

National Aboriginal Council on Species at Risk

Case Study on Consultation, Accommodation  
and Cooperation with Aboriginal Peoples  
Undertaken by Environment Canada in Regard to  
the Boreal Woodland Caribou, and by Fisheries  
and Oceans Canada in Regard to the Inner Bay of  
Fundy Atlantic Salmon and American Eel; and  
Identification of Gaps and Suggestions to Increase  
the Level of Aboriginal Participation in the  
Species at Risk Act

Prepared by:  
Maritime Aboriginal Peoples Council

July 2014

# Maritime Aboriginal Peoples Council



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# Maritime Aboriginal Peoples Council

The Maritime Region Aboriginal Leaders  
Intergovernmental Council of Aboriginal Peoples  
Continuing to Reside on Traditional Ancestral Homelands

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September 2, 2014

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RE: Letter of Transmittal on contract K 2A52-14-9029 Project 18381

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Dear Ms. Gauthier

I am pleased to forward you, the contract designated representative for the Minister of the Environment, the final deliverable report with power point presentation deck.

The study review of consultation, accommodation and co-operation with Aboriginal Groups undertaken by Environment Canada in regard to the Boreal Caribou, and Fisheries and Oceans Canada in regard to the Atlantic Salmon and the American Eel, identified gaps, and suggested methods to increase the level of Aboriginal Peoples participation.

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The study for each of the three species, arrived at conclusions based on a review of literature, correspondence, reports, case law, interviews and discussions, including the study researcher's almost eighteen years of experience with the Species at Risk Act and various aspects about the intent and role of Aboriginal Peoples in the implementation of SARA from early introduction to enactment.

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Following the conclusions for each species, there are a series of recommendations which apply to increasing the level of participation by Aboriginal Peoples, including recommendations which would address identified gaps in either assessing the species, developing recovery strategies or implementing action plans.

Included within the text of this letter of transmittal, I have grouped recommendations into six fundamental recommendations with accompanying

action items, which I suggest must be addressed to increase the involvement and participation of Aboriginal Peoples in the implementation of SARA:

- I. Bridge the Homo-centric and Eco-centric World Views (6 Action Items);
- II Advance Full, Effective and Meaningful Participation (7 Action Items);
- III Prioritize Communication, Awareness and Education ( 5 Action Items);
- IV Uphold the Honour, Duty and Good Faith Conduct of the Crown ( 11 Action Items)
- V Support Aboriginal Peoples Involvement in Developing Strategies and Plans ( 4 Action Items);
- VI Resolve Inter-jurisdictional Relationships in the Implementation of SARA (6 Action Items).

With each of the six fundamental recommendations, I have noted a series of numbered action items which when acted upon, should begin to address most of the shortcoming identified in the three conclusions, and fill in the gaps or become methods to improve; consultation, accommodation and co-operation between Aboriginal Peoples and the Federal Government in the implementation of SARA.

I herewith introduce the six fundamental recommendations and thirty-nine action items to be read as part of the study report.

## **Recommendations to Increase the Level of Aboriginal Peoples' Participation in the Implementation of SARA**

### **I. Bridge the Homo-centric and Eco-centric World Views**

#### ***1. Employ the Precautionary Principle***

The Precautionary Principle should be applied in assessing species at risk, including trans-boundary species.

#### ***2. Broaden Socio-Economic Analyses***

Socio-Economic Analyses must be broadened and conducted in a consistent and transparent manner to ensure that impact analyses include the cultural, spiritual and ecological values of Aboriginal Peoples.

#### ***3. Include Aboriginal Traditional Knowledge in the Status Report***

COSEWIC species assessments must include ATK.

#### ***4. Undertake a Socio-Economic Analysis***

A Socio-Economic Analysis must include and address the potential loss of access and use to the resource, as well as compensation for the loss or use of the resources.

#### ***5. Include Aboriginal Traditional Knowledge***

To comply with the statutory obligation of SARA Section 40, the COSEWIC finding that a species is or is not "at risk" must be based on the best available information, which includes

information provided by the competent authorities and which must contain Aboriginal Traditional Knowledge. Recovery Strategies, Action Plans, and Management Plans therefrom need to include Aboriginal Traditional Knowledge and where appropriate consider using the Two-eyed Seeing Approach.

#### ***6. Resolve the Intellectual Property Rights Impasse***

Negotiations need to take place concerning the development of mutually agreed terms of understanding to overcome the obstacles or impasse created by the “waiver of moral rights and intellectual property rights” requirement of the Crown.

## **II. Advance Full, Effective, and Meaningful Participation**

### ***1. Include Aboriginal Peoples in the Assessment Process***

Aboriginal Peoples must be involved in assessments to provide understanding as to the social, economic and resources impacts, which a listing will have on Aboriginal Peoples’ Rights.

### ***2. Engage Aboriginal Peoples***

The engagement of Aboriginal Peoples in transparent discussions to develop Recovery Strategies, Action Plans, and Management Plans, including discussions on trans-boundary issues, is an important element to the key SARA pillars of prevention, recovery, and management.

### ***3. Encourage Aboriginal Participation in Species Advisory Bodies***

Aboriginal Peoples should be involved in specific working groups such as CEWG, CESWoG, the Atlantic Migratory Game Birds Technical Working Group, Nova Scotia Leatherback Turtle Working Group, and other groups which provide advice or recommendations to the competent departments on the management of species at either the regional, national, or international level.

### ***4. Increase Representation of Aboriginal Peoples in the SARA Conservation Cycle***

Committees involved in drafting Recovery Strategies, Action Plans, and Management Plans, or undertaking research on specific species, must have representation from Aboriginal Peoples.

### ***5. Produce an Annual Report***

Conservation and recovery of species on Aboriginal lands or territories can only be achieved with the co-operation and support of the Aboriginal Peoples concerned. An annual report on the participation of Aboriginal Peoples in Recovery Strategies, Action Plans, and Management Plans should be annually prepared by DFO, EC, and PCA and provided to NACOSAR and interested Aboriginal organizations.

### ***6. Engage Aboriginal Peoples with the Federal Species at Risk Committees***

Aboriginal organizations must be fully engaged in departmental and interdepartmental species at risk processes to help shape SARA policies concerning consultation; full and effective participation; inclusion of Aboriginal Traditional Knowledge; free, prior and informed consent; and other matters which are significant to affected Aboriginal Peoples.

### ***7. Increase Capacity Development and Funding***

Capacity and funding for Aboriginal organizations' must be sufficient to achieve full, effective, and meaningful participation of Aboriginal Peoples in the SARA cycle. This item remains a major concern of Aboriginal organizations and requires immediate resolution.

## **III. Prioritize Communication, Awareness, and Education**

### ***1. Support Communications and Awareness***

Well supported communications and awareness building programs and/or strategies, developed with Aboriginal organizations, must be a guiding principle for the increased involvement of Aboriginal Peoples in the development and drafting of Recovery Strategies, Actions Plans, and Management Plans for the overall implementation of SARA.

### ***2. Bring Clarity to Aboriginal Traditional Knowledge Collection***

When Aboriginal organizations participate in the collection of Aboriginal Traditional Knowledge, it must be clear that the Aboriginal Traditional Knowledge collection activity does not invoke the legal duty to consult, nor is it a partial fulfillment of the legal duty to consult. It is no more or no less than a collection activity.

### ***3. Close the Awareness Divide for Aboriginal Traditional Knowledge***

The Federal Government, with Aboriginal organizations, should sponsor a series of dialogues with proponents for western science and proponents for Aboriginal Traditional Knowledge to create a better understanding and awareness of the value and worth of Aboriginal Traditional Knowledge to reduce, or eliminate, the wide divide that exists between the two for the implementation of SARA.

### ***4. Hold Regular NACOSAR and Minister Meetings***

Regular meetings between the Minister of the Environment and NACOSAR are essential for the implementation of SARA with Aboriginal Peoples. It is vital that NACOSAR regularly advise the Minister on the implementation of SARA. Regular meetings between the Canadian Endangered Species Conservation Council and NACOSAR are important for NACOSAR to provide advice and recommendations to the CESSC on the implementation of federal and provincial laws used for species at risk.

### ***5. Provide NACOSAR With the Necessary Budget***

NACOSAR should have the necessary budget to travel to affected Aboriginal communities to listen to Aboriginal Peoples directly engaged in a species at risk Listed or proposed to be Listed within their territories.

## **IV. Uphold the Honour, Duty, and Good Faith Conduct of the Crown**

### **1. Honour of the Crown**

“The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honour of the Crown. The Honour of the Crown is always at stake in its dealings with Aboriginal peoples.” [*Haida Nation*, SCC]

The Crown in Right of Canada must ensure that the involvement of Aboriginal Peoples in the implementation of SARA is accommodated and achieved to the satisfaction of Aboriginal Peoples.

### **2. Work Together**

From the Preamble of SARA: “All Canadians have a role to play in the conservation of wildlife in this country, including the prevention of wildlife species from becoming Extirpated or Extinct.” People must have a sense of commitment and work together in harmony to achieve this common purpose. SARA is a part of the overall re-shaping of the Crown-Aboriginal Peoples relationship, which aims to achieve recognition and reconciliation together with the Aboriginal Peoples of the Federation of the Peoples of Canada.

### **3. Conduct Meaningful Consultation**

The Crown and Aboriginal Peoples’ participation in SARA must keep forefront these three important principles:

“Consultation must be meaningful, but there is not necessarily a duty to reach agreement...” [*Haida Nation*, SCC]

“The Crown must avoid even the appearance of ‘sharp dealing’. [*Badger, Haida Nation and Mikisew*, SCC]

“At all stages, good faith on both sides is required.” [*Haida Nation*, SCC]

### **4. Advance Mutuality**

Efforts must be made to advance the relationship between the two cultures, based on mutuality and based on the principles of mutual recognition of respect, sharing, and responsibility.

### **5. Conduct Open, Transparent and Accountable Processes**

At each step of the SARA cycle, the participation process must be carried out in a fully accountable, transparent and meaningful way and uphold the Honour of the Crown. The participation processes must advance *bone fide* meaningful consultation and accommodation with the clear intention of hearing, noting, and addressing the concerns, issues, and interests of Aboriginal Peoples.

### **6. Implement UNDRIP**

The implementation of the *UN Declaration on the Rights of Indigenous Peoples* can further the recognition and protection of Aboriginal customary laws, rights and interests in the protection of species at risk.

### **7. Use UNDRIP as a Guide**

Crown-Aboriginal Peoples participation in the SARA cycle process should be guided by the *UN Declaration on the Rights of Indigenous Peoples*. As the most comprehensive, universal, international human rights instrument explicitly addressing the rights of Indigenous Peoples, the Articles of UNDRIP elaborate on the economic, social, cultural, political, spiritual and **environmental rights** [emphasis added] of Indigenous Peoples.

### **8. Agree on the Level of Engagement**

It is understood that each Recovery Strategy, Action Plan and Management Plan must be prepared in cooperation with the participation of every Aboriginal organization directly affected. The Crown and Aboriginal Peoples must agree at which point in the SARA cycle they are engaging in consultation, accommodation, or compensation.

### **9. Note the Participation in Multi-Stakeholder or Multi-Interest Recovery Teams**

Government and Aboriginal Peoples should note that Aboriginal participation on multi-stakeholder or multi-interest Recovery Teams does not invoke the duty to consult, nor should such participation be viewed as consultation.

### **10. Ensure Procedural Fairness**

The Crown must ensure a high level of procedural fairness with respect to the SARA implementation processes within EC, DFO and PCA which can advance SARA implementation while safeguarding Aboriginal People's rights and interests.

### **11. Track Participation Success**

The effective, meaningful participation and satisfaction of Aboriginal Peoples with their participation in the implementation of SARA should be tracked through a performance indicator built into the evaluation process of the competent departments and annually reported to NACOSAR and interested Aboriginal organizations.

## **V. Support Aboriginal Peoples Involvement in Developing Strategies and Plans**

### **1. Do Not Constrain Committees Under SARA**

Federal officials participating on Recovery, Management, and Action Teams or Committees should act in the capacity of *ex officio* members and allow the committee as a whole the freedom to communicate directly with the competent minister about their work and concerns.

### **2. Recognize a Positive Obligation**

The duty for the participation of Aboriginal Peoples in the implementation of the SARA cycle is a positive obligation on the Crown. Aboriginal Peoples must be provided with all necessary information in a timely way to have the opportunity to express their interests and concerns. The Government must ensure that Aboriginal Peoples representations are seriously considered and, however possible, demonstrably integrated into the proposed Recovery Strategy, Action Plan, or Management Plan.

### **3. Ensure Impartiality of Recovery Teams**

Recovery Teams, with Aboriginal Peoples participation, must have the capacity and necessary resources to act impartially and avoid the appearance of bias. Recovery Teams must provide

the best available information to the Minister, and provide advice and recommendations to a competent Minister or department for the effective recovery of the species at risk or its habitat.

#### ***4. Support Aboriginal Peoples Involvement in the Drafting Documents***

Aboriginal Peoples must be involved in the collaborative process for drafting Recovery Strategies, Actions Plans, and Management Plans. If there is no drafting team, then Aboriginal Peoples must be involved in early and direct engagement with a recovery document writer and other experts or be permitted to establish their own action or management team.

## **VI. Resolve Inter-jurisdictional Relationships in the Implementation of SARA**

### ***1. Identify Intergovernmental Processes Involving Federal, Provincial, Territorial, and Aboriginal Governments***

The participation of Aboriginal Peoples within intergovernmental processes must be a requirement for all federal, provincial and territorial committees established to work on the development and implementation of Recovery Strategies, Action Plans, and Management Plans for species at risk and their habitats.

### ***2. Execute an Aboriginal Accord***

There is a long-overdue and pressing need for the competent federal departments, provincial and territorial jurisdictions, and Aboriginal Peoples National Aboriginal Organizations to complete the negotiation of an *Aboriginal Accord on Species at Risk*, setting out the principles for the full and effective involvement of Aboriginal Peoples in the implementation of SARA. The *Aboriginal Accord on Species at Risk* must be anchored to the principles of prevention, recovery, and management through or with the meaningful involvement and participation of Aboriginal Peoples directly engaged with the species at risk or its habitat.

### ***3. Define the Engagement Process***

A clearly defined process is required through which Aboriginal Peoples can engage with federal and provincial jurisdictions to ensure that the Aboriginal Peoples interests, issues, concerns, and rights are identified, considered, and incorporated into species at risk decision making.

### ***4. Collection of Aboriginal Traditional Knowledge***

Aboriginal Traditional Knowledge must be considered as having value and worth in the development of plans and strategies. Negotiations need to take place between the competent departments and Aboriginal representative organizations to agree on acceptable language to all parties before implementing agreements for the collection of Aboriginal Traditional Knowledge at the community level.

