able to speak to landholders holding multiple perspectives from those supportive of legislated environmental protection to those supportive of no legislated restrictions to land use on privately held land. Interview respondents were not chosen in a random manner, but were determined through a process of recommendations. The list of interview respondents was developed through two phases. The first interview respondents contacted were those recommended by the researcher's key informants. Secondly, each interview respondent was asked to provide the researcher with the names of three other potential interview respondents. There was a great deal of cross-over with the provision of these names because many of the respondents recommended the same people.

The researcher chose to conclude the interview process in accordance with pre-determined parameters. Any recommended contacts who did not respond to four (4) telephone calls from the researcher, and any recommended contacts who chose not to participate, were removed from the researcher's list. Interviews were then concluded once the recommended names provided to the researcher by interview respondents were no longer new names. That is, the names of other appropriate respondents recommended by the latter interview respondents were

names of individuals already contacted by the researcher. The researcher is confident that the final data set encompasses qualitative information reflective of a diverse group of interview respondents from within the study region.

Before all interviews, each participant received an interview consent form accompanied by background information on this project, and the guarantee of anonymity. In order to confirm accuracy, the researcher provided a type-written copy of the notes taken during each interview to each of the interview respondents. Only two respondents contacted the researcher to clarify minor details.

5.3.2 Analysis of interview process and discussion of problems encountered.

Given the chosen methodology with personal semi-structured interviews, the researcher's credibility is considered more important than if the methodology had called for a random survey.²⁴⁰ The researcher entered into this project aware that her past experience and association with the Canadian Parks and Wilderness Society might hinder her capacity to meet with local agricultural landholders. However, this issue was not considered to be a problem by any of the key informants, and the researcher is unaware of any concerns from interview respondents.²⁴¹ Each interview respondent willingly answered all the questions and did not

²⁴⁰ Robson, Colin. 1995. *Real World Research: A resource for social scientists and practitioner-researchers*. Blackwell Publishers Limited: Oxford, UK. p.160.

²⁴¹ After several respondent interviews were completed, the researcher and the respondent spoke more freely about issues surrounding conservation in general. In these discussions, even after the researcher had highlighted her personal background with conservation advocacy, none of the respondents expressed a concern regarding the researcher's capacity to complete this project.

appear to respond negatively to the researcher. The researcher does not believe that the results of this study are skewed in any way towards her own personal bias, as the questions were explicitly designed not to lean towards a conservation bias.

Many of the interview respondents reflected a general distrust of government authority, and in particular of the federal government. It is possible that their distrust of such authority has led them to become both disenchanted and disinterested in the current process around Bill C-5. These people could then have been poor respondents in that, because their cynicism has led them to have no faith in the process, they may not have cared about their responses to the questions. Most of the respondents in this study group are over 50, with grown children and/or grandchildren. It is feasible that because of their current stage of life, and the realization that retirement could be imminent, financial issues play heavier on their minds than if the study group represented a younger age group. One of the respondents informed the researcher that he had only grade seven education and therefore was a slow reader. The researcher is aware of the possibility that other respondents could have completed minimal formal education as well, and perhaps some did not clearly understand the information package they received in advance of their interview. Since the respondents clearly articulated their thoughts and opinions during the interviews, the researcher believes that most of the respondents did not lack the ability to understand the information provided to them.

The researcher also noted that all of the recommended respondents were men. Although this might be inappropriate in many studies, given the lifestyle of ranching households in Alberta, the researcher does not consider this a concern. The respondents represented a close-knit community whereby many of the interview respondents had spoken to their friends and/or neighbours who had already been interviewed.²⁴² While it is feasible that the interview respondents could have colluded and pre-determined their responses to the interview questions, the researcher does not believe that to be the case. The interview respondents tended to be keen to speak about their individual thoughts and concerns, and often noted how certain friends or neighbours would not likely support the views the respondent had expressed during the interview.

Due to the nature of this case study, and the specific scope of this project, the conclusions represent a relatively small number of interview respondents. Again, the researcher believes that the choice to interview fewer individuals by emphasizing the respondents' expertise in the issue of species at risk legislation remains a valid trade-off to a higher number of interviews of a less complex nature. The results here reflect the views of individuals who have knowledge of the federal process to develop national species at risk legislation, and how those provisions might be applied to their landholdings.

²⁴² Frequently when the researcher asked a respondent to provide names of other potential interview respondents, the respondent speaking knew of several other individuals who had already been interviewed.

5.3.3 Results summary

During the opening discussion before the questioning process began, the researcher learned that all-but two of the interview respondents rely upon both privately owned and leased lands to maintain their cattle operations.²⁴³ The two who did not access leased lands highlighted this fact to the researcher and commented on how they were very unusual. This fact has important consequences with regards to compensation issues because, although the federal government is considering applying compensation to leased lands, the regulations surrounding compensation on private land may very well be different from the regulations applicable to leased lands.²⁴⁴

Question 1

Question Asked	Part A -- Where has your knowledge regarding federal endangered species legislation come from? Part B -- What do you know about the Endangered Species Act of the U.S.? Part C -- Does your information provide you with the complete spectrum of viewpoints regarding the SARA? And, are you concerned about the bias presented in the information you depend upon?
Responses Provided	Part A -- Overall reliance upon resources from agricultural organizations. Part B -- All respondents have heard stories of ESA provisions resulting in major negative implications for any landholders involved. Part C -- Respondents have minimal concern about bias in the information they rely upon.

Question One led the researcher to several important conclusions. The respondents rely first and foremost on agricultural publications, seminars and representatives for their information on

²⁴³ Please note that leased grazing lands managed by the respondents include both forestry (green zone) or multi-use (white zone) lands. Distinction between the two zones is not relevant to this study as Bill C-5 is federal legislation and will not likely distinguish between various forms of provincial agreements.

²⁴⁴ The federal Minister of the Environment commissioned Dr. Peter Pearse to produce an academic report regarding compensation and to provide recommendations for Bill C-33. This report is discussed further in Chapter 6.

the species at risk legislation. The publishing organizations that were specifically mentioned are the Western Stock Growers' Association, the Alberta Cattle Commission, the Canadian Cattlemen's Association, and (to a lesser degree) the United Grain Growers. Although some respondents had read the legislation themselves, they had generally done so after learning about issues and concepts from agricultural representatives and programs. That is, those that had read the legislation had focused upon those provisions and issues that were highlighted in the writings of others. Worth noting is that legislation can be difficult to read and clearly comprehend for anyone. It comes as no surprise that respondents look for guidance to understand the provisions within the SARA and to grasp the implications of these provisions. The difficulty with understanding the legislation opens up a clear path for agricultural organizations and representatives to offer explanatory information the respondents, but also to guide them in accordance with any agenda such organizations may have.

Secondly, the researcher questioned respondents with regards to their knowledge and understanding of the U.S. Endangered Species Act. Only one of the respondents had actually read any of this Act, and only two had personal connections with people who had been affected by the ESA. However, every one of the interview respondents had heard landholder horror stories where the ramifications of having provisions of the ESA applied to private land had led to tremendous personal losses on the part of the private landowner in question. A typical comment was, "[w]e have watched the lunacy that has gone on [in the U.S.]; it locks up the

abilities of local people to work on the land.²⁴⁵ Each of the respondents was also familiar with the "shoot, shovel and shut-up" response,²⁴⁶ and several expressed concern about this attitude becoming a chosen response for them if similar provisions of Canadian legislation could be applied to their lands.

Thirdly, the researcher asked if the interview respondents felt the information they relied upon was biased, and if that presented a concern. Some of the respondents appreciated the fact that the information they relied upon was reflective of their needs and concerns, and felt this to be appropriate. In fact, the comment that "I don't consider I am victimized by lack of information,"²⁴⁷ was reflective of most of the respondents. Only three of the respondents considered bias as a potential concern and had taken steps to understand the environmental perspective on the issue of species at risk, or to read the Bill and other material from the federal government more carefully themselves.

Question 2

Question Asked	Part A -- Have you noticed a change in wildlife distribution in your area over the last 10 to 20 years? Part B -- Do you know what species are listed as at risk in this area, and can you recognize them?
Responses Provided	Part B -- Respondents are not confident with capacity to identify species and habitats on their land. Note: Respondents spoke of a need to keep location and existence of listed species confidential.

²⁴⁵ Interview Respondent #5.

²⁴⁶ The "shoot, shovel and shut-up" response occurs when U.S. landholders are so fearful of the application of ESA provisions that they remove (kill) any listed species on their land, or ensure that their land management practices do not encourage the development of habitat for any listed species.

²⁴⁷ Interview Respondent #3.

The relevant part of this question surrounded the capacity of interview respondents to identify species at risk on their lands. Very few of the respondents felt that they would be able to identify all species currently listed at risk without either a great deal of reading, or some outside assistance. In addition, none of the respondents felt certain about their capacity to recognize critical habitat and what would be required to maintain that habitat. One of the respondents illustrated the severity of their concern by noting that "[he has] a Masters Degree in Animal Science and [he] need[s] help with identifying species and habitats."²⁴⁸ Clearly there is a need for further education of these landholders if species at risk are going to be safely maintained on their lands and if these landholders are going to be sure they are not unknowingly committing a crime against a species at risk or its habitat.

Of additional interest here is that those respondents who spoke of listed species that they are currently aware of on their land, all qualified their comments by reminding the researcher of her promise of confidentiality. Each of these respondents was proud to have habitat for these species and spoke with enthusiasm about seeing the species, but preferred that no one else be made aware of the existence of those species on their lands. The respondents' concerns were two-fold. They felt that such knowledge would send interested, but uninvited, observers onto their land. These visits might then lead to the application of species at risk provisions upon their lands once legislation is passed in Canada. One of the respondents noted that "[t]he burrowing

²⁴⁸ Interview Respondent #12.

owl has scared the devil out of the farmers"²⁴⁹ because some of the regional landholders have previously been part of a national burrowing owl project,²⁵⁰ and are now fearful that legislative restrictions may be applied to their landscape because government officials know where the owls were nesting in the past. These landholders are concerned that habitat protection may supersede their personal management practices and ranching interests on their own lands.

