

## **ECELAW Student Paper Series**

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### *The Recovery Plan for Moose in Mainland Nova Scotia and the legal implications of the province's failure to satisfy its obligations under the Endangered Species Act*

By Steven Evans

#### I. INTRODUCTION

In 1998, the Nova Scotia legislature passed the *Endangered Species Act* (hereinafter, "the *Act*"), a new legal framework for the conservation and recovery of species at risk in the province.<sup>1</sup> The *Act* provides endangered and threatened species with an official designation and prohibits individuals from harming or trading in members of that species. Importantly, the *Act* commits the Minister of Natural Resources (hereinafter, the Minister) to prepare a recovery plan for endangered and threatened species, identifying the species' needs, threats and core habitat, and recommending a course of action for the recovery of the species.<sup>2</sup>

In 2003, the mainland (eastern) moose was listed as endangered under the *Act*. This species was once found in large numbers throughout Nova Scotia, but it is now limited to a few isolated populations located only on the mainland (the Cape Breton population disappeared entirely in the late 19<sup>th</sup> or early 20<sup>th</sup> century and was replaced by a

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<sup>1</sup>*Endangered Species Act*, SNS 1998, c 11, s 2(1) [ESA].

<sup>2</sup>*Ibid* s 15.

different subspecies from Alberta).<sup>3</sup> While there is considerable uncertainty with respect to the moose's current population, it is estimated that at present there may only be 1,000 to 1,200 individual moose, far short of what is needed for long-term viability.<sup>4</sup>

Pursuant to the *Act*, the Minister appointed a recovery team for the mainland moose and together the Minister and the recovery team prepared a recovery plan. The *Recovery Plan for Moose (Alcesalcesamericana) in Mainland Nova Scotia* identifies the needs, threats and habitat requirements of the mainland moose, and it recommends a number of actions designed to aid in the moose's recovery.<sup>5</sup> The *Recovery Plan* also contains a number of deficiencies. From failing to identify the essential habitat the moose needs to survive, to omitting cost estimates and setting a recovery goal that falls far short of recovery, the *Recovery Plan* fails to provide the mainland moose with the level of protection and support required for endangered species under the *Act*. These deficiencies, along with others, demonstrate that the province is failing to satisfy its obligations under the *Act*, to the detriment of species at risk throughout the province.

This paper is comprised of six parts. Part II introduces the *Act* and describes its purpose and provisions with respect to endangered and threatened species. Part III describes the eastern moose and the factors affecting it in mainland Nova Scotia. Part IV summarizes the *Recovery Plan for Moose (Alcesalcesamericana) in Mainland Nova Scotia* and identifies where it has not met the requirements of the *Act*. Part V analyzes the

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<sup>3</sup> Gerry Parker, "Status Report on The Eastern Moose (*Alcesalcesamericana Clinton*) in Mainland Nova Scotia" (2003) online: <<http://novascotia.ca/NATR/wildlife/biodiversity/pdf/statusreports/StatusReportMooseNSComplete.pdf>> [Parker].

<sup>4</sup> Nova Scotia Department of Natural Resources, "Recovery Plan for Moose (*Alcesalces Americana*) in Mainland Nova Scotia" (2007) online: <<http://novascotia.ca/natr/wildlife/biodiversity/species-recovery.asp#moose>> at 19 [DNR].

<sup>5</sup> *Ibid.*

extent to which the *Act's* deficiencies are unlawful and discusses the possible implications, legal and otherwise, of the province's actions. Part VI concludes.

## II. THE *ENDANGERED SPECIES ACT*

The purpose of the *Endangered Species Act* is to provide for the “protection, designation, recovery and other relevant aspects of conservation of species at risk in the Province, including habitat protection”.<sup>6</sup> It seeks to achieve this via mandatory and discretionary provisions directed at the Minister of Natural Resources. For example, the Minister is responsible for preparing recovery plans for endangered and threatened species, and has the authority to designate and regulate areas of core habitat. The *Act* establishes large fines for individuals and corporations that breach its provisions or any of its regulations.

The *Act* came into force four years before the long-delayed federal *Species at Risk Act* (*SARA*), which applies to species at risk on federal land.<sup>7</sup> In a 2012 report titled “Failure to Protect: Grading Canada's Species at Risk Laws”, Ecojustice ranked Nova Scotia's statute as the second strongest species at risk law in Canada; its “C” letter grade was higher than *SARA's* “C-” and trailed only Ontario's “C+”.<sup>8</sup> Compared to *SARA* and some other provincial laws, the *Act* is more deferential to scientific experts in the listing of species at risk, and provides potentially more protection for habitat. However, as with all the species at risk laws, the *Act's* effectiveness highly depends on how the responsible authority chooses to use his or her discretion.

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<sup>6</sup>*ESA*, *supra* note 1s 2(1).

<sup>7</sup>*Species at Risk Act*, SC 2002, c 29 [*SARA*].

<sup>8</sup>Ecojustice, “Failure to Protect: Grading Canada's Species at Risk Laws” (2012) online: <<https://www.ecojustice.ca/publications/reports/failure-to-protect-grading-canada2019s-species-at-risk-laws/attachment>> [*Ecojustice*].