### ***5. Finalize an EC Framework Policy***

The absence of a coherent and robust final framework policy between the three competent authorities on the implementation of SARA has been a significant limiting factor impeding the participation of Aboriginal Peoples in the implementation of SARA. EC must update and finalize the draft (May 31, 2008) EC Overarching Framework Policy.

## **6. Apply Inclusiveness**

Section 35 (2) of the *Constitution Act, 1982* references the Aboriginal Peoples of Canada to include the 'Indian, Inuit and Métis peoples'. Recovery Strategies, Action Plans, and Management Plans need to be respectful and inclusive of *all* Aboriginal Peoples, on and off-reserve, in settlements, and on traditional ancestral homelands and accordingly guided to consider their full and effective participation and their interests, issues, concerns, and rights.

Since this Study was undertaken for NACOSAR, under the project authority of the Minister of Environment, readers are able to focus either on each of the three species recommendations separately, or if they choose, they may focus on the recommendations specific for NACOSAR.

The transmittal letter groups the study recommendations into six fundamental recommendations with a total of 39 accompanying action items. This presentation approach in the transmittal letter provides the reader with six succinct overarching recommendations with their action items to increase the involvement, participation and representation of Aboriginal Peoples with consultation, accommodation and co-operation in the implementation of SARA.

Thank you for the opportunity to prepare a study report with recommendations for your review and consideration.

Advancing, Promoting and Advocating the Reality of the  
Maritime Off-Reserve Community of Aboriginal Peoples

Roger J. Hunka  
Director of Intergovernmental Affairs, and

Joshua McNeely,  
Director IKANAWTIKET

RJH/JM:mw

Included within the Final Case Study Report

*The duty on States to consult with indigenous peoples in decisions affecting them is aimed at reversing the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on indigenous peoples, and to allow them to flourish as distinct communities on lands to which the cultures remain attached.*

James Anaya, UN Special Rapporteur on Indigenous Peoples (2009)

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## ACRONYMS

AANDC	<i>Aboriginal Affairs and Northern Development Canada</i>
AAPSC	<i>Atlantic Aboriginal Protection of Species Committee</i>
AFSAR	<i>Aboriginal Fund for Species at Risk</i>
ATK	<i>Aboriginal Traditional Knowledge</i>
ATK SC	<i>Aboriginal Traditional Knowledge Subcommittee of COSEWIC</i>
BCCA	<i>British Columbia Court of Appeal</i>
CEWG	<i>Canadian Eel Working Group</i>
CESWoG	<i>Canadian Eel Science Working Group</i>
Competent Departments	<i>Environment Canada, Fisheries and Oceans Canada, Parks Canada Agency</i>
COSEWIC	<i>Committee on the Status of Endangered Wildlife in Canada</i>
CSAS	<i>Canadian Science Advisory Secretariat</i>
DFO	<i>Department of Fisheries and Oceans Canada</i>
DU	<i>Designatable Unit</i>
EC	<i>Environment Canada</i>
FN	<i>First Nations</i>
IPR	<i>Intellectual Property Rights</i>
MAPC	<i>Maritime Aboriginal Peoples Council</i>
NACOSAR	<i>National Aboriginal Council on Species at Risk</i>
NAO(s)	<i>National Aboriginal Organization(s)</i>
PCA	<i>Parks Canada Agency</i>
RENEW	<i>Recovery of Nationally Endangered Wildlife</i>
RIAS	<i>Regulatory Impact Analysis Statement</i>
RPA	<i>Recovery Potential Assessments</i>
SARA	<i>Species at Risk Act</i>
SCC	<i>Supreme Court of Canada</i>
SEA	<i>Strategic Environmental Assessment</i>
SEIA	<i>Socio-Economic Impact Analysis</i>
UN	<i>United Nations</i>
UNDRIP	<i>United Nations Declaration on the Rights of Indigenous Peoples</i>

## Executive Summary

When the *Species at Risk Act* (SARA) was being negotiated through various bills, Aboriginal Peoples were expected to play an important role in the implementation of the legislation. This sanguinary promise was captured in the SARA Preamble:

The roles of the aboriginal peoples of Canada and of wildlife management boards established under land claims agreements in the conservation of wildlife in this country are essential.

Under section 6 of SARA, Aboriginal engagement was intended to be an integral part of the objectives of the Act:

The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

Over the past decade, the implementation of SARA by Environment Canada, Fisheries and Oceans Canada and Parks Canada Agency, with Environment Canada being responsible for the overall administration, has resulted in complex and underfunded processes, which has resulted in an eclipse of the hopes expressed in the Preamble.

Concomitantly, the recognition of our Aboriginal and treaty rights and interests, and the Crown's constitutional duty to consult have been a slow process. Under SARA, consultation, accommodation and cooperation with Aboriginal Peoples have been erratic with disparate processes taking place in Environment Canada, Fisheries and Oceans Canada and Parks Canada Agency. The participation of Aboriginal Peoples and the use of Aboriginal Traditional Knowledge (ATK) in SARA implementation have resulted in a complex tangle of issues and concerns over rights, entitlements and expectations.

In 2012, Environment Canada undertook its own evaluation of programs and activities in support of SARA and found that the competent departments did not track the levels of Aboriginal satisfaction associated with consultations. This evaluation also reported that "...the extent to which these consultations have led to on-going successful engagement between the federal government and external stakeholders and Aboriginal groups is unclear." Effective and meaningful progress cannot be tracked until information on relevant engagement with Aboriginal Peoples is collected and evaluated.

This case study prepared for the National Aboriginal Council on Species at Risk (NACOSAR) critically examines the complex landscape involved in carrying out consultation, accommodation and cooperation with Aboriginal Peoples by Environment Canada in regard to Boreal woodland caribou, and Fisheries and Oceans Canada in regard to inner Bay of Fundy Atlantic salmon (iBoF) and American eel.

As of March 2014, recovery strategies have been completed for the Boreal woodland caribou and the inner Bay of Fundy Atlantic salmon. In May 2012, the American eel was reexamined by the Committee on the Status of Endangered Wildlife in Canada and designated as Threatened. The reassessment triggered a new listing consultation process, which will be undertaken by Fisheries and Oceans Canada in Fall/Winter of 2014-2015.

In 2010, Environment Canada released draft policies dealing with SARA and its implementation. The national Aboriginal organizations provided critiques of these draft policies, but no feedback was ever received from the department, though Environment Canada officials assured NACOSAR that the submissions had been reviewed.

There has been no indication from the competent departments (Environment Canada, Fisheries and Oceans Canada, and Parks Canada Agency) as to when the next iteration of SARA policies will be undertaken and whether or not the national Aboriginal organizations will be engaged in the process.

A great many issues arise from the points raised in this case study and the challenge for Environment Canada, Fisheries and Oceans Canada, Parks Canada Agency and Aboriginal organizations is to find an effective and lasting framework for achieving the goals and objectives of SARA. Crown consultations under SARA must follow specific legal requirements, since there are serious issues with respect to the impact on Aboriginal rights and interests and the honour of the Crown.

The hard fact is that Aboriginal consultation is separate from consultation activities that take place with stakeholders and the public. Because there is no accepted process by which Aboriginal Peoples can be assured that Aboriginal rights and interests are reflected in species at risk decision-making, the overall effect is a confused approach with each of the competent departments acting unilaterally.

## Introduction

The National Aboriginal Council on Species at Risk (NACOSAR) was created under Section 8.1 of the *Species at Risk Act* (SARA), 2002.

The role of the Council is to:

- (a) advise the Minister on administration of this Act; and
- (b) provide advice and recommendations to the Canadian Endangered Species Conservation Council.

On December 1, 2013, NACOSAR called for a review of what engagement, (consultation, accommodation and cooperation) had taken place under SARA in the cases of the Boreal woodland caribou; inner Bay of Fundy Atlantic salmon and American eel. This case study is intended to provide information to NACOSAR as to how it might advise the Minister of the Environment on the administration of SARA.

This case study was undertaken by the Maritime Aboriginal Peoples Council (MAPC), which is the intergovernmental forum for the leaders of Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council and the Native Council of Prince Edward Island. These organizations represent and advocate for the Mi'kmaq, Maliseet and Passamaquoddy Aboriginal Peoples continuing to reside on Traditional Ancestral Homelands throughout Nova Scotia, New Brunswick and Prince Edward Island.

## Approach and Methodology

Under SARA, affected Aboriginal Peoples must be involved in and consulted on all relevant activities in the SARA cycle: assessment; listing; recovery strategy; action plan(s); management plan; development and implementation; critical habitat protection; permitting and related agreements.

In 2006, a formative evaluation of federal species at risk programs reported:

Given the requirements of the Act, as well as past court decisions, core departments have assessed the legal standard with respect to Aboriginal involvement as high, complex, and evolving. Recent court decisions suggest that there are three tests that need to be considered to support federal decision making involving Aboriginal peoples: 1) adequate consultation on proposed decisions; 2) adequate rationale/justification, addressing the impacts on Aboriginal peoples and the benefits to Canadians, of decisions taken; and 3) accommodation, where possible. These considerations were kept in mind when assessing the core departments' efforts to involve Aboriginal peoples in SARA-related issues during the evaluation period.<sup>1</sup>

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1 *Formative Evaluation of Federal Species at Risk Programs*. Final Report. Ottawa: Stratos Inc. July 2006. p.19

Through a narrative analysis of the Crown consultation, accommodation and cooperation that has taken place for the Boreal woodland caribou, American eel and the inner Bay of Fundy Atlantic salmon, we have uncovered weaknesses in the consultation and accommodation processes. Our methodology is of necessity selective, given the challenge of navigating these complex processes, which cover many years. The case study is organized as follows: overview of Aboriginal and treaty rights and the duty to consult; American eel; Boreal woodland caribou; and inner Bay of Fundy Atlantic salmon. The conclusion offers recommendations to increase the level of Aboriginal participation in SARA implementation.

## Aboriginal and Treaty Rights

This case study has not been prepared as legal advice or argument for recognition and accommodation of Aboriginal and treaty rights. The sections dealing with the subject, as well as the duty to consult, are meant to provide an overview of the basis of Aboriginal engagement with species at risk implementation. The relationship between Aboriginal Peoples and the Crown is governed by a distinct branch of law called the doctrine of Aboriginal rights.<sup>2</sup> The duty to consult is an obligation owed by the Crown to Aboriginal Peoples and is legally enforceable.

The existing Aboriginal and Treaty rights of the Aboriginal Peoples of Canada are recognized and affirmed in section 35 of Part II of the *Constitution Act, 1982*.<sup>3</sup> The definition of these section 35 rights did not take place during the constitutional negotiations and as a consequence, this work has been left to negotiations and decisions from the courts. The uncertainties around the form and scope of our Aboriginal rights have resulted in “ongoing instability in Canada’s constitutional law regarding Aboriginal rights, with concepts sometimes shifting rapidly in the space of a few years.”<sup>4</sup>

Section 35 of the *Constitution Act, 1982* provides that:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

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2 Slattery, Brian. *Making Sense of Aboriginal and Treaty Rights*. Toronto: Canadian Bar Review. Volume 79. 2000. p. 198.

3 *The Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c11

4 Newman, Dwight G. *Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title*. 2007. 44 Alta. L. Rev. 779.

Under section 3, SARA recognizes existing Aboriginal and treaty rights with the following non-derogation clause:

For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.<sup>5</sup>

This clause is a variation of section 25 of the *Constitution Act, 1982*:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.<sup>6</sup>

It is a remarkable fact that starting in the late 1990s, Justice Canada commenced the introduction of a new form of Aboriginal non-derogation clause to federal statutes. To date, eleven weaker variations of the non-derogation language have appeared. The result has been inconsistency in citations of the non-derogation clause in federal statutes. The erosion of the legal status of Aboriginal and treaty rights is of great concern to Aboriginal Peoples.

## The Duty to Consult

The duty to consult is a key doctrine for Aboriginal jurisprudence and policy development. The common law duty to consult is founded on judicial interpretation of section 35 in three cases heard in the Supreme Court of Canada: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* both heard in 2003, and *Haida Nation v. British Columbia (Minister of Forests)* heard in 2004. These three cases set out "...a new legal framework in relation to Aboriginal rights, title and treaty rights."<sup>7</sup>

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5 *Species at Risk Act*. An Act respecting the protection of wildlife species at risk in Canada. [SARA] SC 2002. c. 29.

6 *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act, 1982* (U.K.) 1982, c.II.

7 Newman, Dwight G. *The Duty to Consult, New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing Ltd. 2009. p. 14.

In these decisions, the Supreme Court of Canada held "...that the Crown has a duty to consult, and where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights." In the *Haida* decision, the Chief Justice of Canada, Beverly McLaughlin stated: "the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."<sup>8</sup>

Five fundamental components of the duty to consult were developed in the trilogy of cases: *Haida Nation*, *Tlingit First Nation* and *Mikisew Cree*:

- 1) the duty to consult arises prior to proof of an Aboriginal rights or title claim or in the context of uncertain effects on a treaty right<sup>9</sup>
- 2) the duty to consult is triggered relatively easily, based on a minimal level of knowledge on the part of the Crown concerning a possible claim with which government action potentially interferes;<sup>10</sup>
- 3) the strength or scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer consultation requirement arising from a stronger *prima facie* Aboriginal claim and/or a more serious impact on the underlying Aboriginal right or treaty right;<sup>11</sup>
- 4) within this spectrum, the duty ranges from a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interests, but it does not include an Aboriginal veto power over any particular decision;<sup>12</sup> and
- 5) failure to meet the duty to consult can lead to a range of remedies, from injunction against a particular government action altogether (or, in some instance, damages) but more commonly an order to carry out the consultation prior to proceeding.<sup>13</sup>

The Supreme Court of Canada has stressed the importance of responsiveness in situations where the duty to consult arises:

...knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them... **Responsiveness** [emphasis added] is a key requirement on both consultation and accommodation."<sup>14</sup>

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8 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004], at para. 16.

9 *ibid.*, at paras. 33-34.

10 *ibid.*, at para. 35.

11 *ibid.*, at para.32.

12 *ibid.*, *supra* note I at para. 48.

13 *ibid.*, at paras. 13-14.

14 *Taku River Tlingit First Nation v. BC (Project Assessment Director)*, 2004 SCC 76 at para. 25.