Question 3

Question Asked	Part A -- If the federal government chooses to take the lead and work with local landholders on initiatives to protect endangered species, what do you think they should do to gain your cooperation? Part B -- What are your thoughts on working with other organizations (agricultural groups, community groups, or environmental groups)?
Responses Provided	Part A -- Knowledge that compensation is available, and understanding restrictions to qualify for it. Note: Five respondents declined to answer the question because they believe species at risk protection is not within the federal government's jurisdiction, and therefore not federal authority. Part B -- Respondents are willing to work with others on conservation initiatives, but need to know the credentials of who they are working with and if such people have a personal agenda.

Here the researcher was hoping to receive some recommendations on how the federal government might take the lead to encourage landholder participation in species at risk legislation. This question was intended to determine the respondents' capacity to, and interest in, participation in a federal program to protect species at risk and their habitat.

²⁴⁹ Interview Respondent #10.

²⁵⁰ "Operation Burrowing Owl" is a project initiated by the federal government and the World Wildlife Fund to highlight endangered grasslands through publicly recognizing landholders who maintain habitat for burrowing owls. Detailed information on this project is available through the World Wildlife Fund (Canada) website at www.wwf.ca.

Compensation was a clear first choice among respondents who responded with suggestions or recommendations.²⁵¹ Here, they felt that "if [they] had a reasonable expectation that [their] costs would be covered or that [they'd] be compensated for the negatives, there'd be tremendous cooperation."²⁵² Two of the respondents focused upon a need for the government to look at stewardship to a greater depth, and two more respondents focused upon the penalty provisions within Bill C-5. In general, without the government creating "a situation where when a landowner finds an endangered species on his land, it doesn't depreciate the value of the land, or the income that can be gained from that land,"²⁵³ then species at risk legislation will not be supported. Of interest is the fact that five of the respondents declined to answer the question and noted that they do not think the federal government should take the lead at all, that it is instead a question of constitutional authority and political jurisdiction. These respondents believe that wildlife protection is not within federal jurisdiction, and therefore species at risk legislation should be under the authority of provincial or community authorities.

Respondents were also asked for their views on working on conservation initiatives with other organizations or individuals on their lands. Most of the respondents had worked with other organizations before, and past experiences informed their current interest. Overwhelmingly, the

²⁵¹ When the respondents spoke of full compensation, they almost inevitably referred to compensation for their lost capacity to continue to earn the same income. That is, they feel that they should be compensated for the amount of income they would have received from an identified landscape over a term of at least five years, not just the value of a certain number of livestock, or a season of grazing.

²⁵² Interview Respondent #3.

²⁵³ Interview Respondent #2.

respondents were concerned about the credentials of the individual who would be working with them on their land. Thus, "[i]n all cases it depends on the knowledge and expertise of the people, it has to be somebody that understands agriculture, . . . [and ranchers] would be willing to work with them, but not necessarily be directed by them."²⁵⁴ Some programs were spoken of with high regard by different respondents.²⁵⁵ For example, representatives from "Cows and Fish"²⁵⁶ have been on many of the respondents' lands, and several respondents spoke of what they have gained through participating in this program. In contrast, several of the respondents had participated in round-table conservation stakeholder programs with the Alberta government. These respondents had been very disappointed by that process and were not keen to work with multiple stakeholders again. Those speaking of positive experiences of working with other stakeholders in the past tended to be more keen to participate again. All of the respondents suggested that working with another individual would be an option, but that it needed to be someone whom they are familiar with.

Question 4

Question Asked	What, if anything, is your biggest concern about the legislation as it is? Can you recommend a way for this to be corrected?
Responses Provided	First concern: confirmation that respondent would receive compensation. Second concern: the magnitude of the current fines and a fear of maximum fines being applied to respondent.

²⁵⁴ Interview Respondent #9

²⁵⁵ Interview respondents spoke of generally good working relationships with Ducks Unlimited, the Alberta "Cows and Fish" program, and the Southern Alberta Land Trust Society.

²⁵⁶ The Alberta "Cows and Fish" program was established in 1992 by a multi-stakeholder group including government, conservation, and agricultural interests. It is a partnership that applies riparian grazing strategies to restore riparian condition through a process of information sharing and education. Detailed information on the program is available at the website at www.cowsandfish.org.

Through this question, the researcher hoped to understand what each respondent felt was the greatest disincentive for their participation in Bill C-5. By not prompting the respondents with a list of choices, respondents were encouraged to come up with their own thoughts. The two most common choices were a lack of certainty that the landholder would receive compensation, and a fear of having high fines applied when species or habitat were accidentally damaged on their land. Two of the respondents' primary concerns surrounded their fear of what they understand of the due diligence defence, and what is considered to be a lack of *mens rea*.²⁵⁷

As for the solutions and recommendations for improving Bill C-5, the interview respondents spoke of the assurance of full compensation, removal, or a reduction in the value of the fines, and financial recognition of the current stewardship activities that have maintained species at risk up to this time. Respondents in this study believe that the government "need[s] to put some validity in stewardship . . . [ask] why the species is on the land in the first place."²⁵⁸

Question 5

Question Asked	Part A -- What practices do you currently follow that make your land more suitable to wildlife? Part B -- What do you think are the greatest obstacles preventing others from doing the same?
Responses Provided	Part A -- Most common conservation-oriented practices are rotational grazing and/or riparian management. Part B -- Greatest obstacles are a lack of money up front and a lack of knowledge that conservation practices improve grazing lands in the long term.

²⁵⁷ This term is used to define criminal or wilful intent. This term will be discussed further in Section 6.3.

²⁵⁸ Interview Respondent #5.

Like many of the other questions, this question had multiple purposes. By discussing the current stewardship initiatives being practised on each of the interview respondents' lands, the researcher was able to understand the options available to these landholders. As an urbanite, the researcher had read a great deal about stewardship initiatives, but learning about them directly was extremely beneficial. Several of the respondents demonstrated their conservation management initiatives when the researcher visited their ranch by highlighting the importance of range management and illustrating how their landscapes differed from lands where conservation is practised to a lesser degree. The researcher became aware of a re-occurring frustration for these landholders. Ranchers in the area consider the entire landscape as a whole system, rather than a combination of habitats for specific species. In contrast, they feel that the programs of the federal government are designed to split things into independent pieces, such as individual species. In the development of federal species at risk legislation, the government may need to consider the needs of large agricultural landholders over both the long term, and within the context of complete ecosystems rather than individual species.

The second part of the question is more clearly related to this MDP. By understanding the obstacles that may prevent landholders from practicing good stewardship, it became evident that there are some issues that could be addressed by government authorities either through education or within the legislation. The respondents spoke of a lack of money and/or a lack of knowledge as being the most prevalent obstacles to others. They also felt that there should be a greater emphasis placed upon providing financial assistance for those currently practicing

good stewardship activities. There was a general feeling that, for Bill C-5, the people on the ground need to see that there will be some benefit to them if they participate in stewardship initiatives. The respondents felt that if money is available for stewardship initiatives, then landholders would be encouraged to incorporate more conservation-oriented agricultural practices into their current land management practices. This money should also be available to recognize individuals currently practicing effective stewardship methods on their land. There was a common belief that "[t]he biggest problem is having the land produce enough to pay its economical cost,"²⁵⁹ because right now farmers "are forced to try to get an extra five bushels per acre and extra cows on each acre."²⁶⁰ According to the respondents, an implication of needing to produce more from their lands is a decreased capacity to adhere to effective stewardship practices.

Question 6

Question Asked	Part A -- What do you think about the fines that are currently in the legislation? Do you think that fines are necessary to this legislation, or could the government do something different? Part B -- Have you read about the issue of "due diligence" in the legislation, and what do you think? Part C -- The way the Bill is currently written, there is no specific distinction between intentional and accidental damage. Do you see this as a concern?
Responses Provided	Part A -- The fines are too high, and, since most respondents have incorporated their ranches, they are fearful of the fines for corporations. Part B -- Due diligence is unfair; the costs to defend oneself would be prohibitive. Part C -- Respondents need more information on species and habitats to avoid accidental damage to species or habitat on their lands.

Issues and concerns about the punitive provisions of Bill C-5 are routinely highlighted in the agriculturally-based literature. Through the three options of Question Six, the researcher

²⁵⁹ Interview Respondent #15.

²⁶⁰ Interview Respondent #11.

ensured that each interview respondent spoke to the three most frequently discussed issues: (i) the level of the fines, (ii) the due diligence defence and corresponding lack of mens rea, and (iii) the lack of specific provisions distinguishing between accidental and intentional damage to species or habitat. In all cases, the respondent had spoken to at least one of these issues in Question Four when the respondent was asked to detail his/her greatest concern about Bill C-5.

All of the interview respondents felt that the fines were too high. Respondents believe that "[m]ost people can't be fined \$1 million and stay in business,"²⁶¹ and that "anybody caught is out of business for life."²⁶² The respondents are apparently unaware of the summary conviction amounts because each of them discussed the \$1 million fine for secondary offences. The general feeling was that the fines are a disincentive and that the Bill does not balance the punitive concerns with adequate incentives for landholders. As one respondent noted, "[i]t is like using a hammer when a fly swatter will do!"²⁶³ The second concern was the higher fines for corporations which would apply to most of the respondents because they have incorporated their ranches for tax reasons. Only four of the respondents supported the existence of fines at all as a necessary part of the legislation, but these respondents did not support the dollar amounts either. Hence, these few respondents were not "sure there's an alternative for enforcement, but at the present time, the punishment doesn't fit the crime."²⁶⁴ The researcher

²⁶¹ Interview Respondent #14.

²⁶² Interview Respondent #11.

²⁶³ Interview Respondent #6.

²⁶⁴ Interview Respondent #9.

found it interesting that none of the respondents spoke about the fines as being maximum fines, but that each respondent spoke as if the maximum fines would be applied to all incidents.

With regards to the due diligence issues, although not all of the interview respondents recognized the term due diligence, when prompted to think about methods available for them to defend themselves if they were charged, all respondents understood the provisions within Bill C-5 to be problematic. The respondents shared the view that due diligence parallels a lack of *mens rea*, and that they would have to demonstrate their innocence in a court of law. Most of the respondents also understood this to mean that they would have to pre-plan for due diligence defences by having their land professionally audited at high costs to themselves. Hence, "[t]he way they have it we are guilty and we have to prove our innocence which is against the laws of the land."²⁶⁵ Most considered this issue to be unfair, and felt that they were law abiding citizens who shouldn't be faced with such concerns. Respondents believe that it is the government's responsibility to prove they are guilty, and that the due diligence defence reverses that onus.