A species in Nova Scotia is not eligible for legal protection until it is designated as a species at risk in accordance with the *Act*. The *Act* then establishes a number of automatic protections and sets mandatory timelines for recovery planning. The purpose section of the *Act* specifically references the ‘precautionary principle’ stating that a lack of full scientific certainty must not be used as a reason to postpone measures to avoid or minimize threats to a species at risk in the Province.<sup>9</sup> The following sections provide a more detailed summary of how the *Act* is designed to work.

*i. Listing of species*

The *Act* establishes a Species-at-risk Working Group made up of relevant scientific experts appointed by the Minister, whose role is to provide the Minister with a list of species at risk in the province. This list is to include species native to the province that have been designated as “at risk” nationally<sup>10</sup>, with annual additions, deletions or changes in the status of species justified by the Working Group on the basis of scientific information and traditional knowledge.<sup>11</sup> These species, plus any additional species that the Minister chooses to add on a precautionary basis, are deemed to be species at risk for the purposes of the *Act*.<sup>12</sup>

The listing process can be contrasted with that of *SARA*, which allows the federal government to reject the listing recommendations of the advisory committee. The federal government has used this discretion to deny legal listing to 30 species that the Committee on the Status Of Endangered Wildlife in Canada (‘COSEWIC’) advised were at risk of

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<sup>9</sup>*ESA, supra* note 1 s 2(1)(h).

<sup>10</sup> The Committee on the Status Of Endangered Wildlife in Canada (COSEWIC) determines the status of wild species in Canada that are suspected of being endangered or extirpated via an assessment process based on science and aboriginal or community knowledge. See [www.cosewic.gc.ca](http://www.cosewic.gc.ca) for more info.

<sup>11</sup>*ESA, supra* note 1 s 9, 10.

<sup>12</sup>*Ibid* s 11, 12.

extinction.<sup>13</sup> In Nova Scotia, the Minister only has the discretion to add species to the list and cannot reject listing recommendations made by the Species-at-Risk Working Group.

*ii. Automatic protections*

Once a species is designated as an endangered or threatened species under the *Act*,<sup>14</sup> the prohibitions in section 13 automatically apply to protect it. Individuals are prohibited from (a) killing, injuring, possessing, disturbing, taking or interfering with the species, or from attempting to commit any of these actions; (b) possessing for sale, offering for sale, selling, buying, trading or bartering the species or any part thereof; and (c) destroying, disturbing or interfering with a specific dwelling place or area occupied, or habitually occupied, by one or more individuals or populations of the species.

*iii. Mandatory recovery actions*

The Minister is required to appoint a recovery team and prepare a recovery plan within one year of the listing of a species as endangered, and within two years of the listing of a species as threatened.<sup>15</sup> The recovery team is to be made up of individuals interested in the recovery of the particular species, collectively comprising an appropriate diversity of expertise. The team is responsible for assisting the Minister in developing and implementing the recovery plan.

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<sup>13</sup> *Ecojustice*, *supra* note 8 at 8.

<sup>14</sup> A species at risk can be listed as endangered, threatened, vulnerable, extirpated, or extinct. The s. 13 prohibitions do not apply to extirpated species (which no longer exist in the province), extinct species (which no longer exist anywhere), or “vulnerable species” (which are particularly sensitive to human activities or natural events, but are not yet threatened).

<sup>15</sup> *ESA*, *supra* note 1 at 15.

Subsection 15(4) sets out the requirements of a recovery plan, stating that the plan “shall

- (a) identify the needs of and threats to an endangered or threatened species;
- (b) identify the viable status needed for recovery;
- (c) identify options for the recovery of the endangered or threatened species;
- (d) identify the costs and benefits of the options referred to in clause (c);
- (e) recommend a course of action or a combination of actions for the recovery of an endangered or threatened species;
- (f) recommend a schedule for implementation of the recovery plan including a prioritized listing of recommended actions;
- (g) identify habitat of the endangered or threatened species; and
- (h) identify areas to be considered for designation as core habitat”

The Nova Scotia *Interpretation Act* states that in an enactment, “shall” is imperative.<sup>16</sup>

Therefore, these elements of a recovery plan are mandatory.

The Minister must ensure the implementation of those elements of the recovery plan that are provincial responsibilities and that the Minister considers feasible.<sup>17</sup> The Minister must then review the plan after five years in order to determine the progress of the species’ recovery and to decide whether any changes or modifications are required.<sup>18</sup>

*iv. Discretionary elements*

The Minister has discretion in determining how, or even if, a recovery plan is implemented. After a plan is produced, the Minister may look at the feasibility of

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<sup>16</sup>*Interpretation Act*, RSNS 1989, c 235, s 9(3).

<sup>17</sup>*ESA*, *supra* note 1s 15(12).