In March 2009, a MAPC report on Crown consultation addressed the issue of responsiveness:

Timely knowledge is the earliest possible moment in time, when a plan or development is first proposed or made known to a government. It may be at any government office where the proposed plan is shared with an official, or it may be when an application is filed for processing, or it may be when there is an official review of the application or request for a permit or license, or it may be in a public forum where a proponent is seeking formal approval. Wherever the Crown has first knowledge of a works, an activity, a project or development, the requirement of the duty to consult must be understood and called into action. The notice of consultation must be immediately given to the Aboriginal peoples and the proponent. This notice for consultation must begin at the earliest moment in time. The honour of the Crown is not saved from the tarnish of "sharp dealing"<sup>15</sup> with the lapse of time or by the failure of an individual public or civil servant or an official to sound the bell about the duty on the Crown to consult. The passage of more time, or more processing within the system, without any consultation by the Crown with Aboriginal Peoples effected, or impacted, or concerned does not lighten the burden on the Crown to have consultation with the Aboriginal Peoples asserting a right, impact, effect or interest.<sup>16</sup>

Capacity for Aboriginal organizations is key to responsiveness.<sup>17</sup> According to a study carried out by Mi'kma'ki All Points Services, many First Nation organizations are confused over consultation and there is a need to develop a consultative process that meets the needs of political leadership and First Nation people:

Consultation is about relationship building and provides a check-up on how the relationship is going. It is important for Aboriginal people to not subscribe to a government process; rather, we must develop a process for ourselves.<sup>18</sup>

The need for Aboriginal Traditional Knowledge (ATK) Protocols on how the competent departments and third parties approach Aboriginal Peoples was recognized by and guidance developed by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). In their document entitled *COSEWIC Aboriginal Traditional Knowledge (ATK) Process and Protocol Guidelines*, the following is stated in the Preamble:

When available, guidance on the process and protocols used to gather ATK from Aboriginal persons or communities will be provided by that community. However, when such guidance is not established, the ATK Sub-Committee (ATK SC) of COSEWIC recommends the use of the *COSEWIC ATK Process and Protocol Guidelines*.<sup>19</sup> The

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15 *R. v. Badger*, [1996] . I S.C.R. 771 at para. 41.

16 Maritime Aboriginal Peoples Council. *MAWI'AQNUTMA'TMK Let us talk together. MAWI'AKANUTMA'TIMK*. (March 2009). Nova Scotia: Truro. p. 7.

17 Atlantic Aboriginal Options Paper - *Aboriginal Traditional Knowledge & the SARA Process*. Mi'kma'ki All Points Services. 2006. Nova Scotia: Shubenacadie. p. 18.

18 *ibid.*, p. 19

19 *COSEWIC ATK Process and Protocol Guidelines*. December 2010. ATK Subcommittee of COSEWIC. Ontario: Ottawa. 1. [http://www.cosewic.gc.ca/eng/sct0/PPG\\_e.cfm](http://www.cosewic.gc.ca/eng/sct0/PPG_e.cfm) (accessed 12/5/14)

Protocols can provide important guidance, especially in the relationship between consultation and the gathering and reporting of ATK. Some Aboriginal communities view a protocol as conditional and how ATK should be used and interpreted, would require additional safeguards.<sup>20</sup>

## Recovery Planning

The recovery strategy provisions in SARA are recognized as being surrounded by considerable legal mist.<sup>21</sup> SARA has a strict timeline for posting of recovery strategies:

Section 39 (1) of SARA:

To the extent possible, the **recovery strategy** [emphasis added] must be prepared in **cooperation with** [emphasis added]

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board:

(d) every **aboriginal organization** [emphasis added] that the competent minister considers will be directly affected by the recovery strategy;

Section 39 (3) of SARA:

To the extent possible, the recovery strategy must be prepared in consultation with any landowners and other persons whom the competent minister considers to be directly affected by the strategy, including the government of any other country in which the species is found.

Section 40 of SARA:

In preparing the recovery strategy, the competent minister must determine whether the recovery of the listed wildlife species is technically and biologically feasible. The determination must be based on the best available information, including information provided by COSEWIC.

The competent departments have developed policy guidance concerning recovery strategies and their implementation. These include: Draft Overarching Policy Framework (December 2009); and Guidelines for Completing Recovery Strategy Templates (federal) (February 2006) and updated in September 2010.

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20 Atlantic Aboriginal Options Paper – *Aboriginal Traditional Knowledge & the SARA Process*. Mi'kma'ki All Points Services. 2006. Nova Scotia: Shubenacadie. p. 20.

21 VanderZwaag, David L., Maria Cecilia Engler-Palma, Jeffrey A. Hutchings. *Canada's Species at Risk Act and Atlantic Salmon: Cascade of Promises, Trickle of Protection, Sea of Challenges*. Journal of Environmental Law and Practice. 2011. p. 274

## Timelines for Recovery Planning Documents<sup>22</sup>

	For species included in the List of Wildlife Species (Schedule 1) on June 5, 2003	For species added to the List of Wildlife Species (Schedule 1) after June 5, 2003
Recovery strategies for endangered species	Within three years	Within one year
Recovery strategies for threatened or extirpated species	Within four years	Within two years
Management plan for species of special concern	Within five years	Within three years

When species are listed under SARA as Endangered, Threatened or Extirpated, Recovery Strategies are required under section 37, action plan(s) under section 47, and under section 68, a Management Plan if a species is of Special Concern. What constitutes a Recovery Strategy under SARA has been a subject of considerable discussion and debate. For example, according to the Recovery Handbook produced by the National Recovery Group:

In the context of species at risk conservation, recovery is the process by which the decline of an endangered, threatened or extirpated species is arrested or reversed, and threats removed or reduced to improve the likelihood of the species persistence in the wild.

A species will be considered recovered when its long-term persistence in the wild has been secured.

The appropriate target level for persistence whereby a species would be considered recovered differs among species and depends on the current and historical context, including factors such as population abundance, the number of populations and threats. Persistence may range from:

Precarious and limited occurrence - for example, species that have historically been rare or for which damages caused by threats are irreversible, to

Highly viable and self-sustaining - for example, species for which formal down listing to Special Concern or Not at Risk would be warranted.<sup>23</sup>

22 Environment Canada. *Evaluation of Programs and Activities in Support of the Species at Risk Act*. Final. September 2012. Ottawa: Environment Canada. p. 8

23 National Recovery Working Group. *Recovery Handbook (ROMAN)*. 2005-2006 Edition. October 2005. Recovery of Nationally Endangered Wildlife. Ottawa, Ontario. p. 3

As a planning document, a Recovery Strategy undertakes activities according to what the competent departments consider appropriate: consideration of science; ATK; community knowledge; and socio-economic analysis.

Under section 41 (c), SARA requires that critical habitat be identified in Recovery Strategies. Unfortunately, the record on identification of critical habitat has been weak. The 2006 Stratos Report provided many of the reasons for delays and the challenges that exist in identification of critical habitat. These were largely associated with the absence of information on some species and their habitats. The report warned that delays in carrying out this important work would have repercussions for the implementation of SARA, as well as in achieving the intended outcomes.<sup>24</sup>

Five years after the Stratos Report, a judicial review found that Environment Canada (EC) and Fisheries and Oceans Canada (DFO) had failed in their statutory mandate to protect the Northern and Southern Resident Killer Whale and Northeast Pacific Northern and Southern Resident Populations of the Killer Whale. The judgment in *Orca* made the following declarations:

1. With respect to the Protection Statement Application:
  - a. The Minister of Fisheries and Oceans erred in law in determining that the critical habitat of the Resident Killer Whales was already legally protected by existing laws of Canada;
  - b. Section 58 of SARA requires that all elements of critical habitat be legally protected by the competent ministers;
  - c. Outreach programs, stewardship programs, voluntary codes of conduct or practice, voluntary protocols and/or voluntary guidelines and policy do not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited policy documents in the Protection Statement;
  - d. Ministerial discretion does not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited discretionary provisions of the Fisheries Act in the Protection Statement;
  - e. Prospective laws and regulations that are not yet in force do not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited provisions in the Protection Statement that are not yet in force;
  - f. Provincial laws do not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited provincial laws in the Protection Statement.

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<sup>24</sup> *Formative Evaluation of Federal Species at Risk Programs*. Final Report. Ottawa: Stratos Inc. July 2006.

2. With respect to the Protection Order Application:
  - a. The Ministers acted unlawfully in limiting the application and scope of the Protection Order made under section 58(4) of SARA;
  - b. The Ministers have a duty under section 58 to provide legal protection against destruction for all components of the Resident Killer Whales' critical habitat;
  - c. The Ministers acted unlawfully when they limited the application and scope of the destruction prohibition in section 58(1) of SARA to certain components of critical habitat but not others;
  - d. It was an error of law for the Ministers to limit the application and scope of the Protection Order to provide legal protection for geophysical parts of critical habitat only;
  - e. It was unlawful for the Ministers to exclude the ecosystem features of Resident Killer Whales' critical habitat, including availability of prey and acoustic and environmental factors from the scope of the Protection Order.

On January 16, 2014, DFO presented NACOSAR with the department's approach to the identification of critical habitat for species at risk. They indicated that their approach to identification of critical habitat would be guided by: the spirit of the *Species at Risk Act* (SARA); and the department's response to three challenges in the Federal Court of Canada related to critical habitat identification and protection: Greater Sage Grouse: *Alberta Wilderness Association et al. v. MOE* [2009] FC 710 (July 9, 2009); [2009] FC 882 (September 9, 2009); Nooksack Dace #1: *Environmental Defence Canada et al. v. MFO* [2009] FC 878 (September 9, 2009); and Killer Whale #1 and #2: *David Suzuki Foundation et al. v. MFO and MOE* [2010] FC 1233.

DFO stated that critical habitat identification relies on the best available information at that time (sage grouse decision) and relates to population abundance and distribution objectives for the species. It also includes a geographic and biophysical description (Nooksack dace decision). Finally, it generally does not include an assessment of socio-economic impacts.<sup>25</sup>

In 2009, EC released a draft set of policies for the more effective implementation of SARA. The following was set out in regard to consultation with Aboriginal Peoples:

In addition to the above, the federal government recognizes that it has a duty to consult and, if appropriate, to accommodate where it has real or constructive knowledge of potential aboriginal rights or treaty rights, and it contemplates conduct, through a recovery strategy, action plan or management plan that might adversely affect those rights.<sup>26</sup>

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25 Fisheries and Oceans Canada. PowerPoint presentation. "*Critical Habitat Identification and Protection for Aquatic Species at Risk.*" Ottawa. Meeting of NACOSAR. Gatineau, Quebec. January 2014.

26 Environment Canada. *Species at Risk Act Policies*. Species at Risk Act Policies and Guidelines Series [DRAFT]. Ottawa: Environment Canada, 2008. p.6.

DFO maintains that the general approach they use involves the Government of Canada's *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011), the consultation and engagement requirements of SARA and the *Cabinet Directive on Regulatory Management*.<sup>27</sup>

## **Guidance on Considering Aboriginal Traditional Knowledge in Species at Risk Act Implementation**

On September 6, 2010, Fisheries and Oceans Canada, Parks Canada Agency and Environment Canada released a draft document entitled *Guidance on Considering Aboriginal Traditional Knowledge in Species at Risk Act Implementation*. The document was the result of DFO workshops with Aboriginal groups and organizations held between 2008 and 2010. Sections of the document were developed along with EC and PCA. In regard to building relationships with Aboriginal organizations, this guidance document raised the importance of having a long-term relationship building process and that engagement with Aboriginal organizations should begin early in the SARA conservation cycle.

The document set out the following principles for competent departments when working with Aboriginal Peoples:

- Be respectful of Aboriginal peoples and their communities, their rights, values and aspirations;
- Be proactive;
- Seek timely, innovative approaches to resolving emerging issues through discussion, negotiation and reconciliation;
- Access the knowledge, wisdom and skills of Aboriginal people through participatory and collaborative management and decision-making processes; and
- Attempt to accommodate Aboriginal interests in aquatic resources and oceans management, taking into account the need for conservation of the resource, effective and efficient resource management, and the interests of other Canadians.

On page 14 under section 6.1: Building Relationships with Aboriginal Organizations, the following was set out:

Aboriginal consultations under SARA are bound by specific legal requirements that generally set them apart from consultations with stakeholders and the general public. In the context of SARA, the term consultation means that the government must inform Aboriginal organizations about the recovery process and provide them with adequate information to assess the situation and respond to the request to participate in a timely manner. Under SARA [S.39(1)(2)] to the extent possible, the recovery strategy must be prepared in cooperation with every Aboriginal organization that the competent minister considers will be directly affected by the recovery strategy; and any other person or

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<sup>27</sup> Message from J. Stewart to A. MacPhee. "Re: Response to Questions." 8 July 2014. E-mail.

organization that the competent minister considers appropriate (other stakeholders). If the listed wildlife species is found in an area in respect of which a wildlife management board is authorized by a land claim agreement to perform functions in respect of wildlife species, the recovery strategy must be prepared, to the extent that it will apply to that area in accordance with the provisions of the agreement.

To the extent possible, recovery strategies, action plans and management plans must be prepared in cooperation with, among others, wildlife management boards – if the species is found in an area in respect of which the wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species – and every aboriginal organization that the competent minister considers will be directly affected by the recovery strategy.<sup>28</sup> This would entail their early engagement, providing them with an opportunity to participate, taking their views into account and incorporating them in the preparation of recovery strategies, action plans and management plans. It is possible that even within the context of the requirement to cooperate, there may be a range of what cooperation entails based on the nature of the relationship that the GoC has with the particular individual or body.

Knowledge sharing occurs throughout consultation and cooperation. At times, it may be difficult and inappropriate to distinguish between what is “ATK” and what could be considered as other kinds of equally important community knowledge and perspectives. Ultimately, it is up to Aboriginal organizations to determine how they wish to engage in the recovery process and what role ATK or other forms of knowledge should play. The terms of engagement, including the sharing of ATK, can be discussed and agreed upon by Aboriginal organizations at the outset of the consultation process. Specific agreements and protocols may be necessary to ensure that ATK is shared and recorded in a culturally appropriate manner. In some cases, community protocols that outline processes for collection, ownership and use of ATK may already exist, while in other instances it may be appropriate to develop them jointly between the competent minister and the Aboriginal organization.

In 2012, DFO released another version of the ATK guidance document, but EC and PCA were no longer part of the initiative. There was no explanation offered as to why two competent departments (EC and PCA) had removed themselves from the initiative. DFO has indicated that as of June 2014, they are currently working to finalize this guidance document and are seeking regional and legal review. The document will remain an internal operational document to provide DFO officials guidance on how to consider ATK in a respectful and meaningful way throughout the SARA conservation cycle.<sup>29</sup>

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28 *Species at Risk Act*. (S.C. 2002) at 39(1), 48(1) and 6(1)

29 J. Patel to A. MacPhee. “Re: Guidance on Considering Aboriginal Traditional Knowledge in Species at Risk Implementation.” 31 March 2014. E-mail.