The lack of clear provisions specifically distinguishing accidental from malicious damage to species at risk or their habitat did not create the intense discussion that fines and due diligence did. However, several respondents noted the criminal law distinction between "running into

²⁶⁵ Interview Respondent #11.

somebody in an accident and killing them intentionally."²⁶⁶ Respondents tended to believe that there should be provisions specifying and identifying exactly what is an accident as compared to what is intentional, but their concerns about the other two issues (fines and the due diligence defence) were more intense. Worth noting is that this discussion often returned to the fact that the respondents believe that they currently have inadequate information about listed species, and that without more information, they might not be able to avoid an accident.

Question 7

Question Asked	Issues of compensation are frequently discussed. Would you like to comment specifically on compensation under the SARA?
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Because compensation is so prevalent in the literature, the researcher wanted to ensure all respondents spoke about compensation. As it turned out, all of the respondents had spoken about compensation in one of the earlier and less structured questions, making Question Seven redundant.

Compensation Options

Specific options for compensation were discussed in the final section of the questionnaire, through the table. Each respondent was asked to rate these options on a scale of 1 to 5, with 1 representing something that they would consider a negative incentive to working with the

²⁶⁶ Interview Respondent #14.

federal government on such legislation, and 5 representing an option that would inspire them to work with the government. The results are shown on the following page.

The table details the interview respondents' collective views. This table was designed to be considered as a complement to the initial less-structured questions and the results support several viewpoints visible within the earlier questions. For example, the interview respondents' tendency to dislike the federal government and prefer local or community representative is clear. Although land swaps have an appeal, the interview respondents do not believe they are a realistic option because all of the land in their area is currently under some form of management. None of the respondents are interested in receiving lands outside their local community. In addition, the current compensation package described for Bill C-5 is not acceptable to the respondents, and the respondents consider fines a disincentive. Public recognition is not a strong incentive. Programs through various organizations are currently available to recognize stewardship within the industry and similar programs offered by federal authorities may be redundant.

Compensation Scale

Interview Respondents:	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	Averages ¹
Tax changes ²	2	3	3	4	3	4	3	3	2	3	4	4	2	3	2	4	3	3.1
Public recognition ³	4	4	2	2	2	2	1	1	3	2	1	2	4	1	3	3	2	1.9
Fines ⁴	4	3	1	1	0	1	1	0	1	1	1	3	1	1	1	1	1	1.3
Land swaps ⁵	4	5	4	4	0	4	3	4	2	3	4	1	3	3	5	3	3	3.2
Partial compensation ⁶	4	5	2	1	3	1	3	1	2	0	1	1	1	1	4	1	2	1.9
Community support ⁷	3	3	4	4	4	5	3	5	2	3	4	1	3	3	5	4	4	3.5
Provincial support ⁷	3	4	4	2	1	3	3	1	2	3	3	5	5	1	2	2	3	2.8
Federal support ⁷	1	2	4	2	1	2	2	1	2	3	1	3	2	2	1	1	1	1.8

¹ The averages are provided here merely to facilitate reading and general comprehension by the reader. These options were provided as a complement to the preceding open-ended questions, the option results were not intended to provide stand-alone results.

² Tax changes were potentially acceptable, but only if those changes would be capable of affecting overall income taxes, and not just the land taxes for any affected parcel of land. Some also noted that they do not make enough money to worry about a reduction in their taxes.

³ Public recognition was not as popular as the respondent had anticipated. Several agricultural organizations (including the Canadian Cattlemen's Association) offer good stewardship awards to members, but these landholders were concerned that public recognition would lead to visits by the general public and the potential for unforeseen problems.

⁴ Even the respondents who accepted the need for fines, found fines personally discouraging.

⁵ Land swaps were considered unfeasible because there is no land left to exchange in the region and respondents do not want to move.

⁶ Partial compensation was considered an insult by several of the respondents.

⁷ These last three options on the table offer further clarification of the unpopularity of the federal government, and the need for Bill C-5 to be led by local representatives.

5.3.4 Analysis of interview results

This section highlights the relevant findings from the respondent interviews by illustrating how the interview process assisted the researcher in determining a set of recommendations capable of making Bill C-5 more palatable to agricultural landholders. Those findings can be broken into several categories or themes: (i) the respondents have a lack of full information and understanding of certain key concepts, (ii) compensation is the most important issue for the respondents, but compensation may not have the same meaning for them as it does in legal terminology, and (iii) the respondents do not trust the federal government, nor do they want to work with federal representatives. Each of these themes is explained further in the text below, and each theme was incorporated directly into the recommendations and synthesis provided in the following Chapter.

i. A lack of full information and understanding of key concepts

A lack of understanding of key concepts is visible through the interview respondents' overall misinterpretation of the following three concepts. Firstly, the respondents share a consistent fear of receiving the maximum fines listed within the legislation. None of them spoke with the understanding that one could anticipate receiving a fine with a lesser dollar value attached to it. Secondly, respondents shared the belief that due diligence defences can only be successful if the defendant can prove adherence to a professional audit that had been completed in advance. Thus, the respondents are certain that they will need to hire environmental professionals to carry out in-depth audits of their landscape if Bill C-5 is passed as it is. Thirdly, the respondents

are fearful of being convicted and receiving extensive convictions because they are unable to demonstrate accidental damage in the absence of specific statutory provisions distinguishing accidental from wilful damage.

ii. The importance of compensation, and what compensation means

The idea of compensation was on the mind of all of the respondents. However, the respondents believe that compensation should be attached to both current stewardship practices and to any future restraints applied to landholder under provisions of the SARA. That is, while the federal Minister of the Environment speaks of compensation and stewardship as separate and independent concepts, interview respondents in this study do not share his view. These respondents believe strongly that compensation funding should be applied to effective stewardship practices in a similar manner to the application of compensation after a landscape has been designated. Without financial support being applied to stewardship initiatives in addition to the provision of compensation money after restrictions are applied, according to the study group, stewardship activities will no longer occur.

iii. A distrust of the federal government and its representatives

The results of the interviews leave little doubt that the interview respondents in this study do not consider the federal government, or its representatives, trustworthy. This fact is extremely relevant to the development of federal species at risk legislation that is acceptable to agricultural landholders who share this distrust of the federal government. Any education programs,

publications, or presentations will not be accepted if they are provided by federal programs or representatives. Instead, the federal government will need to look to other less confrontational mediums to share information surrounding the proposed Bill C-5.

5.4 Chapter Conclusion

This Chapter has provided background information regarding some important sources of influence for the study group including agriculturally based organizations and perceptions surrounding the U.S. *Endangered Species Act*. The ramifications of such influence include a fear of Canadian endangered species provisions that may be similar to those in the U.S., and a lack of understanding of some of the key concepts within Bill C-5 such as the application of maximum fines and the due diligence defence. A clear mistrust of the federal government and programs emanating from that institution suggest a need for federal authorities to consider other sources to disseminate information surrounding proposed federal legislation. In addition, the respondent interviews support the need for compensation to be formally incorporated into the proposed legislation and related policies before such legislation will be supported by individuals holding similar views to those held by the study group.