<sup>18</sup>*Ibids* 15(11).

implementing it, taking into account (a) whether scientific evidence indicates that the species is naturally becoming extinct; (b) biological, technical and economic factors affecting the species' recovery; and (c) the species' status outside the province.<sup>19</sup>The Minister only has to ensure the implementation of those portions that are provincial responsibilities, and which the Minister considers feasible.<sup>20</sup>

While a recovery plan must identify core habitat, the actual designation of core habitat is subject to the Minister's discretion and the limitations specified in the *Act*. The legal significance of the designation is it allows the Minister to make regulations controlling, restricting, or prohibiting the use of, and activities on, those lands.<sup>21</sup> As a restriction on this broad power, the Minister cannot designate the entire geographical range of a species, unless its inclusion is considered essential for survival.<sup>22</sup> Furthermore, the Minister can only designate private land if the available public land is considered insufficient for the species' recovery.<sup>23</sup> The Minister can also enter into stewardship or management agreements with landowners.<sup>24</sup> If private lands that are being put to a particular use are designated as core habitat, and that particular use is prohibited by regulations, then the Minister must compensate the landowner for the loss that results.<sup>25</sup>

### III. THE EASTERN MOOSE IN MAINLAND NOVA SCOTIA

#### *i. Historic population and range*

The eastern moose (*Alcesalcesamericana*) is one of four subspecies of moose found in North America. Its distribution stretches from Quebec through New Brunswick and

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<sup>19</sup>*Ibid* s 15(6), (7).

<sup>20</sup>*Ibid* s 15(12).

<sup>21</sup>*Ibid* s 15(5).

<sup>22</sup>*Ibid* s 16(2), (3).

<sup>23</sup>*Ibid* s 16(4).

<sup>24</sup>*Ibid* s 16(1).

<sup>25</sup>*Ibid* s 16(7).

Nova Scotia, and into the northeastern US states.<sup>26</sup> Nova Scotia was historically home to an abundance of moose. It has been estimated that prior to European settlement, the province may have held approximately 15,000 individuals. With colonization came habitat loss and overhunting, leading to a serious decline in the total eastern moose population and a reduction of its range. In the late 19<sup>th</sup> century, laws were enacted in Nova Scotia and New Brunswick to restrict hunting, and the populations (with the exception of the Cape Breton population<sup>27</sup>) began to recover.

The twentieth century saw another serious decline in the mainland Nova Scotia moose population. In the 1960s, aerial surveys helped give an estimate of between 2,500 and 4,000 moose. A decade later, the mainland population was estimated at only 1600-1700 moose. While moose hunting has been prohibited on the mainland since 1981, the population has failed to rebound. In 2003, the most recent estimate, the population was estimated at between 1,000 and 1,200 individuals. This population is concentrated in the Cobequid Hills and Pictou-Antigonish Highlands, the southwestern interior in and around the Tobeatic Wildlife Management Area, and scattered pockets of Shelburne, Queens and Yarmouth Counties, and the Eastern Shore of Guysborough and Halifax Counties. In 2000, the eastern moose was assigned “RED” status in Nova Scotia, signaling that the species was at risk of extirpation. The mainland population was removed from aboriginal harvest, and the forest industry was issued cutting guidelines that claimed to enhance moose habitat.<sup>28</sup>

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<sup>26</sup> General facts about the Eastern Moose in Nova Scotia are taken from *Parker, supra* note 3 and *DNR, supra* note 4.

<sup>27</sup> The moose that currently inhabit Cape Breton are of a different subspecies than the eastern moose. In 1948 and 1949, moose from Alberta were introduced on Cape Breton to replace the eastern moose, which had become extirpated there in the late 1800s or early 1900s. These moose, which now outnumber the native mainland population, are not endangered.

<sup>28</sup> *Parker, supra* note 3 at 8.

ii. *Habitat requirements*

Moose are herbivores that live in boreal and mixed-wood forests. They require large areas and diverse habitats, including deciduous shrubs found most abundantly in forests recently disturbed by fire, wind, disease or timber harvesting. In the summer, their preferred habitat includes wetlands, while in the winter they prefer recently disturbed forest bordered by mature conifers where they can seek shelter and escape. The availability of suitable habitat is critical for keeping moose in optimum physical and reproductive condition, and for maintaining population productivity.<sup>29</sup> While timber harvesting can provide eastern moose with a good supply of young, regenerating forests, it eliminates mature conifer stands and reduces the cover needed for calving and to manage heat stress in summer and extreme cold in winter. As well, it introduces logging roads, which can lead to increased poaching.

iii. *Threats*

The 2003 Status Report commissioned by the Nova Scotia Department of Natural Resources (DNR) identified the following threats and limiting factors affecting the eastern moose in Nova Scotia:<sup>30</sup>

- a) *Disease* – moose fatalities are occurring as a result of a parasite carried by white-tailed deer and an unknown viral disease. Moose have also been found with high levels of toxic heavy metals in their organs, a situation that needs more research.

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<sup>29</sup>*Ibid* at 7.

<sup>30</sup>*Ibid* at 34-36.