## Report of the British Columbia Task Force on Species at Risk

On January 31, 2011, the *Report of the British Columbia Task Force on Species at Risk* was released. Under section 3.3 dealing with First Nations Rights, Title and Fiduciary Obligations, the following was stated:

Unquestionably, the federal and provincial governments have at least a fiduciary obligation to ensure that culturally important species do not become at risk due to human activities or that they have appropriate management objectives and plans to maintain them in the long term. Yet there is no clearly defined or accepted process by which First Nations can engage with the federal and provincial governments to ensure that their interests and rights are identified, considered and incorporated into species at risk decision-making.<sup>30</sup>

This case study was unable to find any process in which Aboriginal Peoples were engaged with federal and provincial governments to ensure that our interests and rights are identified, considered and incorporated into species at risk decision-making. Under section 8.1 (b) of SARA, NACOSAR's role includes: "provide advice and recommendations to the Canadian Endangered Species Conservation Council (CESCC)." Section 8.1 (b) was a signal achievement of the Aboriginal Working Group, which was responsible for negotiating Aboriginal references in SARA. Since 2005, NACOSAR has only met once with CESCC and this has interfered with the ability of Aboriginal organizations to have a constructive dialogue with F/P/T jurisdictions on SARA implementation.

## Annual Report of the Species at Risk Aboriginal Interdepartmental Committee

In the 2010-2011 Annual Report of the Species at Risk Aboriginal Interdepartmental Committee, a recommendation was made to promote discussions between, EC, DFO, PCA and AANDC on streamlining consultation processes for species at risk consultations. The Annual Report stated that: "To date the three departments have generally been approaching consultations unilaterally and there is much room for the departments to work more closely on these processes."<sup>31</sup> This case study supports this candid statement and the underlying need for certainty, consistency and clarity in consultation policies. In our work, we were unable to find any evidence of engagement between Aboriginal organizations and the Interdepartmental Committee working on streamlining consultation processes.

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30 *Appendices to the Report of the British Columbia Task Force on Species at Risk*. British Columbia: W. Mitchell Consulting. (January 2011). p. 25.

31 Environment Canada. *Species at Risk Aboriginal Interdepartmental Committee, Annual Report 2010-2011*. Ottawa. p. 2.

## Crown Aboriginal Consultations

Beginning in 2007, the federal government undertook a policy initiative focused on Aboriginal consultation and accommodation. It involved a dialogue with Aboriginal Peoples, provincial and territorial jurisdictions, industry and federal civil servants. The initiative was in response to the Supreme Court of Canada decisions in *Haida Nation*, *Taku River* and *Mikisew*, and where a great deal of interpretative room still remained. The Court had asked that the Crown and Aboriginal Peoples settle through negotiation, consultation and accommodation issues.

In 2008, the outcome of this federal initiative was the policy document entitled *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult*.

In March 2011, the Government of Canada released a second document entitled *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. These revised guidelines set out for federal officials, the specific steps on how and when to consult and seek to accommodate Aboriginal Peoples. A number of additions were added to the Federal Consultation Policy:

A lead federal agency should be appointed (even where there is no obvious choice);

The limited mandates of departments must be addressed in order to meet consultation obligations (it being an insufficient answer to reasonable consultation demands, to state “we don’t have the mandate to deal with that”) and

Consultation by Federal bodies should be integrated with already existing processes like environmental assessment and regulatory approvals.<sup>32</sup>

The updated guidelines provided eight guiding principles:

Guiding Principle 1 - The Government of Canada, in carrying out its activities, will respect the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit people by consulting with Aboriginal groups whose rights and related interests may be adversely impacted by a proposed Government of Canada activity.

Guiding Principle 2 - The Government of Canada will assess how proposed federal activities may adversely impact on potential or established Aboriginal or Treaty rights, Aboriginal groups and their related interests. As part of this assessment, the Government of Canada will identify when consultation should form part of their operations and ensure that consultations are initiated early in the planning, design or decision making processes.

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32 Fasken Martineau Bulletin – Aboriginal Law. <http://www.fasken.com/en/duty-consult-accomodate-aboriginals-canada> (accessed 3/7/14)

Guiding Principle 3 - Early consultations will assist the Government of Canada in seeking to identify and address Aboriginal concerns, avoid or minimize any adverse impacts on potential or established Aboriginal or Treaty rights as a result of a federal activity and assess and implement mechanisms that seek to address their related interests, where appropriate.

Guiding Principle 4 - Consultation and accommodation will be carried out in a manner that seeks to balance Aboriginal interests with other societal interests, relationships and positive outcomes for all partners. A meaningful consultation process is one which is: carried out in a timely, efficient and responsive manner; transparent and predictable; accessible, reasonable, flexible and fair; founded in the principles of good faith, respect and reciprocal responsibility; respectful of the uniqueness of First Nation, Métis and Inuit communities; and, includes accommodation (e.g. changing of timelines, project parameters), where appropriate.

Guiding Principle 5 - The Government of Canada recognizes that Aboriginal consultation is a Crown responsibility that flows from Government activities. The Government of Canada will ensure that a lead federal department or agency is identified and made accountable for any consultation processes that may be carried out for federal government activities. Should a consultation process move a department or agency beyond their mandate, mechanisms will be in place to address additional issues raised in a consultation process.

Guiding Principle 6 - The Government of Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessment and regulatory approval processes in which Aboriginal consultation will be integrated, to coordinate decision making and will assess if additional consultation activities may be necessary.

Guiding Principle 7 - The Government of Canada will coordinate consultation and accommodation activities with its partners (e.g. Aboriginal groups, provinces, territories and industry). While the Crown cannot delegate its obligation, the Government of Canada will, where appropriate, use consultation processes and accommodation measures carried out by its partners to assist it in meeting its commitments and responsibilities.

Guiding Principle 8 - The Government of Canada will carry out its activities and related consultation processes in accordance with its commitments and processes involving Aboriginal groups. The Government of Canada will seek out opportunities to develop and maintain a meaningful dialogue with Aboriginal groups in support of building relationships with its partners.<sup>33</sup>

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33 *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. Ottawa: Government of Canada. March 2011. p. 12-16.

## Cabinet Directive on Regulatory Management

In April 2012, the Government of Canada released the document entitled *Cabinet Directive on Regulatory Management*, which sets out the responsibilities of federal departments for consultation and engagement with Aboriginal Peoples when preparing statutory instruments. Under Consultation, the following is set out:

Departments and agencies are also to work with First Nations, Inuit, and Metis communities and peoples; with national, regional, and local Aboriginal organizations; and with Aboriginal governments and ensure that all obligations in relation to rights protected by section 35 of the *Constitution Act, 1982*, are met.<sup>34</sup>

In a section entitled, *Assessing legal implications and other Cabinet directions*, the following appears:

Departments and agencies are therefore expected to take measures to ensure that regulations are:

- ii. Consistent with the *Constitution Act, 1867*, with the *Constitution Act, 1982* (including the Canadian Charter of Rights and Freedoms) and with particular note of any obligations relating to Aboriginal and treaty rights arising out of section 35), and with the Canadian Bill of Rights, 1960;<sup>35</sup>

The *Cabinet Directive on Regulatory Management* serves an important role with respect to implementation of SARA; however, this case study was unable to find any initiatives to develop working relationships between the competent departments and Aboriginal organizations, to ensure that these directives are fulfilled.

## Legal Institutions

Legal institutions in Canada occupy a major presence in the evolution of the Aboriginal rights in Canada, yet the legitimacy of the Courts as institutions making decisions on Aboriginal issues remains a fundamental question. According to James Hopkins and Albert Peeling writing for the Indigenous Bar Association:

“Legal decisions affecting Aboriginal peoples in the Courts and tribunals of Canada will never be fully legitimate until there is Aboriginal participation in those decisions. If as the Supreme Court of Canada has said “it is... crucial to be sensitive to the aboriginal perspective itself on the means of the rights at stake”, then part of that sensitivity must be incorporated into the structure of decision making through Aboriginal participation on those decisions. The recognition and affirmation of aboriginal peoples’ rights in Canada requires not merely words but concrete and structural efforts if the Crown is to

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34 Treasury Board of Canada Secretariat. *Cabinet Directive on Regulatory Management*. <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrtb-eng.asp> (accessed on 12/7/14)

35 *ibid.*

achieve the reconciliation and legitimation of its power over them. This is particularly important at the Supreme Court of Canada, where final decisions on those rights are made.”<sup>36</sup>

While Aboriginal claims can be and are being pursued through litigation, negotiation is a preferable way of reconciling Crown and Aboriginal interests. The current situation where non-Aboriginal judges make decisions on what is integral to Aboriginal Peoples is unsustainable, since the potential for bias exists.

## **Office of the Federal Interlocutor for Métis and Non-status Indians**

The Office of the Federal Interlocutor for Métis and Non-status Indians (OFI) no longer exists within Aboriginal Affairs and Northern Development Canada (AANDC). As of September 4, 2012, this office was merged into the Policy and Strategic Direction branch of AANDC. From 1985 until September 2012, OFI provided facilitation between Métis and Non-status Indians and federal government departments, and the Interlocutor could speak to these issues at the Cabinet table. The following text had appeared on the OFI website:

For a proposed project/activity that might have implications for Métis and Non-status Indian interests, the Office of the Federal Interlocutor for Métis and Non-status Indians (OFI) serves as a resource centre for information relating to Métis and Non-status Indian interests, and is available for specific information exchanges as follows:

- To assist in bringing more consistency to consultation processes across the federal government with Métis or Non-status Indian groups, it is recommended that OFI be informed by departments/agencies of any decisions to consult with these Aboriginal groups; and
- OFI can provide advice on communications with Métis and non-status Indian groups, if the department/agency decides that a consultation is warranted.

This case study was unable to find any example of a situation where OFI had provided advice to the competent departments concerning Métis and Non-status Indians and the implementation of SARA.

The OFI office had played an important role in profiling Métis and Non-status Indians issues and the loss of this function has had impacts. The key to successful consultation begins with the use of precise constitutional language when referencing the Aboriginal Peoples of Canada.

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36 Hopkins, James C. and Albert C. Peeling. *Aboriginal Judicial Appointments to the Supreme Court of Canada*. (2004) A Paper Prepared for the Indigenous Bar Association. p. 25.

A current example of the lack of inclusive language appears on the DFO Pacific region website:

Consultation is an integral part of SARA. Given that SARA emphasizes and relies on public, **First Nations** [emphasis added] and stakeholder engagement and participation, it is vital that DFO undertakes meaningful consultations with a variety of groups for several aspects of the SARA process.<sup>37</sup>

The term “First Nations” does not appear in the *Species at Risk Act* or the *Constitution Act, 1982*. Aboriginal consultations under SARA are bound by legal obligations to *all* Aboriginal Peoples – not just First Nations. The British Columbia Task Force on Species at Risk called for an updating of the Canada-British Columbia Agreement on Species at Risk (2005). If such a negotiation takes place, it would need to be inclusive of all Aboriginal Peoples.

## Compensation

Under section 64. (1) of SARA:

The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of

(a) section 58, 60 or 61; or

(b) an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species.

The Crown’s failure to engage in good faith (*uberrima fides*) and undertake meaningful consultation and accommodation in regard to SARA implementation has the potential to negatively impact the participation of Aboriginal Peoples in the conservation of wildlife. SARA was specifically designed to set out a central role for Aboriginal Peoples in preventing species from becoming extinct and to have as a value and goal, Aboriginal Peoples restoring Threatened populations to healthy levels.

In addition, actions taken or decisions made without consultation and accommodation with Aboriginal Peoples run the risk of being declared invalid by the courts, which could then issue an injunction to prevent a SARA initiative from proceeding. When the Crown breaches its fiduciary duties, it could also result in civil liability and compensation. The cumulative result of this failure would be the loss of initiatives to protect Threatened and Endangered species.

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37 Fisheries and Oceans Canada. *Species at Risk Act (SARA) Consultations - Pacific Region*. <http://www.pac.dfo-mpo.gc.ca/consultation/sara-lep/index-eng.html>. (accessed 8/7/14)

In April 2000, David Anderson, former Minister of the Environment, requested that Dr. Peter Pearse provide his independent advice on the principles and policies that should guide the provision of compensation under SARA. Dr. Pearse pointed out that the issue of fair compensation for Aboriginal Peoples was addressed in *Delgamuukw v. British Columbia*:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified....In most cases, it will be significantly deeper than mere consultation...In keeping with the duty of honor and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title has been infringed.<sup>38</sup>

Dr. Pearse acknowledged that his report did not include input from Aboriginal Peoples and recommended that it be handled in a separate study, which has never been undertaken. In July 2001, Ruth Wherry, formerly of Canadian Wildlife Service, met with the national Aboriginal organizations (NAOs) in regard to a draft policy framework for the compensation issue. The NAOs advised that there must be clear reference to Aboriginal Peoples in the SARA policy framework for compensation. The NAOs also recommended that there be adequate notice to Aboriginal People concerning any impending Emergency Order. The NAO committee was also concerned that there be guiding principles for the framework policy in regard to compensation for Aboriginal Peoples. Finally, it was recommended that there be a dedicated compensation fund for Aboriginal Peoples, which would allow for easier access to the compensation process.

Robert Mainville, a lawyer who has written extensively on Aboriginal rights issues, has drafted principles of compensation that would apply for two sets of infringements: the first would be those that were not justified under section 35; and the second being those infringements that are justified. The five basic principles are:

- 1) Compensation is to be determined in accordance with a methodology that takes into account the principles of fiduciary law.
- 2) Relevant factors in determining compensation include the impacts on the affected Aboriginal community and the benefits derived by the Crown and third parties from the infringement.
- 3) Compensation is to be determined in accordance with federal common law and will thus be governed by rules that apply uniformly throughout Canada.
- 4) Compensation may be provided through structured compensation schemes or through a global monetary reward.
- 5) Compensation is normally awarded for the benefit of the affected Aboriginal community as a whole.<sup>39</sup>

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38 *Delgamuukw v. British Columbia*. SCC. 1997. S.C.R. at paras. 168 and 169.

39 Manville, Robert. *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach*. Toronto: Purich Publishing Ltd., 2001. p. 128.

## Fisheries and Oceans Canada

The three competent departments have disparate approaches to SARA implementation and as previously noted in the 2010-2011 Annual Report of the Species at Risk Aboriginal Interdepartmental Committee, these competent departments have been approaching consultations unilaterally.

Under section 2.(1)(b) of SARA, aquatic species are the responsibility of DFO:

the Minister of Fisheries and Oceans with respect to aquatic species, other than individuals mentioned in paragraph (a);

After COSEWIC designates an aquatic species as Threatened or Endangered, DFO is required to undertake a number of actions. Some of these actions require science information on the current status of the species, population or Designable Unit (DU), threats to its survival and recovery, and the feasibility of its recovery.

For the Minister of Fisheries and Oceans, this advice is usually developed through a DFO Canadian Science Advisory Secretariat (CSAS) Recovery Potential Assessment (RPA) taking place after the COSEWIC assessment.<sup>40</sup> The *Species at Risk Act* recognizes that Aboriginal traditional knowledge should be considered in the assessment of species, which may be at risk and in developing and implementing recovery measures.<sup>41</sup> However, the role for ATK within the DFO CSAS process is much less clear.