Chapter 6

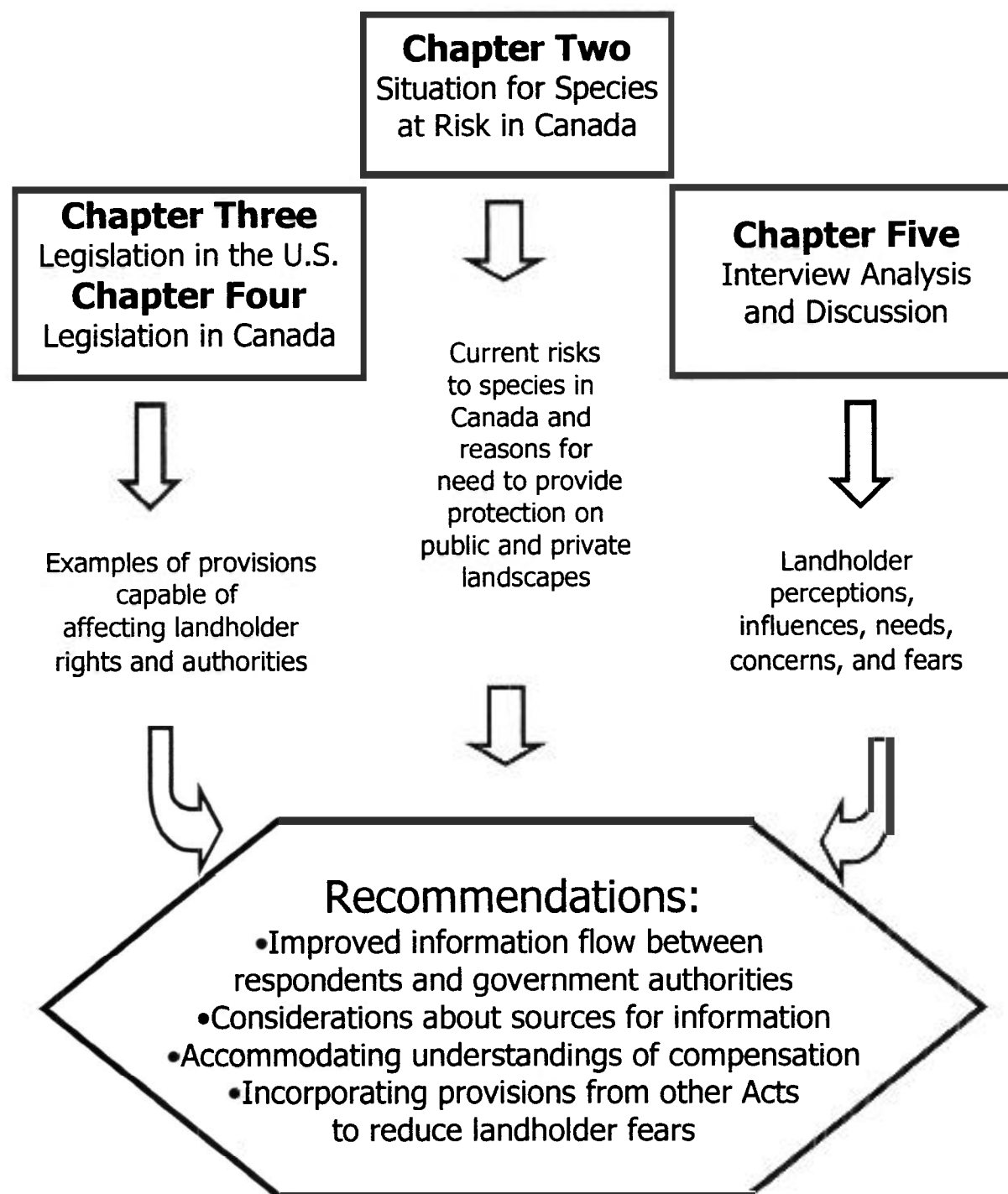
Project Synthesis and Recommendations

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6.1 Chapter Summary

This MDP has built upon the premise that current protected spaces and the species that rely on those lands for habitat will not be secure without effective legislation and supportive mechanisms to encourage habitat protection on both publicly and privately held lands. The government of Canada is developing legislative approaches to protect both species and habitats whereby the federal policy and approach is illustrated in the proposed Species at Risk Act, Bill C-5. A synthesis of the project results and the resulting recommendations are provided in this Chapter (Section 6.2). The project synthesis was achieved through a compilation of the conclusions from each of the preceding Chapters. A visual illustration of this synthesis is provided in the Project Flow Chart on the following page. An analysis of the project synthesis leads to a listing of topics (Section 6.2.4) to be addressed within the Project Recommendations (Section 6.4). Several of the identified topics refer to misunderstandings of terms and concepts. A review and analysis of these terms and concepts (Section 6.3) is provided in advance of the final project recommendations. The final project recommendations are grouped around two distinct approaches that emerged from the research and respondent interviews. Those approaches are (1) cooperative educational opportunities, and (2) minor changes to the proposed legislation. A third aspect of the recommendations includes a discussion of landholder interests and demands that the researcher believes are unlikely to be addressed through the current process to develop Bill C-5. However, if the two recommended approaches are successful, it is believed that the remaining concerns will have been addressed indirectly.

6.1.1 Chapter flow chart



*We want to put species protection in the hands of those who live closest to the species.
The worst result is for species to disappear by becoming pawns
in protracted political disputes or costly court battles.*

David Anderson, federal Minister of the Environment
Parliamentary Statement: 10 September 2001

6.2 Project Synthesis

Through the research and analysis developed in the previous chapters, the researcher has created a List of Topics to be addressed (Section 6.2.4). Each of the Chapters within this MDP provided information that informed the researcher on issues pertaining to species at risk legislation. That information has been compiled and refined to produce the List of Topics in need of resolution (Section 6.2.4). The analysis of these list topics will yield two final sets of project recommendations (Section 6.4).

6.2.1 Synthesis of habitat needs

In Chapter Two the researcher illustrated the need for species protection in Canada, and the relationship between habitat protection and conservation. Human alterations to natural landscape is the most important factor pressuring wildlife towards extinction. Multiple classifications of species need to be protected at the various stages of their lifecycles. That is, some protection requirements might work within a microscale in order to address the habitat needs of invertebrates and amphibians, other requirements might work within a macroscale in order to address the habitat needs of large carnivores, migratory birds and wide ranging

species, and other protection requirements might work within multiple scales to address the needs of plant survival and dispersal. The effects of individual human activities upon the landscape are becoming more and more interrelated so that wildlife is frequently pressured by cumulative effects, rather than one individual activity. Recreational interests and population expansions have intensified the effects of humans on our natural landscapes. Country-wide species at risk legislation is an essential step towards the protection of Canada's current biodiversity. Effective species at risk legislation will also provide a valuable tool for those working to protect Canada's natural spaces.

6.2.2 Synthesis of legislative constructs

In Chapter Three the researcher examined the U.S. legislation to protect species at risk. In the U.S., the *Endangered Species Act* compels government representatives to protect listed species and their designated habitat. However, the government is not required to provide compensation or financial support when such designations affect land-use activities on private lands. This lack of support has created a shared fear amongst landholders who, afraid of the implications of an ESA designation, have been known to destroy both listed species and their habitat before government officials can locate those species on their lands. Canadian landholders looking to the U.S. approach, are concerned about the command and control model upon which the U.S. *Endangered Species Act* is based. The concern is that, although Canadian policy emphasizes a process based upon cooperation first, punitive measures within Bill C-5 may be applied in ways similar to the U.S. model.

In Chapter Four the researcher analysed and compared species at risk legislation applicable to several Canadian jurisdictions. Canada's national government is currently developing species at risk legislation through Bill C-5, the Species at Risk Act. The Bill has an extensive preamble where the federal government commits to ideals of species protection through a cooperative, inclusive approach. The Bill places an emphasis upon voluntary support and stewardship initiatives for the protection of species at risk on private lands. Bill C-5 includes many opportunities and tools to encourage landholder participation including the provision of support for conservation programs, opportunities for cooperative program planning and implementation, the provision of compensation for habitat restrictions placed upon private lands, and for direct acquisition. However, Bill C-5 is noted for its discretionary nature and although such opportunities and tools are available under Bill C-5, the decision to use each of these is left to the discretion of the Minister.

Several of the provinces have developed legislation for protecting endangered species within their jurisdictions. The researcher examined the Manitoba *Endangered Species Act*, the Nova Scotia *Endangered Species Act*, and relevant provisions of the Alberta *Wildlife Act*. Like Bill C-5 however, the Nova Scotia Act is, in the first instance, based on voluntary compliance. Unlike Bill C-5, the Nova Scotia government is bound to provide compensation to landholders who are forced to alter land-use activities due to the placing of habitat restrictions upon their lands. Other features of interest from the Nova Scotia Act include a Species at Risk Fund that accepts

monies from individuals and organizations in addition to government, and the opportunity for landholders to take disagreements over compensation to the provincial Utility and Review Board. The Manitoba Act features lower maximum fines for offences than does either the Nova Scotia Act or Bill C-5. In addition, the Manitoba Act offers exemption permits to ensure selected developments will not be unduly affected by restrictions under the *Endangered Species Act*. Section 12(1) of the Manitoba Act authorizes the Minister to exempt both existing and proposed developments from application of restrictions under the Endangered Species Act. Such an exemption can be granted if the Minister is satisfied that neither the species nor the designated habitat will be at risk. In addition, appropriate measures must be built into the development to ensure that any damage to habitat or species will be minimal. These exemption permits could be re-drafted to apply to agriculturally-based landholders who are affected under restrictions as per Bill C-5. Alberta has not created stand-alone legislation and has chosen to amend its *Wildlife Act* in order to provide for the protection of species at risk in this province. Provisions and regulations provided within this legislation offer potential resolutions for landholder concerns surrounding Bill C-5. For example, Alberta has a conservation fund capable of supporting stewardship initiatives and of providing for compensation when a landholder is negatively affected by the placement of conservation restrictions upon his/her land.

6.2.3 Synthesis of landholder concerns

In Chapter Five the researcher provided an introduction to the interviews, and compiled and analysed the interview results. A synthesis of the landholder concerns informed the researcher

of five primary problems to be addressed in order to develop landholder cooperation for programs surrounding Bill C-5. The analysis of interview results in Chapter 5 resulted in the development of three themes. Those themes (the respondents' need for information, the importance of compensation to the respondents, and the respondents' distrust of federal authority) are incorporated into the entire synthesis through the following ideas and concepts. Firstly, the respondents fear the application of a command and control approach similar to the U.S. Secondly, they are concerned about the end results of a conviction and they fear both the due diligence defence and the level of the maximum fines. Thirdly, they exhibit a strong dislike and distrust of the federal government that is applied to their impression of federal species at risk legislation. In particular, this contempt for the federal government and its programs makes the respondents cynical about the Ministerial discretion provided for within Bill C-5. Fourthly, all of the respondents wanted to see clear recognition of stewardship initiatives and guaranteed compensation within federal legislation. Finally, the respondents demonstrated a need of, and an interest in, greater information regarding local species at risk and their habitat needs.

6.2.4 List of Topics to be addressed

The recommendations for this MDP are intended to overcome the List of Topics provided here. Those recommendations must incorporate both the landholder needs and the realistic capacity of the federal government as it strives to develop effective national species at risk legislation. The following list highlights the relevant issues and concerns (topics) determined through the

evaluation process of this MDP. The capacity of federal authorities to address these concerns, along with discussion on certain chosen topics is addressed in Section 6.3.

Topic 1: Canada's wildlife and natural spaces are being threatened by the cumulative effects of increasing human presence and activities. In order to effectively protect threatened wildlife, protection for adequate habitat is therefore necessary. Since that habitat may include privately held lands, legislated protection of species at risk must include methods to support the protection of habitat on private lands.

Topic 2: Both federal and provincial authorities have committed to the provision of legislated protection of species at risk in their own jurisdictions and the federal government is developing national species at risk legislation in the form of the Species at Risk Act (Bill C-5). As currently written, Bill C-5 will apply on private lands under certain circumstances.

Topic 3: Each of the provincial Acts examined offer unique solutions to landholder concerns. Those of particular interest are:

- A funding body designed to support stewardship initiatives and provide for compensation when necessary. The capacity for this funding body to accept donations from private and corporate supporters rather than just government monies has additional appeal.
- A separate and pre-determined body to address compensation disputes when landholders feel government compensation is inadequate.

- Methods of addressing the provision of exemptions and permits whereby agricultural landholders may feel less threatened by the potential for conservation restrictions to be applied to their lands.

Topic 4: The respondents would like more information on conservation issues specific to listed species that may be on their lands. They would like to avoid inadvertently damaging these species, but feel they require a better understanding of the needs of listed species and their respective habitats before Bill C-5 becomes law.

Topic 5: The respondents in this study hold an intense distrust of anything seen to be emanating from the federal government. They are inclined to regard federally initiated programs with a certain level of contempt and suspicion.

Topic 6: Although Bill C-5 includes landholder "friendly" provisions designed to encourage landholder support of the legislation and related programs, these provisions are left to Ministerial discretion. The respondents general contempt for federal programs (Topic 5) ensures minimal support for extensive Ministerial discretion within the provisions of Bill C-5.