- b) *Illegal kill* – an increase in forest roads increases the potential for poaching of mainland moose
- c) *Predation* – black bears do not often kill moose in Nova Scotia, but combined with other threats like disease and poaching, predation by bears could be a limiting factor hindering population growth.
- d) *Habitat alteration/loss*–forest harvesting has replaced much of Nova Scotia’s mature forest stock with young forest and caused a proliferation of edge habitat. While not directly a deterrent for moose, younger and more fragmented forest increases the penetration of white-tailed deer (and thus brainworm) into moose areas and increases road access for illegal hunting. Habitat fragmentation also isolates moose populations and increases their vulnerability.

The Status Report indicates that the extent to which each of these factors may be contributing to the eastern moose’s decline is unknown.

#### IV. THE *RECOVERY PLAN FOR MOOSE IN MAINLAND NOVA SCOTIA*

The eastern moose was listed as endangered under the Nova Scotia *Endangered Species Act* in 2003, signaling that the species faces imminent extinction or extirpation.<sup>31</sup> In 2004, pursuant to the *Act*, the Nova Scotia Mainland Moose Recovery Team was formed. The original Team was comprised of government and non-government environmental scientists and biologists, and representatives from the forest industry and First Nations.<sup>32</sup> The Recovery Team, together with the Nova Scotia Department of Natural Resources, produced the 38-page *Recovery Plan for Moose*

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<sup>31</sup> *ESA*, *supra* note 1 s 3(d).

<sup>32</sup> *DNR*, *supra* note 4 at 34-35.

(*Alces alces americana*) in *Mainland Nova Scotia* (hereinafter, “the *Recovery Plan*”), which was released in March 2007 (three years later than the *Act* requires).<sup>33</sup>

The *Recovery Plan* contains some, but not all, of the elements required under subsection 15(4) of the *Act*. The following sections attempt to summarize where the *Recovery Plan* is consistent with the *Act*'s requirements, and where it fails.

Under s. 15(4), a recovery plan shall:

(a) *identify the needs and threats to an endangered species;*

The plan contains a section on habitat and biological needs and identifies seven threats, listed in approximate order of priority: (1) disease and parasites, (2) poaching, (3) [human] access to moose habitat, (4) development, (5) forest practices, (6) acid rain and (7) climate change.<sup>34</sup> These threats come with the caveat that the factors affecting the mainland moose population are “many, complex and poorly understood”, and that in order to fully understand the effect of these factors on moose recovery, further studies are needed.<sup>35</sup> Paragraph 15(4)(a) appears to be satisfied.

(b) *identify the viable status needed for recovery;*

The *Recovery Plan* repeats the findings of Beazley *et al.* that the mainland moose population is unlikely to persist in the short-term with a population comprised of isolated, localized groups of fewer than 500 individuals, and that it may not persist long-term at fewer than 5,000 individuals unless there is genetic interchange between groups and outside populations.<sup>36</sup> The *Recovery Plan* observes that although these determinations are uncertain, “they raise concern that at current estimated numbers, mainland moose are in a

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<sup>33</sup>*Ibid.*

<sup>34</sup>*Ibid* at 11-13.

<sup>35</sup>*Ibid* at iii.

<sup>36</sup>*Ibid* at 19.

precarious state and long-term viability is uncertain.”<sup>37</sup> It is arguable whether paragraph 15(4)(b) is satisfied given this uncertainty in the *Recovery Plan*.

(c) *identify options for the recovery of the endangered or threatened species*

The *Recovery Plan* does not identify any options other than the implementation of the actions referred to in (e) below. It is unclear whether this is what paragraph 14(4)(c) requires, or whether multiple options have to be identified.

(d) *identify the costs and benefits of the options referred to in clause (c);*

The *Recovery Plan* identifies the benefits of its proposed actions, but it fails to identify any costs. Paragraph 14(4)(d) is therefore unsatisfied.

(e) *recommend a course of action or a combination of actions for the recovery of an endangered or threatened species;*

The *Recovery Plan* recommends a number of research, monitoring, management, education and stewardship actions. These are classified as urgent, necessary or secondary in priority (see Appendix I for a complete list of actions).<sup>38</sup> Paragraph 14(4)(e) is satisfied.

(f) *recommend a schedule for implementation of the recovery plan including a prioritized listing of recommended actions;*

The *Recovery Plan* does not recommend a schedule for implementation beyond stating that its actions are to be implemented over a five-year period (2007-2012). It contains a prioritized listing of recommended actions (see Appendix I). It is arguable whether paragraph 14(4)(f) has been satisfied.

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<sup>37</sup> *Ibid.*

<sup>38</sup> Taken from the Recovery Planning Table found in *DNR, supra* note 4 at 23-25.

(g) identify habitat of the endangered or threatened species; and

The *Recovery Plan* identifies the habitat requirements of the mainland moose and core areas of moose distribution in the province, thus satisfying paragraph 14(4)(g).

(h) identify areas to be considered for designation as core habitat.

Core habitat is defined by the *Act* as “specific areas of habitat essential for the long-term survival and recovery of endangered or threatened species.”<sup>39</sup> The *Recovery Plan* fails to identify any areas for consideration as core habitat, stating that insufficient information exists relating to mainland moose life history, landscape ecology and biology and that these need to be addressed before core habitat can be defined.<sup>40</sup> The *Recovery Plan* incorrectly states that the province “may” identify core habitat.<sup>41</sup> This is at odds with the definition of “shall” in the *Interpretation Act*, which indicates that it is mandatory. Paragraph 14(4)(h) is unsatisfied.