According to DFO officials:

DFO uses a number of mechanisms for collaboration and consultation on species at risk: recovery teams; workshops; existing advisory bodies; virtual networks; and other consultation mechanisms.<sup>42</sup>

This case study will deal with Aboriginal consultation, accommodation and cooperation by DFO that took place in developing the recovery strategies for two aquatic species: inner Bay of Fundy Atlantic salmon; and American eel.

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40 Fisheries and Oceans Canada. *Revised Protocol for Conducting Recovery Potential Assessments*. December 2007 (Revised April 2009). p. 1.

41 *Species at Risk Act* (SARA). Section 39 (d).

42 K. Robichaud-LeBlanc and H. Millar [DFO]. "Re: Comments on 2011 draft revised Terms of Reference for the Inner Bay of Fundy Salmon Conservation and Recovery Team." Letter to J. McNeely, 30 November 2011.

## Aboriginal Aquatic Resource and Oceans Management Program

The Aboriginal Aquatic Resource and Oceans Management Program (AAROM) is a key element in the delivery of DFO mechanisms for collaboration and consultation concerning aquatic species at risk. The program helps Aboriginal groups to participate effectively in advisory and decision-making processes used for aquatic resource and oceans management.

The AAROM objectives are:

- To assist Aboriginal groups in acquiring administrative capacity and scientific/technical expertise to facilitate their participation in aquatic resource and oceans management;
- To encourage the establishment of collaborative management structures that contribute to integrated ecosystem/watershed management and planning processes;
- To enhance existing collaborative management structures, where appropriate;
- To facilitate sound decision-making in advisory and other processes related to a number of areas of DFO responsibility;
- To strengthen relationships through improved information sharing among Aboriginal communities, DFO and other stakeholders and among Aboriginal communities; and
- To contribute to the federal government's broader objective of improving the quality of life for Aboriginal people.<sup>43</sup>

Without capacity building funding from AAROM, MAPC and other Aboriginal organizations would likely not have the financial capacity to participate in initiatives for aquatic species at risk.

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43 Aboriginal Aquatic Resource and Oceans Management Program.  
<http://www.dfo-mpo.gc.ca/fm-gp/aboriginal-autochtones/aarom-pagrao/index-eng.htm>  
(accessed 17/6/14)

## American Eel

<b>Scientific Name:</b>	<i>Anguilla rostrata</i>
<b>Canadian Range:</b>	ON, QC, NB, PE, NS, NL, Atlantic Ocean
<b>Competent Ministry:</b>	Fisheries and Oceans Canada
<b>COSEWIC Status History:</b>	Designated Special Concern in April 2006. Status re-examined and designated Threatened in May 2012.
<b>SARA Status:</b>	Not Listed. Under consideration. Consultation with Aboriginal Peoples scheduled for Fall/Winter of 2014/2015
<b>SARA Recovery Documents:</b>	No SARA Recovery Documents posted. Canadian Eel Working Group American Eel Management Plan, January 15, 2007 often cited as the interim management plan.
<b>SARA Critical Habitat Protection:</b>	None

### Background

The relationship between the Mi'kmaq and 'Kat,' or the American eel, is a long one stretching back some 4000 years. Professor D.T. McNab, who examined stone eel weirs throughout Nova Scotia, has archeologically documented this relationship.<sup>44</sup> For the Mi'kmaq, *Kat* served as an important food source, medicinal ingredient and ceremonial object. The American eel was believed to be *Jipijka'maq* (the Great Horned Serpent) and is referred to in many Mi'kmaq legends and is part of traditions such as the ritual of *Apuknajit* (Feeding of the Grandfather).<sup>45</sup>

The St. Lawrence River and Lake Ontario Watersheds have a long history of supporting Aboriginal eel fisheries. Historical accounts from the mid-17<sup>th</sup> Century record Haudenosaunee harvesting eels and there are many historical and archeological references to the abundance of eels in this region.<sup>46</sup>

At the 2003 International Eel Symposium held in Quebec City, worldwide concern was declared concerning the declining status of Anguillid eels (which include American eel), their assessment and management. The symposium participants issued a declaration calling for *inter alia* precautionary action to sustain stocks.<sup>47</sup>

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44 McNab, D.T. *Earth, Water, Air and Fire Studies in Canadian Ethnohistory*. Waterloo: Wilfred Laurier University Press. p. 98.

45 Prosper, Kerry and Mary Jane Paulette. *The Mi'kmaq Relationship with Kat (American Eel)*. Nova Scotia: Paqtnkek Fish and Wildlife Commission. March 2002. p. 3.

46 MacGregor, R., J., L. Casselman, Greig, W.A. Allen, L. McDermott and T. Haxton. 2010. DRAFT *Recovery Strategy for the American Eel (Anguilla rostrata) in Ontario*. Ontario Recovery Strategy Series. Prepared for Ontario Ministry of Natural Resources, Peterborough, Ontario. p.12.

47 <http://www.afs-oc.org/worldwide-decline-of-eel-resources-necessitates-immediate-action-quebec-declaration-of-concern/>

The signatories to the Quebec Declaration included "...representation by Aboriginal Nations because of their longstanding association with the eel."<sup>48</sup>

In 2005, the status of the species in Canada was uncertain, since NatureServe Canada had designated the American eel as "*Apparently secure* in Labrador and Prince Edward Island and *Vulnerable* in Quebec".<sup>49</sup> There was no reference to the status of the species in Ontario, Nova Scotia or New Brunswick. NatureServe is a non-profit conservation organization whose mission is to provide the scientific basis for effective conservation action.<sup>50</sup>

### ***Assessment Consultation***

In 2006, COSEWIC undertook its first status report on the American eel and designated the species as of Special Concern.<sup>51</sup> The report acknowledged that eels were fished by Aboriginal peoples "in pre-historic and historic periods" and that the upper St. Lawrence had been a major eel fishing area for Aboriginal Peoples and that the Mi'kmaq in eastern Canada viewed American eel as an important food source.<sup>52</sup> An anonymous source was referenced concerning American eel being less plentiful in the Maritime region and this decline threatened the longstanding Mi'kmaq relationship with the American eel.<sup>53</sup> According to DFO, the 2006 COSEWIC Assessment Report had undertaken some consultations with Mi'kmaq peoples, but was never concluded.<sup>54</sup> Part of the reason for this consultation gap was attributed to the ATK Subcommittee of COSEWIC not having developed their process and protocol guidelines for gathering and incorporating ATK into assessment of wildlife species by COSEWIC.<sup>55</sup>

The 2006 COSEWIC Report listed Aboriginal people who had historically fished American eels: Bay of Quinte, Akwesasne, Kanesatake, Kahnawake, Odanak, Wolinak, Lorette, Nation Huronne Wendake, Premiere Nation Malecite de Viger, Cacouna, Innue Essipit, Betsiamites, Listigui Mi'gmaq Government, Restigouche, Maria, Micmacs of Gesgapegiag, Seven Islands, Innu Takuaikan Uashat Mak Mini-Utenam, Mingan, Natashquan, Eel River Bar First Nation, Pabineau, Eel Ground, Buctouche, Fort Folly, Acadia, Bear River, Millbrook, Paq'tnek First Nation, Waycobah First Nation, Wagmatcook, Chapel Island First Nation, Membertou, Lennox Island and Abegweit. There were no off-reserve Aboriginal organizations in this list.

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48 *ibid*

49 COSEWIC 2006. *COSEWIC Assessment and Status Report on the American eel *Anguilla rostrata* in Canada*. Committee on the Status of Endangered Wildlife in Canada. Ottawa. p. 53. ([www.sararegistry.gc.ca/status/status\\_e.cfm](http://www.sararegistry.gc.ca/status/status_e.cfm)).

50 NatureServe Canada. About Us. <http://www.natureserve.org/about-us> (accessed 16/6/14)

51 COSEWIC 2006. *COSEWIC assessment and status report on the American eel *Anguilla rostrata* in Canada*. Committee on the Status of Endangered Wildlife in Canada. Ottawa. p.viii. ([www.sararegistry.gc.ca/status/status\\_e.cfm](http://www.sararegistry.gc.ca/status/status_e.cfm))

52 COSEWIC 2006. *COSEWIC assessment and status report on the American eel *Anguilla rostrata* in Canada*. Committee on the Status of Endangered Wildlife in Canada. Ottawa. p.53 ([www.sararegistry.gc.ca/status/status\\_e.cfm](http://www.sararegistry.gc.ca/status/status_e.cfm))

53 *Ibid*. p. 53

54 K. Spence to A. MacPhee. "Re: iBoF Atlantic salmon and American Eel." 21 March 2014. E-mail.

55 D. Hurlburt to A. MacPhee. "Re: American Eel." 26 March 2014. E-mail.

In 2006, DFO drafted an American Eel Management Plan to develop and strengthen the species and to halt abundance declines and to foster the recovery of the population.<sup>56</sup> This management plan was not adopted by partnering agencies (EC and PCA); however, management actions consistent with the plan were initiated in every DFO region. The department maintains that Crown consultations were conducted at the time with Aboriginal groups and organizations;<sup>57</sup> however, DFO did not provide a list of the Aboriginal organizations that were consulted.

In the 2006 COSEWIC Status Report on the American eel, the importance of the St. Lawrence River/Lake Ontario area to the species was recognized and that this population had declined by approximately 99% since the 1970s.<sup>58</sup> In Fall 2007, DFO and the Centre for Indigenous Environmental Resources (CIER) undertook information sharing sessions concerning the legal listing and management of American eel populations in Ontario. The sessions were scheduled at: Rama; Six Nations; Pikwakanagan; Mohawks of the Bay of Quinte and Mohawks of Akwesasne.

The announcement triggered a strong response from the Chiefs of Ontario (COO), who warned members to take "...extreme caution if you do attend one of these sessions as this government driven process could become precedent setting for future government driven processes as it is not a First Nation driven process." The Regional Chief advised the Minister of Fisheries and Oceans to use an alternative approach, working with the COO Environmental Unit and the ATK SC of COSEWIC "...to develop a meaningful process for the legal listing and management of all species located in the Ontario region."<sup>59</sup>

In 2007, the Gespe'gewqag Mi'gmaq Resource Council (GMRC) in New Brunswick reported that "First Nations were not consulted prior to the listing of the eel and decided to undertake research of eel populations and traditional knowledge with participating communities: Listuguj First Nation, Eel River Bar First Nation and Pabineau First Nation."<sup>60</sup> The research found that "the listing was made with little input from Aboriginal and First Nation peoples and was primarily based on information from Ontario and central Quebec where eel populations are experiencing drastic declines."<sup>61</sup> This consultation gap was surprising, since it was well known that American eel are physically, spiritually and deeply significant to Mi'kmaq culture.<sup>62</sup>

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56 Fisheries and Oceans Canada. 2010. *Status of American Eel and progress on achieving management goals*. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2010/062. p. 4.

57 J. Stewart to A. MacPhee. "Re: Questions regarding Inner Bay of Fundy Salmon Recovery." 23 May, 2014. E-mail.

58 COSEWIC 2006. COSEWIC assessment and status report on the American eel *Anguilla rostrata* in Canada. Committee on the Status of Endangered Wildlife in Canada. Ottawa. p.iv. ([www.sararegistry.gc.ca/status/status\\_e.cfm](http://www.sararegistry.gc.ca/status/status_e.cfm))

59 Chiefs of Ontario Bulletin. November 2007. Invitation – First Nations American Eel Information Sharing Sessions. [www.chiefs-of-ontario.org](http://www.chiefs-of-ontario.org). (accessed 22/6/14)

60 Monica Schuegraf and Peter Dowd. Perceptions of American Eel Habitat in Gespe'gewa'gi. Quebec: Listuguj. 2007. p.2.

61 *ibid.*

62 *ibid.*

63 *ibid.*

For example, according to GMRC researchers Schuegraf and Dowd:

Eel was an important part of Mi'kmaq diets. Some elders would eat eel every day. Today only two people eat eel. Yet, 88% of individuals said they would eat eel if it were available. Many methods were used to fish eel; spearing was the most common method used all year round. Locations of traditional eeling grounds were identified. 100% of respondents said that eel fishing has decreased in their communities. The most common reasons offered for the decrease in eel fishing are, (1) pollution/sewage in the water, (2) change in diet, (3) traditions not passed down, (4) damming of the Eel River.<sup>63</sup>

The research undertaken by GMRC concluded that there were "...significant gaps in knowledge regarding the status of the American eel population in the three communities..."<sup>64</sup>

In 2006, the American eel had been classified by COSEWIC as one Designatable Unit and assessed as of Special Concern.<sup>65</sup> On September 13, 2007, MAPC wrote to DFO and objected to this assessment of the American eel:

We disagree with the COSEWIC designation of Special Concern for all American eel within near-shore, in-shore, coastal, and in-land Canadian waters. Specifically, we disagree with COSEWIC's assessment of American eel as one inclusive population-based Designatable Unit (DU). COSEWIC, under its own guidelines, can and should assess American eel in biogeographically distinct DUs.

We maintain that a blanket SARA listing of Special Concern for all American eel will not achieve appropriate conservation and management of this species. Among other issues, there is no direct evidence supporting previous management efforts in the Maritimes, to decrease mortality of American eel, as an approach to increase the American eel population in the Lake Ontario and the St. Lawrence River systems. We agree that American eel should be more efficiently and effectively managed in the Maritimes Freshwater Ecological Area by applying the precautionary principle as an approach. The precautionary principle should also be applied to American eel residing in the Great Lakes-Western St. Lawrence Freshwater Ecological Area - meaning substantially enhanced protection and restoration of American eel and its habitat in the Great Lakes-Western St. Lawrence Freshwater Ecological Area, through a recovery oriented strategy and recovery actions.

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64 *ibid.* p. 9.

65 Pre-COSEWIC Peer Review Meeting of American Eel. *Terms of Reference*. Zonal Advisory Process - Gulf, Central and Arctic, Maritimes, Newfoundland and Labrador, Quebec. September 1, 2010. p. 1.

MAPC also brought to the attention of DFO the absence of ATK in the 2006 COSEWIC assessment:

It was also brought to your attention during our meeting that there is a noticeable lack of Aboriginal Traditional Knowledge (ATK) in the COSEWIC American eel Status Report. American eel is an important fish to Aboriginal Peoples for food, social and ceremonial purposes – every part of the eel is used and eel lore and knowledge is preserved and passed on from time immemorial.

We recommend to the Minister that in addition to our concerns about the single DU assessment by COSEWIC, the COSEWIC Assessment must be referred back to COSEWIC to include ATK in the American eel Status Report.