Topic 7: The U.S. model is known for its command and control approach that demands government authorities take action. Stories around the experiences of landholders who have been dramatically affected by the application of conservation regulations upon their lands have

coloured the perceptions of Canadian landholders. Canadian landholders fear that, even though Bill C-5 is structured to emphasize cooperation, the command and control options under Bill C-5 may be used freely. This misunderstanding on the part of the interview respondents, and potentially on other landholder groups, is understandable due to their collective distrust of federal authority. The issue surrounding the capacity of the Canadian federal government to rely upon a command and control approach is explored further in Section 6.3.1.

Topic 8: The study group understands and defines compensation and stewardship differently than do government and legal authorities. In addition, the need for compensation and stewardship funding to be assured under Bill C-5 is a primary concern for landholders. This is a somewhat complex point and the distinction between compensation and stewardship is explored more fully in Section 6.3.3.

Topic 9: The study group misunderstands some key legal concepts with regards to convictions and sentencing. As with compensation and stewardship, this is an issue that must be resolved in order to increase landholder cooperation of programs initiated under Bill C-5. The misunderstandings is explored further in the next section, Section 6.3.4.

6.3 Analysis of Issues to be addressed

Of the List of Topics developed in Section 6.2.4, certain ones require further exploration. This section provides such exploration through a discussion of key topics.

The first two topics identified relate to the current situation of endangered species in Canada, the need to protect habitat on private land, and the current national process to develop species at risk legislation. The third topic identified relates to other legislation by summarizing certain provisions from other jurisdictions, provisions that could be incorporated into Bill C-5 with the intention of encouraging landholder cooperation. The fourth topic identifies the interview respondents' collective need for more information regarding the needs of species at risk and their habitats. Topics five and six relate to the relationship between the landholders in this study and the federal government. In particular, topics five and six highlight the lack of faith the respondents hold for federal authority. All of these six topics are relatively straightforward and the researcher believes these topics do not require further exploration or explanation. Each of these six topics was incorporated directly into the final recommendations (Section 6.4).

The final three topics require further exploration and explanation before being incorporated into the project recommendations. These topics were addressed in the following way. Topic seven relates to a shared fear amongst interview respondents that Bill C-5 will be used in a similar way to the U.S. legislation. The respondents are fearful that the punitive provisions in Bill C-5 will become the emphasis once the legislation is implemented. Section 6.3.1 provides a discussion regarding the government's intent within Bill C-5, in addition to a brief discussion on the anticipated application of the national legislation. Topic eight identifies different interpretations of the terms, compensation and stewardship. Exploration of this topic is achieved through

Section 6.3.2 which describes the current approach to compensation for Bill C-5, and through Section 6.3.3 which discusses the two terms in accordance with legal understandings and precedents. Topic nine identifies a collective misunderstanding of some key legal concepts related to convictions and sentencing. This topic is explored through a discussion in Section 6.3.4.

The final Section here, Section 6.3.5, provides a more general context. Several of the identified topics from Section 6.2.4 include the need for sharing information and improving educational opportunities. Other topics noted the respondents' distrust of the federal government and federally initiated programs. The discussion in Section 6.3.5 attempts to provide a solution for these combined topics by illustrating several educational and information sharing programs in existence in the region.

6.3.1 Command and control under Bill C-5

This section offers a discussion surrounding the federal government's attempts to avoid a command and control emphasis within Bill C-5. Command and control legislation is often spoken of in terms of sticks and carrots. Law enforcers rely upon command and control provisions to ensure compliance through the extent of enforcement provisions (sticks) provided for when actions are taken contrary to the legislation in question. As an illustration, the U.S. endangered species legislation relies upon enforcement by authorities to ensure compliance after critical habitats have been designated and prohibitions have been applied. In contrast, Bill

C-5 approaches compliance through incentives (carrots) designed to encourage voluntary participation. While Bill C-5 includes "sticks"²⁶⁷ within certain provisions, those enforcement provisions are intended to be used as a last resort when voluntary initiatives fail. Throughout the proposed legislation, and through interpretive commentary provided by federal representatives, voluntary initiatives are (and will continue to be) the primary focus of actions related to the implementation of Bill C-5 provisions. If Bill C-5 fulfils the federal government's current intentions, the use of command and control provisions (sticks) will be rare. However, landholders must trust the federal discretionary powers in order to fully support this legislation.

The Canadian political system relies upon a federal system based upon the division of powers²⁶⁸ written into the Constitution of 1867. Within the Constitution, clearly defined heads of power²⁶⁹ give exclusive authority over defined issues to either federal or provincial governments. Given that the Canadian Constitution was written at a time when political leaders and influential citizens believed that Canada's natural wealth was boundless, it is no wonder that the protection of endangered species is not one of the designated powers defined in the Constitution. This lack of clearly designated authority for species at risk ensures some amount of uncertainty with

²⁶⁷ Among other provisions, "sticks" within Bill C-5 include high fines which can be applied to individuals and corporations who do not comply with prohibitions under the legislation. The federal safety net, where provisions under Bill C-5 can be applied to provincial jurisdiction when legislative protection is considered to be inadequate by the federal Minister, would apply these provisions in the provincial context.

²⁶⁸ The division of powers is the delineation between federal authority and provincial authority whereby each jurisdiction is given authority over defined issues and capabilities.

²⁶⁹ Heads of power refer to the specified political jurisdiction where either provincial or federal authorities are identified within the constitution.

regards to the creation of endangered species legislation in Canada. However, as explained below, there are several relevant powers that reside with each level of government.

The provincial legislative powers enumerated in Section 92 of the *Constitution Act, 1867* provide authority for provincial involvement in the development of comprehensive national endangered species legislation. Firstly, authority for Property and Civil Rights in the Province, S.92(13) "is by far the most important of the provincial heads of power."²⁷⁰ Here the capacity of the provinces to legislate with regards to property within the province could influence any federal attempt to protect critical habitats, and would certainly affect legislation designed to address issues affecting private landholders. In addition, the provincial residuary power {s.92(16)}, whereby "[g]enerally all Matters of a merely local or private nature in the Province," is frequently suggested as a possible alternative or complement to s.92(13)²⁷¹ Both these sections support provincial authority with regards to species at risk. They also create a risk that federal species at risk legislation affecting private property within the provinces may be challenged legally. Without provincial support, federal legislation capable of protecting endangered species may be challenged by the provinces in Court as being beyond federal jurisdiction.

²⁷⁰ Hogg, Peter W. 1997. *Constitutional Law in Canada*. p.546

²⁷¹ Ibid. p.458.

Intent on creating a centralizing document capable of supporting strong Parliamentary control, Canada's Constitutional framers created the *Peace, Order, and Good Government* clause (s.91), the "POGG Power." According to the text, this should give the federal government authority to legislate on "all Matters not . . . assigned exclusively to the Legislatures of the Provinces . . ." It is not clear that over-arching federal legislation based on the POGG Power and that affects provincial authority over provincial lands will survive a provincial constitutional challenge under the POGG power.

The following two sections are intended to address Topic #8. Ministerial discretion over compensation provisions and a lack of certainty with regards to the availability of compensation has affected landholder views of the Species at Risk Act. The first section (Section 6.3.2) provides a synopsis of the compensation provisions under Bill C-5. The second section (Section 6.3.3) addresses different interpretations of the terms compensation and stewardship and how those interpretations have influenced the text within Bill C-5.

6.3.2 Compensation under the SARA: the Pearse Report

The federal Environment Minister commissioned a report to examine the issues surrounding compensation under species at risk legislation and to provide recommendations for the SARA.²⁷²

²⁷² Pearse, Peter (Simon Fraser University). 2001. "The Species at Risk Act and the compensation issue." A report commissioned by the federal government.

The Minister's plan is to incorporate the details surrounding compensation within the regulations of the SARA, after the Bill has been proclaimed. While the Minister has promised not to follow the guidelines in the Pearse Report exactly, he will certainly take into account the information and suggestions provided as to a recommended framework for compensation.

The report is prefaced on the expectation that compensation will not be a common occurrence under the legislation. As Pearse notes, "[t]he federal government's preferred approach to protecting critical habitats . . . is to engage the voluntary efforts of landowners and others through incentive . . . programs . . ." ²⁷³ Therefore, compensation will only be available as a last resort when voluntary efforts and other initiatives cannot be adequately negotiated. Pearse further notes that the provision of "[f]ull compensation for all regulatory restrictions . . . would undermine any incentives for engaging in voluntary habitat protection arrangements." ²⁷⁴

Dr. Pearse examined the issues surrounding compensation for those holding rights and interests in lands in addition to those holding fee simple titles. His conclusion is that each case should be examined on an individual basis where it can be determined if the regulatory restrictions impair the legal or contractual rights of the private holder. That is, when regulatory provisions applied to designated habitat do not impair the current rights provided to the lease holder, no compensation should be made available. If, on the other hand, the regulatory provisions

²⁷³ Ibid. p.3

²⁷⁴ Ibid. p.19.

significantly impair the rights provided under the contract with the lease holder, that lease holder should be eligible for compensation. Again, the undefined term "extraordinary impacts" from Bill C-5 is the determining factor for compensation eligibility.

In reaching his conclusions, Dr. Pearce initiated and reported on consultations with various stakeholders across the country. He also compiled and analysed the legal aspects of compensation in Canada. In brief, Dr. Pearce recommended ten principles for compensation which are paraphrased below.²⁷⁵

1. Protection must be provided for all listed species ;
2. Critical habitats can be better protected through voluntary initiatives than by government controls;
3. Costs to protect species at risk should not be borne upon individuals, but should be shared by Canadians;
4. Compensation should be available when land-use restrictions cause significant hardship, as it is noted in the Bill-5 where "extraordinary impacts" should be eligible for compensation;
5. Private property rights must be respected while established laws and policies on expropriation must be recognized;
6. Authorities given to federal and provincial governments must be respected in accordance with constitutional responsibilities and the spirit of cooperation;
7. Policies, programs, and procedures should be clear and transparent;

8. Administrative arrangements should avoid costly procedures and burdensome compliance requirements;
9. Administration of compensation should be based on existing structures and procedures;
10. All arrangements should promote voluntary and cooperative measures.

Finally, Dr. Pearce developed a framework for determining under what circumstances compensation should be made available.²⁷⁶ He recommended that the threshold for "extraordinary impacts" should be a loss of 10 percent of the value of the property. That is, lands where habitat protective provisions are applied will suffer a reduction in their market value. Once that property's market value is reduced by 10%, compensation provisions should come into play. The amount of compensation should reflect a split between the government and the landholder whereby the government should pay 50 percent of value lost beyond initial the 10 percent loss. According to Pearce, "compensation should be sufficient to ensure that the public shares substantially in the burden of protecting critical habitats, but it should . . . not be so generous as to weaken incentives to finding cooperative stewardship arrangements."²⁷⁷ The report also includes a discussion regarding various forms of compensation including land swaps and changes to a landholders tax obligations.²⁷⁸

²⁷⁵ Ibid. p.13.