## V. ANALYSIS

The province has failed to satisfy the requirements of the *Act* in relation to the eastern moose in at least four ways. First, it failed to publish the *Recovery Plan* within the statutory timeline. Second, it failed to identify the costs of the recovery options in the *Recovery Plan*. Third, it failed to identify core habitat in the *Recovery Plan*. And fourth, it failed to conduct a five-year review of the *Recovery Plan*. Each of these failures represents an unlawful breach of the *Act*. The following sections attempt to assess the implications of these and other actions taken by the province. Where available, the

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<sup>39</sup> *ESA*, *supra* note 1s 3(b).

<sup>40</sup> *Ibid* s 30.

<sup>41</sup> *Ibid*.

sections take into account recent federal case law relating to SARA, which may be useful for analogy purposes in the absence of any provincial case law.<sup>42</sup>

*i. The Minister failed to publish the Recovery Plan within the statutory time limit*

The *Act* requires that the Minister prepare a recovery plan within one year of the listing of an endangered species. This is also a requirement of the *National Accord for the Protection of Species at Risk*, which the province has agreed to, and which is explicitly recognized in s. 2(1) of the *Act*.<sup>43</sup> According to this timeline, the Minister should have published the *Recovery Plan* in 2004, not in 2007 as it eventually did.

The subject of late recovery strategies was dealt with in *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*, in which a group of environmental NGOs sought judicial review of the decisions of two federal Ministers in failing to post recovery strategies for one endangered species (the Nechako White Sturgeon) and three threatened species (the Pacific Humpback Whale, Marbled Murrelet and Southern Mountain Caribou) within the statutory timelines.<sup>44</sup> The applicants sought a declaration stating that the Ministers' ongoing failure or refusal to post these recovery strategies was unlawful, and an order of *mandamus* compelling the Ministers to post the proposed and final recovery strategies. After submitting the application, and before the Court's judgment was handed down, the Ministers posted the four proposed recovery

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<sup>42</sup> The four major federal species at risk cases are summarized in further detail in Appendix II.

<sup>43</sup> *National Accord for the Protection of Species at Risk*, 2006, online: <<http://www.abo-peoples.org/wp-content/uploads/2013/02/National-Accord-for-the-Protection-of-Species-at-Risk.pdf>> [*National Accord*].

<sup>44</sup> *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*, 2014 FCJ No 151 [*Western Canada*].

strategies. The Court still granted the applicants' request for a declaration, but found that the request for *mandamus* had become moot.

In this case, a recovery plan has been published; however, the delay was unlawful. An applicant might find themselves in the same position as the Western Canada Wilderness Committee applicants after the Ministers had posted the recovery strategies, with the court willing to grant a declaration that the government's actions were unlawful, but no more.

ii. *The Minister failed to identify the costs of the recovery options*

The *Act* requires that the costs (and benefits) of each recovery option be identified in a recovery plan. The eastern moose *Recovery Plan* fails to identify any costs. This absence of costs presumably makes it more difficult for the Minister to establish the feasibility of implementing the *Recovery Plan*, or any portion thereof, pursuant to s. 15(6). And it makes it more difficult for members of the public to determine whether the Minister has used his or her discretion reasonably in implementing only those portions that the Minister considers feasible, pursuant to s. 15(12).

iii. *The Minister failed to identify core habitat in the Recovery Plan*

The *Act* requires that core habitat be identified in a recovery plan. Habitat protection is included in the *Act's* purpose, and in the *National Accord for the Protection of Species at Risk*, which the *Act* recognizes.<sup>45</sup> The majority of the threats listed in the *Recovery Plan* relate to some extent to the availability and suitability of moose habitat. However, the *Recovery Plan* fails to identify any core habitat, providing only the more limited "specific dwelling place or area" protection of s. 13(1)(c) in place of the broader

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<sup>45</sup>*Ibid.*

regulatory protection that a core habitat designation is intended to provide. This failure does not just rob the mainland moose of protected habitat, it relieves the Minister of having to use his or her discretion to decide whether to designate core habitat and makes it more difficult for the public to determine if this discretion was used reasonably. It also reduces the public's awareness of habitat issues, thus limiting its opportunity to "meaningfully participate in relation to conservation of species at risk", as is sought under s. 2(1)(e) of the *Act*.

Under *SARA*, "critical habitat" has much the same meaning as core habitat, however it only has to be included in recovery strategies "to the extent possible, based on the best available information."<sup>46</sup> Despite this qualification, which makes the identification of critical habitat more discretionary than core habitat, the federal government has been successfully challenged when it has failed to identify critical habitat in recovery strategies. In *Alberta Wilderness Assn. v. Canada (Minister of Environment)* (the "Greater Sage-Grouse" case), a group of non-profit environmental and natural history organizations argued that the Minister of Environment's failure to identify critical habitat in its Greater Sage-Grouse recovery strategy was unlawful and that sufficient information was known in order to identify part of the bird's habitat.<sup>47</sup> The court examined the information that was available and found that the Minister's decision to not identify any critical habitat was unreasonable. As a remedy, the recovery strategy's section on critical habitat was struck and the Minister was given a deadline for redrafting it.