MAPC called for a Socio-Economic Impact Analysis (SEIA) to be undertaken at the listing stage:

In evaluating the SARA listing for American eel, the Minister must involve Aboriginal Peoples in the assessment, to understand the unique social, economic, and Rights impacts which a SARA listing will have on the Traditional Ancestral Homelands Aboriginal Peoples. A SARA listing may abrogate or derogate Aboriginal Rights and Treaty Rights, particularly where the Courts have determined that a Maritime Aboriginal and Treaty Right exists for the use of eels for both social and economic purposes [Marshall]. A SEIA must definitely include and address the issues of potential loss of resource access and use, and of compensation, dependent on the SARA listing and results from further consultation.

The MAPC letter also pointed out that the DFO American Eel Management Plan (2007) did not include ATK and engagement of Aboriginal Peoples in recovery and management activities for the species. Absence of ATK was attributed to the lack of Aboriginal involvement in the Canadian Eel Science Working Group (CESWoG), which reports to the Canadian Eel Working Group (CEWG) made up of three jurisdictions: Canada, Ontario and Quebec. These jurisdictions have major interests in eel conservation and management, and have as a general objective, the promotion of American eel conservation and recovery.<sup>66</sup>

In 2007, DFO developed a consultation workbook on the American eel and used this tool to receive broad input on the impacts of adding the American eel to Schedule 1 of SARA. (Schedule 1 identifies which species are legally protected under SARA). The comments were requested by March 31, 2007. In the section of the workbook entitled *What Does Consultation Mean?*, there were no references to Aboriginal Peoples. It stated, “When COSEWIC assesses a species, it is based on the scientific data at hand. But when the Government of Canada considers this same species for addition to the SARA list, it regards the public’s input to be an important part of their recommendation to the [Governor in Council] GIC.”<sup>67</sup>

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66 Canadian Eel Science Working Group. *Terms of Reference*. 2010. Appendix 1.

67 Fisheries and Oceans Canada. *Species at Risk Act. Legal Listing Consultation Workbook – American eel (Anguilla Rostrata)*. 2007. p. 4.

The workbook questionnaire had no reference(s) to Aboriginal Peoples, nor any reference to the historical significance of the species to Aboriginal Peoples.

### ***COSEWIC Call for Bids – Status Report***

In January 2010, COSEWIC posted a call for bids to produce a status report on the American eel. In the terms of reference for the bid, the following was stated:

The American eel (*Anguilla Rostrata*) was listed on COSEWIC’s January 2010 Call for Bids to produce a status report. DFO, as a generator and archivist of information on marine species and some freshwater species, is to provide COSEWIC with the best information available to ensure that an accurate assessment of the status of a species can be undertaken.<sup>68</sup>

The distribution list included eleven Aboriginal organizations: Newfoundland and Labrador: Federation of Newfoundland Indians; Quebec: Gespe’gewaq Mi’gmaq Resource Council and Agence Mamu Innu Kaikusseht; Ontario: Plenty Canada and Mohawk Council of Akwesasne; New Brunswick: Maliseet Nation Conservation Council and North Shore Micmac District Council; Prince Edward Island: Mi’kmaq Confederacy of Prince Edward Island; and Nova Scotia: Maritime Aboriginal Peoples Council (NS, NB, PEI), Mi’Kmaq Rights Initiative and U’namaki Institute of Natural Resources.

### ***American Eel as a Test Case***

In the 2010-2011 Annual Report of the Species at Risk Aboriginal Interdepartmental Committee, the workplan activities called for the implementation of ATK protocols and use of the American eel as a test case. PCA completed ATK protocols with many AAROM groups, but other federal departments were not able to adopt these protocols, since many Aboriginal groups wanted each department to approach them on an individual basis. According to PCA, cutbacks to federal budgets slowed the process of developing these ATK protocols.<sup>69</sup>

### ***Pre-COSEWIC Review and Evaluation***

From August 31 to September 3, 2010, a Pre-COSEWIC Review and Evaluation of Progress on the Management Objectives for the American eel took place. This was a science peer review of information on American eel from Eastern Canada. The meeting participants included the following Aboriginal organizations: Micmac Confederacy of Prince Edward Island, U’namaki Institute of Natural Resources, IKANAWTIKET, Maritime Aboriginal Aquatic Resources Secretariat, Plenty Canada, Agence Mamu Innu Kaikusseht, and Maritime Aboriginal Peoples Council.

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68 Fisheries and Oceans Canada. *Peer review of DFO information for American eel relevant to status assessment by COSEWIC and science review of progress on management goals*. 2010. p 5.

69 Y. Bosse to A.MacPhee. “Re: Species at Risk Aboriginal Interdepartmental Committee.” 12 June, 2014. E-mail.

In April 2006, the American eel had been classified by COSEWIC as one Designatable Unit; however, at the pre-COSEWIC review meeting, an important discussion took place concerning this designation and whether or not there should be two separate Designatable Units:

The presenter concluded that although the species is panmixic, the American eel from St. Lawrence and Lake Ontario are sufficiently divergent (phenotypically and genetically) from Maritime and more southern populations that the stock could be a candidate for a separate designatable unit (it was suggested that they should be given their own designated unit but this is inconsistent with the DU definition). This generated a large amount of discussion with divergent points of view on how a geographic component can be considered a DU when the species is clearly panmictic, especially for the upper St. Lawrence and Lake Ontario stock that produces almost exclusively female eels, with the male spawners having to come from other areas.<sup>70</sup>

Though this issue was unresolved at the Pre-COSEWIC review meeting, the fact that all participating Aboriginal organizations from Maritime Canada were proposing the same action, it remained an important consideration for future recovery initiatives.

### *Atlantic Aboriginal Protection of Species Committee*

In June 2011, the Atlantic Aboriginal Protection of Species Committee (AAPSC) was formally organized to include a broad range of Aboriginal organizations which would provide sound technical advice on behalf of species. AAPSC had existed informally with a draft Terms of Reference since 2007. The committee is non-consultative and has as a goal "To increase Aboriginal participation in the identification, involvement (discourse), education, maintenance, preservation and recovery of species in Atlantic Canada, while providing opportunities for resource development, following guidance from various sources such as recovery plans."<sup>71</sup>

This committee is a good example of cooperation, since it brings together the expertise and experience of its members under a consensus-based partnership, to provide advice and recommendations for implementing species and habitat conservation, and recovery initiatives. During 2010-11, the Atlantic Species at Risk - Aboriginal Interdepartmental Committee, which is comprised of PCA, EC, DFO and INAC officials in the Atlantic Region, developed projects with the AAPSC to address common objectives. For example in 2011, DFO funded a train-the-trainer workshop, where individuals were trained on how to conduct interviews to gather ATK on the American eel and other species at risk.

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70 Fisheries and Oceans Canada. 2011. *Proceedings of the Zonal Advisory Process on the Pre-COSEWIC Review and Evaluation of Progress on Management Objectives for the American Eel*. August 31-September 3, 2010. DFO. Can. Sci. Advis. Sec. Proceed. Ser. 2011/028. p. 4.

71 Atlantic Aboriginal Protection of Species Committee. *Terms of Reference*. Maritime Canada. June 2011. p. 1.

In 2012, Mi'kma'ki All Points Services received funding from PCA to produce an Atlantic Aboriginal Options Paper entitled, *Aboriginal Traditional Knowledge and the SARA Process*. The paper highlighted Aboriginal issues and concerns surrounding the gathering and reporting of ATK:

- The ownership and use of ATK data through the SARA process. Aboriginal groups want to ensure that confidentiality is upheld throughout all stages of the SARA process.
- To ensure that ultimate ownership of ATK data remains within the collective memories of the people who have provided the information in the first instance.
- That the disclosure of ATK data through the SARA process does not negatively impact any ongoing political process involving Aboriginal land and resource discussions that exist in each region.
- Consider a risk assessment of Aboriginal groups not providing ATK information through the SARA process.<sup>72</sup>

The options paper pointed out that, "There is a general consensus that FN organizations do not agree with the manner in which ATK is currently handled through SARA."<sup>73</sup> The paper outlined several approaches for the use of ATK in initiatives under SARA. It warned the reader that, "the collection and reporting of ATK is often a complex and time consuming process". Options were provided as a reference guide for ATK practitioners:

- a) FNs must develop ways for outside groups to understand ATK. This cannot be achieved through a document but rather through being part of a larger experience. It is with experience that ATK can be partially understood and provide a proper basis to discuss joint initiatives in a respectful manner.
- b) More FN discussion should take place on ATK in order to gain a proper understanding on what it can mean in various circumstances. This should be considered a different exercise than attempting to define ATK. FNs should work to develop ways to engage with FN Elders on gaining a better understanding of ATK.
- c) Many FN organizations have made advancements in collection, storage and management of ATK. There is a need to complete a resource document that outlines the best practices of various FN organizations. This resource can help ensure that there are consistent practices and approaches to ATK in the Atlantic.
- d) FN organizations should consider the development of a broader statement on ATK that can provide further guidance in collection, storage, management and protection. This statement can help inform the drafting of ATK organizational policies, Interview Guides and Information Sharing Agreements within FN organizational settings.

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72 Atlantic Aboriginal Options Paper – *Aboriginal Traditional Knowledge & the SARA Process*. Mi'kma'ki All Points Services. Nova Scotia: Shubenacadie. 2012. p. 2.

73 *ibid.*, p. 21.

- e) There is need for FNs to consider various options regarding the confidentiality of ATK data. These can include but are not limited to: providing general ATK information to government departments, taking necessary precautions to separate names from specific data, the establishment of Ethics Committees, the provision of Knowledge Sharing Agreements and the use of the indigenous language to protect sensitive information, and the reporting of data in a general manner.
- f) There is a need to develop options regarding the ownership of ATK. A statement or protocol regarding the ownership of ATK can provide the principle basis to put government and corporate stakeholders on notice regarding the rights (including Intellectual Property Rights) associated with ATK.
- g) It is suggested that FN organizations and communities should draft appropriate Release Forms, Consent Forms and other similar documents to provide clarity and informed consent from the knowledge holder regarding the manner in which their knowledge will be protected and managed.
- h) Indigenous conceptions regarding the ownership of ATK should be further researched by FN organizations. Emphasis should be placed on establishing linkages / relationships between individual and community ATK interests. Once these linkages / relationships have been secured, the prospect of Knowledge Sharing Agreements or amended standard clause template agreements with government departments can be adopted to reflect an Aboriginal concept regarding the ownership of ATK.
- i) The prospect of developing a “gatekeeper” role for the management and storage of ATK should be considered by FN organizations. It is suggested that due consideration should be provided to the following: Political approval, Elder involvement, community access, flexibility in ATK use, establishment of best practices for ATK management and consideration of the economy of scale regarding FN capacity.
- j) There is a need to develop more clearly defined linkages between FN organizations and various political forums that undertake formal consultations with government. These linkages can provide clarity in the following areas: **the roles and responsibilities of FN organizations on consultative matters** [emphasis added], direction on the use of ATK data, conditions upon which ATK can be gathered, direction on government communications / discussions regarding ATK **and the sharing of ongoing consultative initiatives and related documents** [emphasis added].
- k) There is a need for FNs organizations to consider the development of an ATK Protocol. This document can provide guidance to the following: FN organizational capacity, Intellectual Property Rights regarding ATK, FN linkages and associated ATK processes, **statement on consultation** [emphasis added] and FN discretion and control of ATK.

- l) There is a need for FNs to develop initiatives and related mechanisms to mitigate any risks associated with the provision of ATK through the SARA process. The relative benefits of gathering ATK for FN and government purposes may take into account the following features: ATK protection, FNs capacity, government funding, the concept of two eyed seeing, credence to FNs methodology and data collection practices, a defined role for ATK and the prospect of trans generational learning.
- m) FNs should consider the development of mechanisms and related processes that support the development of ATK capacity within FN community settings. These efforts can focus on the transmission of ATK between FN elders and youth through means and methods that are culturally relevant and appropriate.

### ***Aboriginal Fund for Species at Risk***

The Aboriginal Fund for Species at Risk (AFSAR) program established in 2004, includes two funds: 1) Aboriginal Capacity Building Fund, which supports Aboriginal organizations in building capacity to enable participation in the conservation and recovery of species at risk; and 2) Aboriginal Critical Habitat Protection Fund, which supports the recovery of species and the protection of important habitat on Aboriginal lands.<sup>74</sup> In the 2012 Annual Report on the *Species at Risk Act*, it was reported that since 2004, AFSAR contributed nearly \$20 million to 600 projects.<sup>75</sup> Between fiscal year 2009-2010 and 2013-2014, AFSAR funded 51 projects where American eel was listed as a benefitting species from the initiatives.<sup>76</sup> The total amount of Environment Canada funding for these 51 projects was \$2,339,674. American eel is listed in all the projects; however, in some cases the projects were not entirely focused on this species.<sup>77</sup> While the AFSAR program strengthens capacity in Aboriginal communities for SARA implementation, it is not part of the Crown's constitutional duty to consult Aboriginal communities in matters that affect our rights and interests.

### ***American Eel ATK Interview Guidebook***

In 2009-2010, the American eel ATK guidebook was written by a team struck from some members of the Atlantic Aboriginal Protection of Species Committee (AAPSC). This committee is made up of organizations that had come together as multi-stakeholders concerned with species at risk and the involvement of Aboriginal Peoples in SARA. The purpose of the guide was described as follows:

The purpose of the American eel ATK field guide is to help Aboriginal people and organizations to complete the documentation of Aboriginal Traditional Knowledge (ATK) for Species at Risk (SAR) in the Atlantic region. The team has designed questions to identify American eel ATK, which is defined as traditional knowledge information

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74 Environment Canada. Aboriginal Fund for Species at Risk Program. (accessed 12/6/14)

75 Environment Canada. *Species at Risk Act* Annual Report. 2012. p. 33

76 V. Harrington to A. MacPhee. "Re: AFSAR." 12 June 2014. E-mail.

77 V. Harrington to A. MacPhee. "Re: AFSAR." 13 June 2014. E-mail.

about the biology, life cycle, population trends, and habitat requirements of this species. This guide is meant to provide best practices to technicians involved in documenting ATK and should be used in conjunction with the questions developed by the team to get the best possible results while gathering American eel ATK.<sup>78</sup>

The guide provides an example of wording that could be used to acquire approval from an Aboriginal community's leadership for the provision of ATK. The final clause in this template states:

And be it also resolved that participation by Aboriginal people in this study is not, and **should not be construed as consultation.**<sup>79</sup> [emphasis added]

The ATK interview guidebook contains a sample release/consent form, which sets out the purpose of the study; however, the form lacks a notice indicating to the reader that the process is not consultation.<sup>80</sup>

### ***2012 COSEWIC Assessment***

In May 2012, the status of the American eel was re-examined by COSEWIC and designated as Threatened. This took place because the species had not received protection under Schedule 1 of SARA as a result of the assessment undertaken in 2006. The 2012 COSEWIC assessment report indicates that "extensive discussions and consultations" had taken place with *inter alia*, Aboriginal groups.<sup>81</sup>

The reassessment has triggered a new listing consultation process, which will be undertaken by DFO in the Fall-Winter of 2014-2015. This forward-looking approach will involve Aboriginal organizations, provinces, the fishing industry and other interest groups. If the American eel is listed under SARA, DFO will begin the recovery process by developing a Recovery Strategy and Action plan(s). Both the Recovery Strategy and the Action Plans will be prepared in cooperation with Aboriginal organizations directly affected by the Recovery Strategy.<sup>82</sup>

### ***Closing the ATK Awareness Divide***

The cultural gap between Western science and ATK appears at times to be impossibly wide, resulting in an urgent need for a greater degree of understanding and trust between the two cultures. As science becomes more specialized and complex, it becomes less aware of ATK. It is important to convene dialogue between proponents for the application and possibility of the two cultures or two world views working together. There is a need to dispel the attitudes

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78 Atlantic Aboriginal Protection of Species Committee. Interview Guide Book Task Team. *American Eel ATK Interview Guidebook*. February 2010. p. 22.