²⁷⁶ Ibid. p.20

²⁷⁷ Ibid. p.20

²⁷⁸ Ibid. p.23.

6.3.3 Two distinct concepts: compensation and stewardship

Clear and detailed provisions regarding stewardship initiatives and compensation availability in the legislation were consistent needs expressed by the study group. The respondents are keen to see a guarantee of the provision of fair²⁷⁹ compensation and detailed eligibility requirements so that they can be certain that compensation will be available to them when (and if) stewardship and cooperative efforts fail on their land. Bill C-5 has been designed to support stewardship initiatives first and foremost, but to provide compensation as a back-up when stewardship initiatives fail. Thus compensation is not intended to be available when someone living on the land will not voluntarily enter into stewardship efforts and attempts to choose compensation options instead of stewardship responsibilities. In order to develop recommendations for compensation and stewardship provisions, the researcher will clarify several issues surrounding these two terms. Although interview respondents and agricultural representatives frequently speak of stewardship and compensation as being inseparable, for reasons provided here, the researcher will consider the two concepts to be distinct.

In Canada, rules surrounding the provision of compensation have developed in accordance with statutory interpretation.²⁸⁰ That said, new compensation rules that are incorporated into Canadian legislation will contribute to the wealth of statutory interpretation and may alter the

²⁷⁹ "Fair" compensation in the eyes of the interview respondents includes compensation for the potential lost income in addition to the lost right to property.

²⁸⁰ Schwindt, Richard. 1992. "Compensation on public lands." A report commissioned by the British Columbia government. p.37.

way governments (both provincial and federal) are required to provide compensation.

Compensation under Bill C-5 would add an additional wrinkle because "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."²⁸¹ Dr. Pearce came to the same conclusion as he found "virtually no precedent in Canada for compensation for a regulatory intrusion on someone's private land."²⁸² Since any compensation provided under Bill C-5 would represent a payment for a restriction on property use, a provision mandating automatic compensation would conflict with the traditional understanding of compensation in Canada.

Considering the current balance of powers between federal and provincial governments, one must believe that the federal government will choose to affect provincial government roles as little as possible. Setting a precedent for funding compensation in Bill C-5 might have ramifications on the financial demands of all levels of government. Although there is not complete agreement on this issue, it does not appear, based on the Pearce Report and Ministerial pronouncements that the federal government will introduce legislation that sets a new precedent for the meaning of compensation. As noted in Section 6.3.1, the introduction of federal legislation to protect species at risk is not clearly within federal jurisdiction and requires provincial support to a certain extent. That support could be at risk if the federal government

²⁸¹ *Supra*, Notes 268-274. p.11.

chooses to define compensation under terms capable of adversely affecting provincial government interests.

Although Stewardship is frequently mentioned as the chosen method for endangered species protection, the term is not specifically defined within Bill C-5. Stewardship is defined elsewhere by government authorities²⁸³ to denote some form of voluntary or cooperative action intended to support the sustainability of a natural landscape and its wild inhabitants. There is little disagreement with regards to the practice of supporting and sustaining natural landscapes. However, agricultural representatives (in addition to the interview respondents), do not automatically connect stewardship to voluntary action that is independent of financial rewards. From their perspective, stewardship and compensation are inseparable, meaning that there is an expectation that funding options under the Species at Risk Act must be applied similarly to both compensation and stewardship. From the viewpoint of the legislative and legal analysts however, compensation must be considered independently because of the potential to create a new legal precedent on compensation through the provisions within Bill C-5. It is worth noting that, in other parts of the country, federal authorities are currently presenting several stewardship initiatives and providing some funding for participating landholders.

²⁸² Pearse, Peter. 2001. Speaking at round table discussion of the Parliamentary Standing Committee on Environment and Sustainable Development. 5 June, 2001.

²⁸³ Environment Canada website: www.ec.gc.ca

For the purposes of this MDP, stewardship is considered as cooperative and voluntary activities that precede any legislative restrictions and compensation is considered any governmental support mechanisms available after the application of such a restriction. Such a distinction does not preclude stewardship activities and compensation provisions applying on one piece of land. It is feasible that a landholder can cooperate on a large landscape, but need compensation for restrictions to a small, but integral portion of his/her land. For example, most of the interview respondents rely on fresh water springs on their land. If an endangered species' habitat was designated in or around one of these springs, the effects to the landholder would be far greater than if a habitat designation occurred elsewhere on the land. Such a loss might require compensation, while stewardship activities might be adequate elsewhere.

6.3.4 Legal concepts under the SARA

Almost all environmental legislation in Canada imports *strict liability* where *mens rea* (wrongful intention) is not an element of the offence. In the case of a *strict liability* statute, the offence is committed if the prohibited act has occurred, and the Crown need not prove wrongful intent on the part of the accused.²⁸⁴ Instead, defendants are provided with the opportunity to demonstrate their innocence through the process of a *due diligence* defense. A *due diligence* defence is based on the accused demonstrating that, although the prohibited act was committed, s/he took reasonable care to avoid committing the infraction. By placing the onus of

²⁸⁴ Saxe, Diane. 1990. *Environmental Offences: Corporate responsibility and executive liability*. Aurora, ON: Canada Law Book Inc. p.99.

demonstrating one's innocence upon the accused, the Crown invites each defendant to demonstrate his/her own expertise in a given field. At the same time, the *due diligence* defense ensures that individuals are treated in accordance with the practices and procedures common in their own field. In the case of damage to critical habitat or to a listed species on their land, agricultural landholders would need to demonstrate that they were acting responsibly, that they understood the law and had taken reasonable steps to learn about the species or habitat, and that they were following similar (or better) procedures to those followed by other agricultural landholders.

The provision of a *due diligence* defence in Section 100 confirms that Bill C-5 is *strict liability* legislation. This approach has created intense consternation on the part of landholders and their representatives. These people would prefer that the Crown demonstrate that the violations were intentional and with wrongful intent.²⁸⁵ Further, many authors suggest that preparing for a *due diligence* defence would require a professional environmental assessment which could bankrupt many farms and ranches.²⁸⁶ Removal of the *due diligence* defence might support the initial interests of local agricultural landholders, but it would also reduce the likelihood of large corporations and their representatives being convicted because the Crown would be responsible for proving intent. Environmental legislation in Canada currently

²⁸⁵ The Species at Risk Working Group (SARWG). 2000. "Conserving species at risk cooperatively: a response to the Species at Risk Act." Brief presented to the Parliamentary Standing Committee on Sustainable Development and the Environment.

²⁸⁶ Canadian Cattlemen's Association. 2000. "A review of the proposed species at risk legislation identifying areas of particular interest to cattle producers."

emphasizes pollution restrictions. Here, *strict liability* legislation allows for convictions in cases where negligence has resulted in environmental contamination. Cases such as careless handling of pollutants that result in major damage to the habitats of endangered species would best be served with *strict liability* legislation because intent would be difficult to prove. Therefore, although landholders in this study, and those who represent them, would prefer to change this legislation such that the Crown must prove criminal intent, such a change might not be appropriate. It is unlikely that the Crown would be successful with regards to ensuring convictions of some of the most serious potential infractions possible under Bill C-5 if the Crown was responsible for proving intent.

6.3.5 Current cooperative and educational programs

Piggy-backing on currently successful and trusted local programs would be the most effective choice for federal authorities. The distrust and cynicism towards federal authority demonstrated by the interview respondents supports the need to avoid the development of independent federal programs. Local organizations requested to deliver species at risk educational programs would require the provision of federal funds and support for additional technical and staffing needs, in addition to program guidelines and materials for program delivery. A description of two potential programs is provided below.

The Southern Alberta Land Trust Society (SALTS)²⁸⁷ was incorporated in 1998. It offers a local mechanism for agricultural landholders in southern Alberta to enter into conservation easement arrangements with this non-government organization. SALTS is guided by two principles: (i) organization and direction come from within the local agricultural community to provide a sense of local empowerment and responsibility, and (ii) a broadening of the traditional environmental focus of habitat conservation by incorporating issues related to agricultural, scenic, historic and cultural land values. The emphasis upon local direction and needs, in addition to the expanded socio-economic values of land in the region, have assured strong support for SALTS and several local landholders have entered into conservation agreements already.²⁸⁸

The Alberta Cows and Fish Program was established in 1992 as a partnership between provincial government agencies, and environmental and agricultural organizations. The partnership is considered a success by those involved with the program because, through a cooperative educationally-based program, it has applied riparian grazing strategies to restore the riparian habitats on eleven ranches in southern Alberta.²⁸⁹ The Cows and Fish Program message of protection for riparian habitats is shared through a steering committee that communicates and educates other stakeholders. Ranchers have responded positively to this program because of its community base and its conciliatory approach to education through the sharing of experiences

²⁸⁷ The Researcher obtained information surrounding this organization through their website, through personal conversations with representatives, and through numerous publications and editorials.

²⁸⁸ Strong support of SALTS was clear through discussions with key informants and interview respondents. In addition, the organization has hired new staff members over the past year to deal with the demand.

²⁸⁹ This program was also spoken highly of by interview respondents and key informants.

and concerns. In addition, the program is based on the fact that effective restoration of riparian habitats improves the viability of local cattle ranches and thereby leads to financial incentives.

The Cows and Fish Program is a hands-on education program that utilizes workshops, meetings and training sessions to educate landholders on methods capable of addressing habitat restoration and livestock needs. The SALTS program takes advantage of recent federal and provincial tax law changes and offers conservation easements through a local organization. Both of these programs address the financial restraints that might make participation in a conservation difficult for some landholders, in addition to addressing the need to employ local representatives for information sharing.