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<sup>46</sup>*SARA*, *supra* note 7 s 41(1)(c).

<sup>47</sup>*Alberta Wilderness Assn v Canada (Minister of Environment)*, 2009 FCJ No 876 [*Alberta Wilderness*].

In the case of the mainland moose, the *Recovery Plan* states that insufficient information exists in order to identify core habitat. However, unlike critical habitat under *SARA*, the identification of core habitat in a recovery plan is mandatory. The Minister cannot argue that its exclusion was reasonable based on the evidence. Even if this argument were available, the *Act*'s recognition of the precautionary principle and the court's decision in the federal *Greater Sage-Grouse* case show that it would be a difficult argument to make.

*iv. The Minister's failure to conduct a five-year review of the Recovery Plan*

The *Act* requires that recovery plans be reviewed every five years "to determine the progress of the recovery of the species and whether any changes or modifications are required".<sup>48</sup> The review of the *Recovery Plan* should have taken place in 2012, however none was conducted. This may not be as significant as the failure to identify core habitat or costs, but it does point to the extent to which the mandatory requirements of the *Act* are being neglected by the province.

*v. The Recovery Plan fails to plan for the recovery of the eastern moose*

Under the *Act*, a recovery plan is defined as a "statement of needs and actions to be undertaken for the *recovery* of an endangered or threatened species" (emphasis added).<sup>49</sup> Given this definition, the mainland moose *Recovery Plan* is not ambitious enough. The *Recovery Plan*'s stated recovery goal is not to increase the number of mainland moose, but to maintain the population within its current range, estimated at between 1,000 and

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<sup>48</sup> *ESA*, *supra* note 1s 15(11).

<sup>49</sup> *Ibid* s 3(n).

1,200 moose.<sup>50</sup> This cannot reasonably be considered “recovery”, given that Beazley *et al.* have identified the current population as being likely not viable<sup>51</sup> and the *Recovery Plan* states that at the current estimated numbers, the moose are in a precarious state.<sup>52</sup> Furthermore, the *Recovery Plan* states that the current population may have already stabilized,<sup>53</sup> which means that the *Recovery Plan* could potentially achieve its recovery goal without producing any beneficial impact for the mainland moose, negating the point of producing a recovery plan in the first place.

A recovery plan needs to provide direction for the *recovery* of the species because there is no obligation under the *Act* to produce any further plans, only to review the recovery plan after five years. While the lack of sufficient data about the mainland moose undoubtedly affected the Recovery Team’s ability to prepare a more ambitious recovery plan, the *Act* directs the Recovery Team and the Minister to aim higher. A recovery plan should endeavour to return a species to a viable status, not simply identify that status and set a goal that maintains the status quo. As well, the province had four years from the time that the mainland moose was declared endangered until the time the *Recovery Plan* was published during which it could have conducted research to discover the unknown data. It is unclear to what extent it attempted to accomplish this.

## VI. CONCLUSION

The Nova Scotia government has failed to satisfy its obligations under the *Endangered Species Act* with respect to the mainland moose. It published a recovery plan

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<sup>50</sup> *DNR, supra* note 4 at 22.

<sup>51</sup> Beazley et al, “Complexity and Information Gaps in Recovery Planning for Moose (*Alces alces americana*) in Nova Scotia, Canada” (2006) 42 *Alces* 89 at 93 [*Beazley et al.*].

<sup>52</sup> *DNR, supra* note 4 at 19.

<sup>53</sup> *Ibid* at 7.

that was late, missing mandatory elements and not ambitious enough to provide for the species' recovery. It then failed to review the *Recovery Plan* after five years as required under the *Act*. While a Recovery Team partially made up of non-government members helped prepare the *Recovery Plan*, the Minister is ultimately responsible for the document and its deficiencies, and it is therefore the provincial government that is legally responsible.

The province's failure to implement the *Endangered Species Act* with respect to the mainland moose can be seen as representative of its overall failure to implement the legislation for other species at risk. The moose is one of 28 species listed as endangered in Nova Scotia.<sup>54</sup> Of these 28 species, only three (the eastern moose, the Blanding's turtle<sup>55</sup> and the Canada lynx<sup>56</sup>) have had recovery plans prepared for them, while one more (the American marten<sup>57</sup>) has had a partial recovery plan prepared for it.<sup>58</sup> Of the remaining 24 species, 13 should have already received recovery plans according to the statutory timeline.<sup>59</sup> There are also nine species listed as threatened in the province, all of which lack recovery plans.<sup>60</sup> Four species are overdue, while five were listed in 2013 and will not require recovery plans until 2015. Of the three full recovery plans that have been

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<sup>54</sup>The list of Nova Scotia's species at risk is found online at <http://novascotia.ca/natr/wildlife/biodiversity/species-list.asp>.