79 *ibid.*, at 6.0.

80 *ibid.*, at 7.1.

81 COSEWIC. 2012. *COSEWIC assessment and status report on the American Eel *Anguilla rostrata* in Canada*. Committee on the Status of Endangered Wildlife in Canada. Ottawa. x. ([www.registrelep-sararegistry.gc.ca/default\\_e.cfm](http://www.registrelep-sararegistry.gc.ca/default_e.cfm)). (accessed 5/5/14)

82 J. Stewart to A. MacPhee. "Re: Questions regarding Inner Bay of Fundy Salmon Recovery." 23 May 2014. E-mail.

towards ATK as lesser in worth than western science. Many politicians and public servants who may not have always been informed and responsive to ATK, where without proper exposure to ATK or awareness about ATK, hold a lesser view of ATK. Many important and difficult concerns and issues remain with this awareness divide unresolved about the two world views.

## **Conclusions**

This case narrative concerning the American eel and the Crown constitutional duty to consult with Aboriginal Peoples in matters that may affect our rights and interests, illustrates the importance of protecting our treaty liberties to hunt, fish, fowl and collect all manner of species.

There is a fundamental difference in the approach of the Crown and Aboriginal Peoples to implementing SARA and this work still remains incomplete and formative. "Compounding the issue is the continued reluctance by the Government of Canada to grasp and adopt a paradigm shift as called for the *UN Convention on Biodiversity*, and especially those articles of international law requiring recognition and reconciliation with Indigenous Peoples, respecting the diversity of Indigenous Peoples within UN member States."<sup>83</sup>

Coming back to the issue of the legal complexity of SARA, according to Jaclyn Shepherd from DFO Legislative and Regulatory Affairs, in 2008 the department faced challenges in complying with the processes in the *Cabinet Directive on Streamlining Regulations* including:

- Coordinating Aboriginal consultations within the legislated timelines in SARA for listing decisions;
- Managing the expectations of affected parties including Aboriginal groups;
- Records management for the storage of ATK; and
- Terms of use of ATK in Regulatory Impact Analysis Statements.<sup>84</sup>

Clearly, there are lingering uncertainties concerning meaningful consultation with Aboriginal peoples on the American eel and meeting a high standard capable of upholding the honour of the Crown. Reassessment of the species by COSEWIC has triggered the need for Aboriginal consultation.

DFO has advised that during the winter of 2014-2015 it will be working on a consultation plan for the American eel. We remain hopeful that this consultation plan and accommodation will be successful in developing a mutually respectful long-term relationship with Aboriginal Peoples. However, if the Crown fails to adequately consult with the Aboriginal Peoples concerned, the matter of developing a Recovery Strategy and/or Action Plans may well result in calling on the courts to become involved.

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83 McNeely, Joshua E. and Roger J. Hunka. Maritime Aboriginal Peoples Council – IKANAWTIKET. *Policy Critique of the Draft Species at Risk Act Overarching Policy Framework*. Nova Scotia: Truro Heights. January 2011. p. 28.

84 Fisheries and Oceans Canada. Workshop Meeting Report. *Species at Risk Act* and Aboriginal Traditional Knowledge. October 28-30, 2008. p. 4.

## ***Recommendations***

### ***Communications and Awareness***

DFO and PCA lack appropriate communications and awareness building activities with Aboriginal representative organizations concerning the development of a Recovery Strategy and Action Plan(s) for the American eel. Communications and awareness building with Aboriginal organizations must be an implementation priority and a guiding principle in the work to develop a Recovery Strategy and Actions Plans.

### ***Inclusiveness***

Section 35 (2) of the *Constitution Act, 1982* references the Aboriginal Peoples of Canada to include the 'Indian, Inuit and Métis peoples'. The Recovery Strategy and Action Plan(s) for the American eel will need to be respectful and inclusive of *all* Aboriginal Peoples on and off-reserve and properly consider the complex interests, issues and concerns that are at stake.

### ***Clarity in Consultation Processes***

When Aboriginal organizations participate in the collection of ATK, it must be clear that this participation does not fulfill the duty to consult and is not a partial fulfillment of the duty to consult.

### ***Intergovernmental Processes - Federal, Provincial, Territorial, Aboriginal***

Aboriginal representation is required on federal, provincial and territorial committees established to work on development and implementation of a Recovery Strategy and Action Plan(s) for the American eel.

### ***Employ the Precautionary Principle***

The American eel can be managed more efficiently and effectively in the Maritimes Freshwater Ecological Area by applying the precautionary principle. The principle should also be applied to American eel in the Great Lakes-Western St. Lawrence Freshwater Ecological Area.

### ***Socio-Economic Analyses***

Socio-economic evaluations must be broadened to ensure the impact analyses include the cultural, spiritual and ecological values of Aboriginal Peoples and that they are carried out in a consistent and transparent manner.

### ***Assess the American eel in National Freshwater Ecological Areas***

COSEWIC should reevaluate and assess the American eel within all four National Freshwater Ecological Areas as distinct Designatable Units.

### ***Reconsider the Status Assessment of the American eel***

COSEWIC should consider a status assessment for the American eel of the Great Lakes-Western St. Lawrence Designatable Unit as *Endangered* and an assessment of the Maritimes Designatable Unit as *Special Concern*.

### ***Include ATK in the Status Report***

The COSEWIC reassessment must include ATK in the American eel status report.

### ***Aboriginal Traditional Knowledge***

The science-based approach to recovery of the American eel requires greater involvement of the *Two-eyed Seeing Approach*, which needs to be an integral part of a Recovery Strategy and Action Plan(s).

### ***Include Aboriginal Peoples in the Reassessment Process***

Aboriginal Peoples must be involved in the reassessment of the American eel to provide understanding of the social, economic and rights impacts, which a listing will have on Aboriginal Peoples.

### ***Undertake a Socio-Economic Impact Analysis***

A Socio-Economic Impact Analysis must be undertaken on the American eel to include and address issues concerning potential loss of resource access and use, as well as compensation.

### ***Management Plans Must Include Engagement with Aboriginal Peoples***

A Management Plan(s) for the American eel should include the key pillars of recovery and management, including engagement with Aboriginal Peoples and transboundary management issues.

### ***CEWG Requires Aboriginal Participation***

The Canadian Eel Working Group (CEWG) must have representation from Aboriginal Peoples.

### ***CESWoG Requires Aboriginal Participation***

The Canadian Eel Science Working Group (CESWoG) must have representation from Aboriginal Peoples.

### ***Increase Representation from Aboriginal Peoples in the SARA Conservation Cycle***

Committees involved in drafting Recovery Strategies, Action Plans and Management Plans, or undertaking research on the American eel, must have representation from Aboriginal Peoples.

### ***Makeup of Recovery Teams***

Federal officials participating on Recovery Teams should act in the capacity of *ex officio* members, so as to allow the committee the freedom to communicate directly with the competent minister.

### ***Annual Report***

The conservation and recovery of the American eel can only be achieved with the cooperation and support of Aboriginal Peoples. An annual report on the participation of Aboriginal Peoples in a Recovery Strategy, Action Plans and Management Plans should be provided by DFO to NACOSAR.

## Boreal Woodland Caribou

<b>Scientific Name:</b>	<i>Rangifer tarandus caribou</i>
<b>Canadian Range:</b>	YT, NT, BC, AB, SK, MB, ON, QC, NL
<b>Competent Ministry:</b>	Environment Canada
<b>COSEWIC Status History:</b>	Designated Threatened in May 2000. Status re-examined and confirmed Threatened in May 2002.
<b>SARA Status:</b>	Schedule 1, Threatened
<b>SARA Recovery Documents:</b>	Final Recovery Strategy posted on Oct. 5, 2012. No Proposed Action Plans posted (due by December 31, 2015).
<b>SARA Critical Habitat Protection:</b>	One Gazette Description for Critical Habitat in Wood Buffalo National Park and Prince Albert National Park posted on August 3, 2013

### Background

The significance of the Boreal woodland caribou is of highest importance to many Aboriginal Peoples and as the impacts of industrial development, climate change and population growth continue to increase, some caribou herds will face extinction within 10 to 15 years. This dismal fact prompted an angry response from Al Lameman, Chief of the Beaver Lake Cree Nation. “We are calling on government to immediately halt the destruction of our lands, lands that sustain our caribou and our people. It is difficult to express the anger I feel at the loss of this noble animal in our territory. Our traditional land is dwindling. We need habitat for our animals to ensure there is a healthy surplus. These animals sustain us and, as they die, our future becomes uncertain. We must act now to take care of Mother Earth.”<sup>85</sup>

In May 2000, the Boreal woodland caribou was assessed by COSEWIC and designated as Threatened within the meaning of SARA. In 2003, the species was listed as Threatened when the *Species at Risk Act* was proclaimed. When a species has been identified as being Endangered, Threatened or Extirpated, SARA requires that a proposed Recovery Strategy be prepared and published by the competent Minister within a fixed period of time. The timelines depend on the status of the particular species. The time period can last up to four years from the date of the listing, plus a 90-day comment and finalization period.

Under section 42 (2) of SARA:

With respect to wildlife species that are set out in Schedule I on the day section 27 comes into force, the competent minister must include a proposed recovery strategy within three years after that day, in the case of wildlife species listed as an endangered species,

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85 Manitoba Wildlands News. *First Nations Demand Canada Protect Woodland Caribou*. July 28, 2010. [http://www.manitobawildlands.org/news\\_item.asp?number=1493](http://www.manitobawildlands.org/news_item.asp?number=1493) (accessed 11/6/14)

and within four years after that day, in the case of wildlife species listed as a threatened species or an extirpated species.

In a landmark case, EcoJustice was able to demonstrate that systemic problems exist in Canada's species at risk protection regime. The federal court found that the Minister of the Environment had failed to comply with statutory timelines for the preparation and publication of a recovery strategy for the Boreal woodland caribou. Concerns over unlawful delays by the federal government in developing recovery strategies under SARA have pointed to a systemic problem in the implementation processes. The failure to develop Recovery Plans for the white sturgeon, humpback whale, marbled murrelet and woodland caribou all resulted in a legal action in the Fall of 2012, with a decision rendered in February 2014. Justice Mactavish held that the Minister had acted unlawfully in not complying with SARA deadlines.

In paragraphs 101 and 102 of the decision, the Court stated:

To state the obvious, the *Species at Risk Act* was enacted because some wildlife species in Canada are at risk. As the applicants note, many are in a race against the clock as increased pressure is put on their critical habitat, and their ultimate survival may be at stake.

The timelines contained in the Act reflect the clearly articulated will of Parliament that recovery strategies be developed for species at risk in a timely fashion, recognizing that there is indeed urgency in these matters. Compliance with the statutory timelines is critical to the proper implementation of the Parliamentary scheme for the protection of species at risk.<sup>86</sup>

The Recovery Strategy for the Boreal woodland caribou had been due in June 2007, but it was not announced until November 2012. On August 26, 2011, Environment Canada had posted the proposed Recovery Strategy and a sixty-day public comment period was extended to February 22, 2012. The reason for this extension was that Environment Canada wanted to *inter alia*, consult Aboriginal communities prior to finalizing the recovery strategy.<sup>87</sup>

In 2003, the National Boreal Caribou Technical Steering Committee had been launched with the objective to develop a National Recovery Strategy for the species. This committee was comprised of representatives from provincial and territorial jurisdictions. There were no Aboriginal representatives on this steering committee, despite section 39(1)(d) of SARA, which calls for the Recovery Strategy to be prepared in cooperation with:

Every aboriginal organization that the competent minister considers will be directly affected by the recovery strategy;

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86 *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans and Minister of the Environment)*, 2014. FC 148. p. 27.

87 Environment Canada. 2012. *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada*. Species at Risk Act Recovery Strategy Series. Environment Canada, Ottawa. III.

In 2007, Environment Canada undertook a science review of the Boreal woodland caribou to identify critical habitat to the extent possible based upon the best available science and/or prepare a Schedule of Studies. In December 2010, the outcome of this initiative was a science-based report entitled *Scientific Review for the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada*. This report acknowledged that it had not incorporated ATK in a systematic way. In the Preface, the following plan was outlined:

These western science studies will be informed by Aboriginal traditional knowledge that Environment Canada plans to collect through a series of regional workshops with Aboriginal peoples, culminating in a national workshop. The goal of these workshops will be to inform recovery planning and implementation. Environment Canada will work closely with national Aboriginal organizations to develop and hold these workshops.”<sup>88</sup>

Also in the Preface, the undertaking was made that consultation activities in regard to the key elements of the Recovery Strategy, including recovery goals and objectives and potential threat mitigation activities including land management regimes, would include Aboriginal groups. There was no consultation with national Aboriginal organizations following up on this 2007 science review.

During a September 2009 NACOSAR meeting held in Prince Albert, Saskatchewan, EC officials Virginia Potter and Bob McLean briefed the council and indicated that the department was to begin consultations with Aboriginal peoples, as part of the overall process to develop a National Recovery Strategy for the Boreal population of woodland caribou. Officials outlined the intent to establish an Aboriginal Advisory Group to provide input on guidance on the Boreal caribou consultation process and to review and provide advice on draft versions of the National Recovery Strategy.

The Advisory Group was to be comprised of one representative from each of the NAOs and Dr. Micheline Manseau, who had been nominated by NACOSAR. It was expected that there would be two face-to-face meetings per year and teleconference calls every two weeks.<sup>89</sup> Director General Virginia Potter informed NACOSAR that information obtained from consultations with Aboriginal communities would be synthesized by an Environment Canada team of writers and the draft report would be sent to the Advisory Group for review and comment.<sup>90</sup> Unfortunately, no such document was ever distributed to the Advisory Group for their consideration prior to its dissolution.