Environment Canada is already working to make stewardship an effective tool for conservation initiatives across Canada by developing partnerships with non-governmental organizations including agriculturally-oriented organizations. The Department has created the "Habitat Stewardship Program,"¹²⁹⁰ a program intended to support stewardship initiatives capable of enhancing habitat conservation and restoration activities on privately held lands. In the first year of the program's existence, nine priority landscapes and species were identified and programs were subsequently developed to support these priorities. Project eligibility encompasses a variety of activities including educational and outreach programs, habitat

restoration, program planning and applied research. The researcher notes that this program provides the foundation for some of the needs of the interview respondents, including those related to the need for information sharing regarding the needs of species at risk. Expanding this program would likely be most successful if it was incorporated into the programs already available such as Cows and Fish.

6.4 Project recommendations

In order to compile a list of recommendations, this Section focuses upon two approaches designed to encourage landholder support of Bill C-5. The first approach suggests opportunities for the sharing of information and concerns between government representatives and the interview respondents. The second approach suggests minor pragmatic changes that can be made to Bill C-5 before the Bill is proclaimed. These changes are capable of addressing the perceptions and concerns of the interview respondents in addition to concerns and perceptions of the agricultural community as a whole. The third section of the recommendations provides a discussion on several concerns of the interview respondents that are not addressed in either of the two approaches here. Although these represent issues of concern to landholders, given the current federal approach under Bill C-5, these concerns will be difficult for federal authorities to address. Further, these concerns may not need to be addressed if the interview respondents have access to better and more open information sharing and if minor alterations can be made

²⁹⁰Environment Canada. 2001. "Species at risk backgrounder: Habitat Stewardship Program." More information on this program is available at www.speciesatrisk.gc.ca

to Bill C-5. That is, addressing the issues within the final section may be unnecessary if the recommendations within the two approaches are addressed successfully.

The recommendations provided here will address the List of Topics determined in Section 6.2.4.

The first two topics listed (Topic 1: species needs, and Topic 2: current federal process to develop species at risk legislation) represent general concepts and these two topics have affected all of the recommendations. Topic 5 regarding the interview respondents' suspicion and cynicism of the federal government has coloured all of the recommendations as well. In order to address this lack of trust on the part of the interview respondents, and the agricultural community at large, federal authorities must work to develop a better understanding between them and the study group. Each of the other topics will be addressed in the specific recommendations which follow.

6.4.1 Approaches

There are two approaches recommended to reach the goals of encouraging landholder participation and support of Bill C-5. Information sharing opportunities and minor changes to the proposed legislation are explained in the following sections. Alleviating the distrust will take time and effort, but the recommendations collected here will encourage the sharing of information and knowledge, rather than emphasizing an authoritarian role of government representatives.

6.4.1.1 Information sharing opportunities

Through provisions within the proposed Act, and statements made by the Minister and various representatives, the federal government has acknowledged its belief that the most appropriate way to protect critical habitat on private lands is through cooperation with the landholder. In addition, there are several key subjects where an increased understanding would benefit the interview respondents. Any program designed to address the sharing of information between government representatives and landholders must overcome the immense amount of distrust of the federal government within the community studied here. The researcher believes that by providing opportunities for information sharing and education, this distrust can be reduced over time.

The researcher recommends the development of cooperative education programs on specific topics where the study group has demonstrated either an interest in further education, or a misunderstanding of issues or concepts. There are three subjects that should be addressed through this educational information sharing process:

1. Information and instruction regarding designated species and habitat needs;
2. The implication of *strict liability* legislation and the development of *due diligence* defences;
3. Command and control provisions and the emphasis upon stewardship within Bill C-5.

The first subject is encompassed within conservation knowledge and the second and third subjects are encompassed within legal knowledge. An examination of each follows.

Conservation knowledge: Topic four highlights the interview respondents' expressed interest in obtaining information regarding local species at risk. This topic is addressed because more in-depth information surrounding the specific needs of species at risk is required on the part of the landholders. As noted, there was an overwhelming need and interest highlighted by the interview respondents for this information. Interview respondents are concerned that without full information regarding species that may be on their lands, they will inadvertently commit an act against a species or its critical habitat. It is recommended that federal authorities take steps to offer similar information sharing opportunities to the agricultural community as a whole.

There are two recommended methods of sharing information for this program. Any initiatives in this regard must acknowledge the value of the knowledge and experience of the landholders and demonstrate mitigation whereby the landholders will be minimally affected by provisions under Bill C-5.

In the case of the interview respondents, the researcher recommends that the program materials be supplied by the federal government and that the programs be presented by representatives of "Cows and Fish." Several of the interview respondents spoke highly of the "Cows and Fish" representatives who are working with area ranchers to restore and preserve riparian areas. The "Cows and Fish" program is brought to communities through demonstration ranches which incorporate successful fish habitat protection along with enhanced cattle production capacities.

Legal Knowledge: The researcher recommends a set of legal issues be discussed in an information sharing opportunity available for agricultural landholders and government representatives. Again, program design must take into account the level of cynicism felt towards federal authorities. That is, programs must emphasize the sharing of information between both landholders and government representatives. This set of subjects will address three of the topics identified in Section 6.2.4 of this MDP. The topics and the related subjects are as follows:

1. Topic 7 discussed landholder fears surrounding Canada adopting a command and control approach to species at risk legislation. The researcher recommends an education subject where the current stewardship emphasis under Bill C-5 is highlighted in accordance with an understanding of the political reasons behind this emphasis.
2. Topic 8 discussed landholder understandings of stewardship and compensation with regards to Bill C-5. Providing information on stewardship and compensation under Canadian law will help to alleviate some of the current misunderstandings. In addition, the government needs to appreciate the landholders knowledge to a greater extent by offering support mechanisms that place value upon good stewardship practices in the past.
3. Topic 9 highlighted how the interview respondents misinterpret key legal concepts surrounding *strict liability* legislation. An education component that included an explanation as well as a demonstration of a relevant *due diligence* defense would alleviate some of the

fears associated with the penal provisions currently within Bill C-5. This could be presented through the development of a demonstration site on a community landholder.

The issues for instruction recommended here do not lend themselves well to education opportunities similar to the Cows and Fish program. These would be most acceptable if a mediator or intermediary was incorporated into the process and if they incorporated open sessions where landholders can meet judges and/or lawyers in discussions. In these cases, federal authorities and representatives need to overcome the cynicism that their educators are likely to encounter. This process should also involve the sharing of information whereby the educators would convey to government authorities any interests or requests made by landholders attending the sessions. Federal educators should work with local agricultural representatives in order to determine the best formats for information sharing with the community. Programs may be offered in the form of town hall meetings, conferences or workshops, or presentations held in association with other meetings of agricultural organizations such as the Canadian Cattlemen's Association or the Western Stock Growers' Association. This option will explain the process of *due diligence* defenses and ensure that the landholders are prepared and comfortable with their individual level of preparedness.

Finally, it is worth noting that, even if landholders are confident of their preparedness for a *due diligence* defence, there are ramifications with regards to being charged. The landholders will need to obtain legal counsel, and they may be (or may perceive themselves to be) recognized in

their community as criminals. Their lack of trust in federal authorities is evident in their thoughts on dealing with legal authorities. However, if the landholders begin to accept and respect the legislation, such distrust and cynicism will be reduced and potentially alleviated.

6.4.1.2 Minor changes to the proposed legislation

There are several options whereby minor amendments to Bill C-5 could offer clarification and reduce fears surrounding the implementation of the Bill. These options, again, address the issue of landholder distrust and suspicion with regards to federal programs and representatives. In particular, changes to the proposed legislation will alleviate the concerns surrounding Ministerial discretion provisions within Bill C-5. That is, these changes will address Topic 6 (contempt for Ministerial discretion) as determined in Section 6.2.4. Emphasis is also placed on addressing the concerns surrounding Topic 8. Topic 8 (compensation and stewardship) are addressed here because the interview respondents consistently highlighted their concerns regarding compensation as it is written in Bill C-5. Finally, Topic 5 (distrust of federal authority) provided insight into provisions within other legislation. Those insights are incorporated into the following recommended changes.

Dispute resolution for compensation disagreements: A dispute resolution mechanism in the form of an independent and publicly accessible body would provide an acceptable "last resort" option. This body would have to follow pre-determined guidelines with regards to eligibility requirements, as well the understanding that each case would be examined on an individual

basis. Landholders dissatisfied with specific compensation options offered through Bill C-5 would be able to take their concerns to this body on an individual basis.

Ensuring compensation follows stewardship initiatives: The issue of compensation can be addressed without requiring the input of large amounts of money from the government if stewardship funding and initiatives are successful. According to Dr. Pearce, the provision discussing compensation under the SARA (Section 64) "is a very general, discretionary provision, which gives rise to considerable anxiety about how it will be interpreted and administered."²⁹¹ In other words, it is not the fact that compensation is inadequate that concerns landholders, it is the fact that compensation is left completely to the Minister's discretion. Clarification surrounding the relationship between stewardship and compensation would improve relations with the agriculturally-based landholder community and lead to a better acceptance of the compensation provision within Bill C-5. Since agriculturally-based landholders would prefer to stay on the land and develop successful stewardship projects, compensation should be used as a security blanket in the event that stewardship projects are ineffective under a given situation. It would be beneficial if compensation was clarified as being only available after the landholder being compensated has worked towards voluntary conservation efforts. For example, Canadians might expect to have voluntary support from a landholder who is able to maintain (to a great extent) a cattle operation surrounding a sharp-tailed grouse (*Tympanachus phasianellus*) dancing ground. In contrast, Canadians might expect to compensate a landholder

who, in protecting the habitat of a listed amphibian, is required to lose access to one of the land's major water sources.

Creation of a funding body: Another clarification would be the inclusion of a clearly defined funding body able to accept both public and government monies. Section 13(1) currently within Bill C-5 provides an opportunity for organizations, governments, and individuals to contribute towards the cost of programs or measures, but the provision does not specifically create a fund. A national conservation funding body financially supported by all Canadians could provide support specifically for stewardship programs and initiatives connected to the Species at Risk Act. By providing the public with opportunities to contribute, pressure on government resources might be reduced. The determining body would need to be carefully laid out so as to incorporate the various sectors involved, and criteria should be determined in advance to ensure support from various stakeholders and interest groups. A funding body with pre-determined funding criteria will ensure that agricultural stakeholders feel the process to determine stewardship and compensation funds eligibility is a fair process.