<sup>55</sup>The Blanding's Turtle Recovery Team, "National Recovery Plan for the Blanding's Turtle (*Emydoidea blandingii*) Nova Scotia Population" (2002) online: <http://novascotia.ca/natr/wildlife/biodiversity/species-recovery.asp#blandings>.

<sup>56</sup>Nova Scotia Lynx Recovery Team, "Provincial Recovery Plan for the Canada Lynx (*Lynx canadensis*)" (2006) online: <http://novascotia.ca/natr/wildlife/biodiversity/pdf/recoveryplans/LynxRecoveryPlan2007.pdf>.

<sup>57</sup>Nova Scotia American Marten Recovery Team, "Recovery Strategy for American marten (*Martes americana*) on Cape Breton Island, Nova Scotia in Canada" (2006) online: <http://novascotia.ca/natr/wildlife/biodiversity/pdf/recoveryplans/martenstrategy07.pdf>.

<sup>58</sup> The *Recovery Strategy for American marten (Martes americana) on Cape Breton Island, Nova Scotia, Canada* is described as the first part of a two-part recovery plan.

<sup>59</sup> The remaining 11 were listed in 2013, which means that their recovery teams and recovery plans are due in 2014.

<sup>60</sup> A stewardship plan was prepared for the Wood Turtle in 2003 when the species was listed as vulnerable.

produced, not one identifies core habitat or costs, despite the mandatory requirements of s. 15 of the *Act*. A tally of all the omissions from recovery plans and missed statutory deadlines indicates that the Minister of Natural Resources has breached the *Endangered Species Act* at least 30 times since its passage in 1998.

The province's failure to fully implement the *Act* mirrors similar failures by the federal government in implementing *SARA*. In *Western Canada Wilderness Committee v. Canada*, the federal government admitted that it was overdue in posting recovery strategies for the four species at issue, plus an additional 167 species.<sup>61</sup> The federal government has also been challenged multiple times for its failure to identify critical habitat in its recovery strategies to the extent required under *SARA*.<sup>62</sup> Federally and provincially, it appears that governments are extremely hesitant to provide habitat protection even when, as with the *Act*, that protection might be limited to the identification of core habitat within a recovery plan.

Ultimately, this paper has attempted to show the various ways in which the province has failed to satisfy its obligations under the *Act* with respect to the mainland moose. Although the paper does not consider what steps may be appropriate to address these failures, insight gained from this paper may assist in identifying the best approach to ensure that the purposes of the *Act* are met and the provisions are applied to ensure species like the mainland moose have the opportunity to recover.

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<sup>61</sup> *Western Canada*, *supra* note 43 at para 85.

<sup>62</sup> See Appendix II.

APPENDIX I  
RECOVERY PLANNING ACTIONS FROM THE MOOSE RECOVERY PLAN<sup>63</sup>

*Urgent actions:*

- Improve understanding of the weighting and interrelationship(s) of threats and limiting factors
- Develop and implement a strategy to reduce poaching
- Raise public awareness of the status of mainland moose, threats and recovery efforts

*Necessary actions:*

- Improve understanding of habitat suitability, availability and selection
- Improve efforts to provide insight into the structure and genetic profile of mainland moose
- Investigate the cause of death/illness of all found dead and apparent “sick” moose
- Initiate a rigorous long-term monitoring program to provide reliable data on the distribution and demographics of moose on mainland Nova Scotia
- Decrease occurrence of preventable mainland moose mortality
- Review and adapt forest management practices as habitat requirements of moose in Nova Scotia are better understood
- Engage partners in recovery activities
- Engage landowners in stewardship of mainland moose and their habitat

*Secondary actions:*

- Establish means of monitoring the impact severity of each factor (threat) known to inhibit growth of localized moose herds/groups
- Determine the feasibility of translocating adult moose and/or orphans from New Brunswick and proceed as appropriate
- Promote public reporting of poaching and moose observations

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<sup>63</sup>Taken from the Recovery Planning Table found in DNR at 23-25.

## APPENDIX II SPECIES AT RISK CASE LAW

The province's failure to satisfy the legal requirements of the Act makes it vulnerable to legal challenge. While Nova Scotia's implementation of its *Endangered Species Act* has never been challenged in court, Canada's implementation of *SARA* has, most notably in the following four cases. These cases can provide a useful analogy for any action taken against the Nova Scotia government given the similarities between the two species at risk laws.

- i. *Western Canada Wilderness Committee v Canada (Minister of Fisheries and Oceans)*, [2014] FCJ No 151<sup>64</sup>

In February, 2014, a group of environmental NGOs won a Federal Court decision granting their application for judicial review of the federal government's failure to implement *SARA*. The application concerned the Minister of Fisheries and Oceans' and Minister of the Environment's failure to prepare and publish recovery strategies for one endangered species (the Nechako White Sturgeon) and three threatened species (the Pacific Humpback Whale, Marbled Murrelet and Southern Mountain Caribou) within the statutory timelines. The applicants sought a declaration stating that the Ministers' ongoing failure or refusal to post these recovery strategies was unlawful, and an order of *mandamus* compelling the Ministers to post the proposed and final recovery strategies. The applicants argued that the failure to post recovery strategies resulted in adverse consequences for the species as it denied them an identified critical habitat and prevented the implementation of recovery actions.<sup>65</sup>

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<sup>64</sup>*Western Canada*, *supra* note 43.