Suspension permits: Since Bill C-5 places clear emphasis upon cooperative programs, one can surmise that unanticipated habitat designations on private lands will be rare. In those rare cases where habitat designations are placed, permit opportunities could be increased so that suspensions are available for specific landholder activities. Currently, the text of Section 58(1)

²⁹¹ Supra, Notes 268-74, 277. p.31

states that "[n]o person shall destroy any part of the critical habitat . . ." Section 58(2), subsection (1) applies the prohibitions only to cases where the Governor in Council has specified critical habitat. It is suggested here that an additional subsection be added, subsection (2), that provides additional permit opportunities for landholders to learn about species on their lands.

The researcher believes a feasible permit option would be to offer agriculturally-based landholders a six-month reprieve (or a short time period based on seasonal needs) from the application of restrictive habitat provisions on their lands. That period of grace should only apply if the landholder agrees to undertake voluntary steps to protect species at risk as well as to meet the habitat requirements. During the six-month grace period there needs to be a guarantee that conservation authorities will work with the landholder to ensure he/she has a comprehensive understanding of the specific prohibitions in each instance. Similarly, the landholder should be prepared to commit to cooperate within this process. These grace permits should only be available to the landholder and should not be transferable.

6.4.2 An unlikely wish list

The researcher accepts that the federal government will not take great strides towards altering the way compensation is provided for, or defined, in Bill C-5. The fact that federal authorities are already stepping into untested ground by developing wildlife legislation capable of applying to provincial and private lands will ensure that Bill C-5 will address compensation issues with caution. The common landholder rhetoric is that for the legislation to work on the ground (i.e.

on the lands of private landholders), compensation MUST be fair and equitable. For the agricultural community, fair and equitable means the government must allocate money towards compensation sufficient to compensate for the full market value and the potential loss of income. This may not be an option for the federal government, especially given the emphasis within the legislation upon stewardship mechanisms. The researcher believes that if landholders are given a better understanding of legal issues and assurances around stewardship opportunities and believe that federal authorities understand their concerns, compensation should not be as important and this threat factor will be of less concern.

Secondly, the researcher does not anticipate changes to Bill C-5 whereby it will no longer be *strict liability* legislation thereby removing the *due diligence* defence option. Ensuring that the Crown must prove a defendant's intent may prevent convictions on a grand scale and allow those committing large-scale and careless acts to go free. However, if education with regards to *strict liability* legislation is effective, landholder concerns surround a *due diligence* defence may become negligible.

6.4.3 Summary table of recommendations

Project Recommendation	Topic(s) Addressed
APPROACH: Information sharing opportunities	
<u>Conservation knowledge</u> : Sharing of information regarding the needs of local species at risk and their habitats.	#4: Species at risk information.
<u>Legal knowledge</u> : Training and information sharing with regards to key legal concepts including <i>strict liability</i> , <i>due diligence</i> defences, and the avoidance of a command and control approach under Bill C-5. These are subjects that can not easily be incorporated into changes to Bill C-5.	#7: Command and control fears, #8: Compensation and stewardship, #9: <i>Strict liability</i> and <i>due diligence</i> .
APPROACH: Minor changes to the proposed legislation	
<u>Dispute resolution for compensation</u> : The creation of a public and independent funding body to deal with disputes surrounding compensation under Bill C-5.	#6: Distrust of Ministerial discretion, #8: Compensation and stewardship.
<u>Ensuring compensation follows stewardship initiatives</u> : Changes in the current provision in order to confirm compensation will be available only after voluntary initiatives are explored fully.	#6: Distrust of Ministerial discretion, #8: Compensation and stewardship
<u>Creation of a funding body</u> : A publicly supported funding body to provide support for stewardship initiatives first, and provide compensation monies as a last resort.	#8: Compensation and stewardship.
<u>Expansion of permits</u> : Provision of permits to provide agriculturally-based landholders with a period of grace when their lands are designated as critical habitat.	#6: Distrust of Ministerial discretion, #8: Compensation and stewardship.

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Ducks Unlimited Canada (Alberta): www.ducks.ca

Environment Canada (Canadian Wildlife Service): www.ec.gc.ca/cws-scf

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Land Stewardship Centre of Canada: www.landstewardship.org

Manitoba Department of Conservation: www.gov.mb.ca/natres/wildlife

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Prairie Farm Rehabilitation Administration (PFRA): www.agr.ca/pfra

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Scientists for Species: www.scientists4species.org.

Sonoran Institute: www.sonoran.org

Southern Alberta Landtrust Society (SALTS): www.salts-landtrust.org

Western Producer: www.producer.com

Wild Canada.net: National website for species at risk. August, 2001. www.wildcanada.net/.

Key Contacts:

Mike Going, Central Rockies Wolf Project.

Guy Greenaway, Southern Alberta Land Trust Society (SALTS).

Glen Pauley, Southern Alberta Land Trust Society (SALTS).

Dave Poulton, Canadian Parks and Wilderness Society (CPAWS).

Peggy Strankman, Canadian Cattlemen's Association.

Norman Ward, Western Stock Growers' Association.

***Landholders, Habitat and Species at Risk Legislation
in the Canadian Context***

Fiona Boulet

Mr.
Post Office Box
XX, Alberta

Hello XXXX. This letter is a follow-up to our telephone conversation this week. As I told you, I am a Masters Student at the University of Calgary working on my Master's Degree Project. You were recommended as a local landholder who is knowledgeable on the issue of species at risk legislation.

For my Masters Project, I am looking at issues surrounding the current discussions about federal legislation designed to protect Canada's endangered species. In particular, I would like to develop a list of concerns relevant to the agricultural community of southwestern Alberta. While such concerns have been considered, they appear to need better attention before the legislation is brought into force. Interviews with those who may be affected by federal endangered species legislation will provide an important perspective for my project.

Please find attached the following:

- Participant Information Sheet -- Some background information on my project.
- Interview Consent Form -- An official request for your assistance in accordance with University of Calgary project requirements.

The interview itself will take approximately half an hour and I am hoping to complete the official interviews before the end of July. I will telephone you soon to discuss your availability for my project, and to set up a time for the interview that fits your schedule.

Thank you so much for your interest in my Master's project. I look forward to speaking with you again soon.

Yours sincerely

Fiona Boulet
Masters Student, U. of Calgary
Phone: (403) 249-7348; Email: zzaj@cadvision.com
3109 Leduc Crescent SW, Calgary, AB T3E 5X1

**Landholders, Habitat and Species at Risk Legislation
in the Canadian Context**

Fiona Boulet

INTERVIEW CONSENT FORM

Project Title:

Landholders, Habitat, and Species at Risk Legislation in the Canadian Context.

Researcher:

Fiona Boulet (Graduate Student at the University of Calgary, Faculty of Environmental Design); For contact Information, please see below.

University Supervisor:

Dr. W.A. (Bill) Ross, Faculty of Environmental Design, University of Calgary;
Phone: 403-220-6961; Email: ross@ucalgary.ca.

External Advisors:

Roger Creasey, Faculty of Environmental Design, University of Calgary;
John Donihee, Canadian Institute of Resource Law, University of Calgary.

This consent form, a copy of which has been given to you, is part of the process of informed consent. It should give you a general understanding of the purpose of this project and what your participation will involve. If you would like more detail about something mentioned here, or information not included here, you should feel free to ask at any time.

The attached page provides more detail on the project and what your participation will involve.

Your signature on this form indicates that you have understood to your satisfaction the information regarding participation in the research project and agree to participate as a subject. In no way does this waive your legal rights nor release the investigators, sponsors, or involved institutions from their legal and professional responsibilities. You are free to withdraw from the study at any time. Your continued participation should be as informed as your initial consent, so you should feel free to ask for clarification or new information throughout your participation. If you have further questions concerning matters related to this research, please contact the following:

Fiona Boulet
3109 Leduc Crescent SW
Calgary, AB T3E 5X1

Phone: (403) 249-7348
Email: zzaj@cadvision.com

If you have any questions concerning your participation in this project, you may also contact Mrs. Patricia Evans, Research Services Office, Room 602, Earth Sciences; Telephone: (403) 220-3782.

Participant

Date

Researcher

Date

If you are able to participate,
please sign this copy and return in self-addressed envelope.

***Landholders, Habitat and Species at Risk Legislation
in the Canadian Context***

Fiona Boulet

Participant Information Sheet
(Interview Consent Form -- Attachment)

Introduction for Participants: Please understand that your participation in this project is completely voluntary and you have the right to withdraw from the study at any time. In deciding to participate in this project, you will need to carefully read this document before signing the Consent Form that is attached. Your signature on the Consent Form confirms that you understand the process for participation in this project.

Confidentiality / anonymity and storage and disposal: All information obtained during the interview process will be kept in strict confidence and your identity will be kept confidential. All interview notes and written records will be kept in the researcher's personal cabinet and names of subjects will not be associated with these notes. Names will be maintained in a separate booklet in accordance with the date that interviews occur. All notes will be destroyed at the culmination of the project.

Project Description: This project has been developed to partially fulfil the requirements for a Masters Degree in the Faculty of Environmental Design at the University of Calgary. The final report (the MDP) will be a culmination of literature and legal analysis, combined with the results of the interview process for which you are being asked to participate. This report, in its final form, may be published, but your name will not be associated, in any way, with the published results.

This MDP is attempting to respond to the following question: *What legislative and policy options can be used to encourage landholder participation in, and support of, protection of habitat within species at risk initiatives in relation to federal legislation?* To achieve this objective, the relationship between habitat protection of species at risk and the need for landholder support will be illustrated. I will explore current and past practices for habitat protection and how such practices can affect the interests of landholders. Specifically, I hope to determine potential incentives for encouraging holders of large landscapes to work with agencies on initiatives designed to protect the habitat of species at risk in Canada. I will also determine what such landholders believe to be barriers to their participation with these initiatives. The end result of the MDP will be a listing of recommendations intended for individuals and agencies working with landholders on management initiatives addressing the protection of species at risk and habitat.

Participant Commitments:

If you decide to participate, you will commit to the following, and no more.

- The interview will be conducted at a time and location convenient to you. It should take no more than one hour to complete. You are not agreeing to come to Calgary, I intend to conduct interviews over the phone, but would be pleased to meet with you (at a location of your choice) if you would prefer a personal interview.
- Notes will be taken during the interview to supplement the researcher's memory. You will be given a copy of the re-written notes from your interview with an opportunity to correct, change, or add what you think is important before your words and ideas are used for the research.
- No risks to you as a subject are perceived for this project.
- There is no monetary compensation available to you, however your time and assistance on this project will be greatly appreciated.