<sup>65</sup>*Ibid* at para 56.

The Ministers admitted to a failure to comply with their statutory obligations and posted three of the four proposed recovery strategies after litigation commenced (the fourth was posted shortly after the hearing ended). They also acknowledged that recovery strategies were overdue for 167 additional species. This led the Court to state that the delays at issue were “just the tip of the iceberg” and to observe that there was “clearly an enormous systemic problem” within the Ministries.<sup>66</sup>

The Court granted the applicants’ request for a declaration, stating that the remedy was necessary and appropriate, both as an “expression of judicial disapproval of the current situation” and to encourage future compliance with the statute by the Ministers.<sup>67</sup> It issued a declaration declaring the Ministers’ failure to post recovery strategies for the four species within the statutory time periods to be unlawful. However, it denied the request for *mandamus* as the belated posting of the proposed recovery strategies made the request moot. It was also too early to grant *mandamus* compelling the Ministers to publish the final recovery strategies, as the timeline for these was triggered by the posting of the proposed strategies and had not yet elapsed.

- ii. *Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*, [2010] FCJ No 1471<sup>68</sup>

The “Orca” case concerned the Minister of Fisheries and Oceans’ and the Minister of the Environment’s failure to satisfy their statutory obligations to provide legal protection for Killer Whale critical habitat. Under *SARA*, the relevant minister must issue either a protection order prohibiting the destruction of critical habitat identified in a recovery strategy, or a protection statement describing how that critical habitat is already

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<sup>66</sup>*Ibid* at para 85.

<sup>67</sup>*Ibid* at para 92.

<sup>68</sup>*Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*, 2010 FCJ No 1471.

legally protected. In this case, the DFO posted a protection order that ignored the biological, chemical and acoustic components of the critical habitat identified in the recovery strategy and a protection statement that relied not on legal protection, but on policy and other non-statutory instruments, prospective laws and ministerial discretion. The applicants, a group of environmental NGOs, challenged these actions. The Court sided with the applicants and issued declarations that the Ministers acted unlawfully with respect to both the protection statement and the protection order.

- iii. *Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, [2009] FCJ No 1052<sup>69</sup>

The “Nooksack Dace” case dealt with the Minister of Fisheries and Oceans’ failure to satisfy the mandatory requirements of *SARA* with respect to identifying critical habitat. The applicants, a group of environmental NGOs, applied for judicial review of the Minister’s decision to not identify critical habitat in the posted recovery strategy for the Nooksack Dace, a small, nearly extinct, minnow. In this case, the recovery team had identified critical habitat, but at the Minister’s direction, it was removed. The Court granted the application and stated that the Minister acted contrary to the law by failing to meet the mandatory critical habitat requirements of *SARA*. It also established that critical habitat includes not just a geographic location, but also the special features that exist there and that allow the species to carry out its life processes.

- iv. *Alberta Wilderness Assn v Canada (Minister of Environment)*, [2009] FCJ No 876<sup>70</sup>

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<sup>69</sup>*Environmental Defence Canada v Canada (Minister of Fisheries and Oceans)*, 2009 FCJ No 1052.

<sup>70</sup>*Alberta Wilderness*, *supra* note 46.

The “Greater Sage-Grouse” case dealt with an application for judicial review of a recovery strategy posted by the Minister of Environment. The applicants, a group of non-profit environmental and natural history organizations, argued that the government’s failure to identify critical habitat in its Recovery Strategy for the Greater Sage-Grouse was unlawful. Under s 41(1)(c) of *SARA*, a recovery strategy must include “an identification of the species’ critical habitat, to the extent possible, based on the best available information.”<sup>71</sup> If the information is not sufficient, then pursuant to s 41(1)(c1), the recovery strategy must include a schedule of studies to identify critical habitat.<sup>72</sup> The Recovery Strategy for the Greater Sage-Grouse stated that critical habitat could not be identified due to several knowledge gaps and technical activities that first needed to be addressed.<sup>73</sup> It instead contained a schedule of studies.

The applicants argued that *SARA*’s use of “to the extent possible” meant that the Minister needed to identify as much critical habitat as possible. According to the applicants, sufficient information was known about the Greater Sage-Grouse’s critical habitat in Alberta to make a partial identification. The Minister agreed with the first statement, but disagreed with the second, arguing that the decision to not identify critical habitat was based on expert evidence.<sup>74</sup> The issue for the Court was whether this decision was reasonable, given the information that was available in the Recovery Strategy. It held that it was not. Sufficient information was known about Greater Sage-Grouse populations in order to identify some critical habitat. As a remedy, the recovery strategy’s section on critical habitat was struck and the Minister was given a deadline to redraft it.

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<sup>71</sup>*SARA*, *supra* note 7 s 41(1)(c).

<sup>72</sup>*Ibid* s 41(1)(c1).

<sup>73</sup>*Alberta Wilderness*, *supra* note 46at para 10.

<sup>74</sup>*Ibid* at paras 40-44.