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88 Environment Canada. August 2008. *Scientific Review for the Identification of Critical Habitat for Woodland Caribou (Rangifer tarandus caribou), Boreal Population, in Canada*. Ottawa: Environment Canada. Preface.

89 National Aboriginal Council on Species at Risk (NACOSAR) *Record of Decision*. September 15-16, 2009. Saskatchewan: Prince Albert. p.4.

90 *ibid.*

In October 2009, EC organized the Advisory Group, which was described in Part III of a draft terms of reference:

The primary role of the Advisory Group is to provide advice to Environment Canada during the process of developing the national recovery strategy for boreal caribou. Under these Terms of Reference, the members of the Advisory Group are not responsible for managing or drafting the national recovery strategy for the boreal caribou, nor leading or undertaking SARA consultations. The Advisory Group will provide recommendations to Environment Canada in order to address issues associated with the national recovery strategy for boreal caribou.<sup>91</sup>

The first face-to-face meeting of the Advisory Group took place on October 8, 2009 and the final one took place on April 6, 2011. The draft Terms of Reference for the Advisory Group were:

- 1) Providing input and advice on the development of a national recovery strategy for boreal caribou as a representative of their organization, but are not responsible for undertaking SARA consultations with that organization;
- 2) Providing advice on the incorporation of the final scientific findings and Aboriginal traditional knowledge in the national recovery strategy to ensure that Aboriginal traditional knowledge is treated with respect and is protected;
- 3) Providing advice on the drafting of the national recovery strategy and consideration of supporting products (e.g., consultation materials) developed throughout the process by Environment Canada;
- 4) Informing and representing the members of their respective organizations.<sup>92</sup>

In a background document attached to the draft Terms of Reference, an important piece of copy appeared:

This process is expected to raise many issues and questions including consideration of the Aboriginal traditional knowledge that was part of the legal requirements of the SARA assessment. The proposed National Recovery Strategy must respect provisions of land claim agreements, treaties and any self-government agreements. How the ATK information/ knowledge is accessed, by whom and who controls the use of this information, and the protocols required, are central concerns of national Aboriginal organizations. Protocols will be required and they can vary from community to community, organization to organization and region to region.<sup>93</sup>

The draft terms of reference outlined Environment Canada's role as an observer to provide technical advice. Officials would provide administrative support, including coordination of meetings, document preparation and meeting summaries. An important

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91 National Aboriginal Organization Boreal Caribou Advisory Group. *Draft Terms of Reference*. October 14, 2010. Part III.

92 *ibid.*, p. 1..

93 *ibid.*, p. 6.

part of this administrative support was for the department to provide for liaison with a parallel Advisory Group made up of representatives from the Species at Risk Advisory Committee (SARAC), including coordination of all joint meetings, document preparation and meeting summaries.<sup>94</sup>

On November 22, 2010, the Canadian Wildlife Service (CWS) presented the Advisory Group with a PowerPoint presentation entitled, *Considering Aboriginal Traditional Knowledge in the Development of the National Recovery Strategy for Woodland Caribou, Boreal Population*. The PowerPoint explained that there would be three phases of work: 1) Consultations; 2) Aboriginal Traditional Knowledge; and 3) Scientific Studies leading to the development of a National Recovery Strategy. The specific objectives of the Boreal Caribou ATK process were to:

Ensure the ATK provided by knowledge holders is gathered properly and respectfully;

Ensure that ATK informs the development of the national recovery strategy and is reflected accordingly in the document;

Ensure there is appropriate recognition of the knowledge shared by knowledge holders; and

Have this work contribute to building relationships with Aboriginal groups for species at risk conservation.

The CWS approach was to involve:

Contact regional Aboriginal organizations (First Nation, Inuit and Métis) to determine their interest in participating. May result in direct involvement or advice on process / Aboriginal facilitators, etc.

Aboriginal communities were also contacted and informed that ATK gathering would be taking place in their area.

This approach was to lead to the following outcomes:

A regional or local Aboriginal organization (or their delegate) interviewed knowledge holders;

Regional/local workshops coordinated by Aboriginal facilitators; and

ATK gathering done in partnership with other initiatives.

The interviews with knowledge holders were to be carried out by Aboriginal organizations or contractors, with the reports being verified by participants and/or communities. The original notes under this plan would remain with the community or regional organization, with EC receiving a summary report.

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94 Ibid., p. 3.

A specific process was set up for how ATK reports would be used to help draft the National Recovery Strategy:

Receipt of ATK reports – CWS regional offices will receive the ATK reports and forward a copy to Environment Canada;

Review of ATK reports – CWS regional staff will review the reports and identify all information that would support drafting the various components of the Recovery Strategy and subsequent Action Plans;

Communication with ATK contractors – share with the ATK contractor, CWS’ understanding of the information provided - indicate where/how the ATK might be reflected in the recovery strategy - explain cases where knowledge provided would be more applicable at the Action Plan stage;

Information provided to the drafting team – the Recovery Strategy drafting team will use these summaries during the drafting process (and will refer to full ATK reports as necessary); and

Further notification – all ATK contractors would be notified 2 weeks before posting on the Species at Risk Public Registry that the posting of the national recovery strategy will occur.

The following chart was presented to the Advisory Group as a proposed summary form for the ATK information collected by the contractor. The form divides ATK into four areas:

RS - Recovery Strategy AP- Action Plan P & D – Population and Distribution CH IS- Caribou Herds

Document name:

How knowledge was gathered (workshop, in-community interviews, # of participants):

ATK Contractor contact:

Page #	Description	Applicable section of RS and/or AP (potential)
2	Knowledge relating to species biology (e.g. impact of parasites on health) and seasonal movements	RS - Species biology AP - seasonal movements could support actions related to protected areas, timing restrictions on development activities.
4	Specific knowledge relating to habitat types that are limiting in certain areas (e.g., feeding areas)	AP - local level planning for habitat protection.
5	Knowledge relating to threats (e.g. the impact of forestry operations)	RS - Threats section AP - Recovery actions (amount and type of forestry allowed or mitigation options)
9	Statements regarding the need to preserve caribou	RS - P&D Objectives
13	Caribou usage by community	AP - Socio-economic evaluation
20	Knowledge relating to population trends	RS - Population trends section
23 - 26	Recommendations for protected areas	RS - Broad strategies, CH IS (potential) AP - Recovery actions

On December 9, 2009, John Cheechoo from Inuit Tapiriit Kanatami and a member of the National Aboriginal Organization Advisory Group posed nine questions to EC concerning their upcoming work with ATK and the Boreal woodland caribou. EC responded in writing to these questions.

*Question 1 - How will existing Aboriginal Traditional Knowledge on Boreal caribou be considered as part of the Boreal caribou ATK work?*

Some of the Aboriginal contractors/organizations leading the collection of boreal caribou ATK are being asked to do a survey of existing information as part of their contracts. Whether the contractor/organization will complete this work is determined as the contract is negotiated. It is recognized that accessing all of the available information may be difficult given the range of activities that may have benefited from ATK (e.g. various community meetings, consultations with provinces etc.). Environment Canada will also search for ATK projects that may have been conducted internally (e.g., projects done through the Aboriginal Fund for Species at Risk).

*Question 2 - What guidelines for confidentiality of information and intellectual property are being used?*

Where they exist, Environment Canada and Aboriginal contractors will use community or regional guidelines and protocols for the collection and use of ATK. Environment Canada is also working on a consent process that ensures that information is treated properly and that the ownership of the information remains with the knowledge holder or community (as appropriate). This process will ensure that knowledge holders understand: why the information is being requested; how the information they provide will be used; that their involvement is voluntary; and they will have an opportunity to review their input to ensure that it was used properly.

*Question 3 - What are the protocols for data management and sharing, and who will be synthesizing the information?*

In most cases, the Aboriginal contractors/organizations will be responsible for managing the information collected from the interviews with knowledge holders. They will return the source information to the community/ knowledge holder after compiling a summary report for their region or area. Knowledge holders will review the information summarized from the interviews to ensure it was collected accurately, prior to finalizing the regional summary report. At this time, they may revise or remove any of the information that was recorded. Environment Canada will only be provided with the summary reports, not the source information. Ideally, the summary reports could also be shared with provinces and territories to assist them with their recovery planning for Boreal caribou - an approach for sharing of these regional reports with provinces and territories is still being discussed.

*Question 4 - Will there be a report on all TK on boreal caribou? How will the national workshop fit in?*

Yes, EC is proposing to publish a national report on TK for Boreal caribou. A national workshop would bring together knowledge holders, members of the recovery strategy drafting team, Aboriginal contractors and Environment Canada to share experiences and lessons learned from the ATK work on Boreal caribou and to provide guidance on how the information should be used to inform the recovery strategy.

*Question 5 – Will there be a generic questionnaire or region-specific questionnaire?*

Environment Canada developed a standard questionnaire and table of contents for the ATK work to provide a degree of national consistency to the information collected and to identify particular areas where TK would strengthen our understanding of Boreal caribou biology, threats to Boreal caribou, etc. This was required so that information is both comparable across the Boreal caribou range and is in a format that is conducive to use by the team drafting the recovery strategy (i.e., the information addresses the specific components of a recovery strategy). However, it is recognized (and stated at the top of the questionnaire) that the flow of questions and the direction of the interview will be directed largely by the discussion with the knowledge holder.

*Question 6 – Will knowledge holders be identified or remain anonymous?*

Knowledge holders will have the choice whether they are identified in the regional summary report or not. Furthermore, if there was interest in having a particular quote attributed to a specific person, specific consent would be sought.

*Question 7 – Questions regarding overharvesting are loaded questions.*

A recovery strategy must examine the threats to a species at risk. Overharvesting is a potential threat to Boreal caribou survival, and ATK may help inform our understanding of this threat. However, if people feel that this question is loaded, they are not required to answer it.

*Question 8 – There are no questions on feeding grounds.*

From the short questionnaire, the discussion on habitat use was intended to draw out areas where boreal caribou feed.

In response to question 1, EC indicated its intention to search through AFSAR projects for ATK on Boreal caribou. This program has a specific draft policy on ATK that was prepared in June 2010. The rationale stated:

A major component of the Aboriginal Fund for Species at Risk is the collection and organization of Aboriginal Traditional Knowledge (ATK) by Aboriginal communities and organizations. In order to allow for effective use of Aboriginal Traditional Knowledge for Species Recovery purposes, a system for tracking ATK being held by communities and organizations is necessary. This system respects the proprietary rights and self-determination of Aboriginal Peoples by providing them with control over the department's use of this form of knowledge.

There was no explanation offered by EC on how this rationale fit with their expressed intentions on using ATK in the Recovery Strategy for the Boreal woodland caribou. In addition, there was no information provided on community protocols, language to be contained in contracts with Aboriginal communities or how the department had intended to manage the diversity of values among Aboriginal communities. The process of dialogue and consultation with Aboriginal communities was vague and overshadowed by the fact that the federal Minister of the Environment was three years past the statutory deadline for preparing the Recovery Strategy for the Boreal woodland caribou.

During a May 7, 2010 Advisory Group teleconference call, EC outlined its approach to the interview process for collection of ATK:

First step is to contact regional Aboriginal organizations. This may result in the organization leading the project, or providing advice.

Flexible approach:

- Regional Aboriginal organization (or delegate) organizes and carries out in-community interviews
- Regional or local workshops coordinated by Aboriginal organizations or facilitators
- Partner with other initiatives (e.g., Aboriginal Fund for Species at Risk projects, Department of Fisheries and Oceans on species at risk meetings)

Process:

- Aboriginal organization or community identifies knowledge holders and organizes interviews or workshops
- Draft questionnaire – revise as appropriate
- Process explained to knowledge holders prior to interviews voluntary process
- Interviews or workshops conducted – notes/summary report verified with knowledge holders/community
- Summary reports – final version, including maps, etc. sent back to community. Final versions of summary report transmitted to Environment Canada

In their outline for the interview process, EC officials projected what success would look like:

Aboriginal traditional knowledge and western science inform the identification of critical habitat

- Aboriginal traditional knowledge and western science are equally considered throughout the report;
- Areas of congruence and discrepancy are acknowledged and highlighted to better inform the development of the national recovery strategy.

During the teleconference, Advisory Group members informed EC that they were concerned with how ATK could inform the Recovery Strategy and science work, given the short timelines and the pressure that the Minister of the Environment was under to produce a Recovery Strategy. Members indicated that it would be a challenging process to interpret the data and have it meaningfully inform the Recovery Strategy. EC officials responded that the Recovery planning for the boreal caribou would be a very long process and that their goal was to develop long-term relationships between Aboriginal Peoples and the department.<sup>95</sup>

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95 National Aboriginal Organization Boreal Caribou Advisory Group. Meeting Notes from teleconference. May 7, 2010. p 2

## *Contracting problems concerning the collection of ATK*

The history of contracting difficulties associated with the collection of ATK throws some light on the complexity of this undertaking and potential solutions for moving forward with other Recovery Strategies. The challenge for the competent departments is to reach agreements with Aboriginal Peoples that address the need for protection of intellectual property rights, fairness and equity.

This requires negotiation between the competent departments and Aboriginal representative organizations, to arrive at legal language that is acceptable to all parties, before moving on to implementing agreements at the community level. In the case of the Boreal woodland caribou recovery planning process, this important work did not take place.

According to EC, Intellectual Property Rights means any and all intellectual property rights recognized by law, including but not limited to intellectual property rights protected through legislation. The following text was provided by the Finance Department of EC:

- a) Any intellectual Property Rights created by the Recipient in association with the Project shall vest in and remain the property of the Recipient:
- b) The Recipient hereby grants to Environment Canada a non-exclusive, unconditional, irrevocable, perpetual, worldwide, royalty-free right to exercise all Intellectual Property Rights that vest in the Recipient, for any public purpose except commercial exploitation in competition with the Recipient, EC's license includes the right to use, produce, publish, translate, reproduce, adapt, modify, disclose, share, distribute, and broadcast the intellectual property.
- c) The Recipient shall further be responsible for providing to Environment Canada upon request, a written permanent waiver of moral rights (as this term is defined in the *Copyright Act*, R.S.C., c. C-42), from every author that contributes to the intellectual property, which is subject to copyright protection.<sup>96</sup>

The requirement for Aboriginal Peoples to waive moral rights and cede copyright to the Crown, prevented progress on contractual arrangements being made for the collection of ATK. The questions and the contractual language surrounding intellectual property rights have never been negotiated with the NAOs and there appeared to be no clear plan by EC for documenting the protocols/agreements in place between the contractors collecting ATK and Aboriginal communities.

This issue goes to the very heart of meaningful and effective engagement with Aboriginal Peoples on environmental issues. Members of the Advisory Group were concerned that the pressure to meet timelines would result in aggressive efforts to bring ATK into the process and that not enough time was being spent on developing mutually agreeable contracting language.<sup>97</sup>

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<sup>96</sup> Environment Canada Finance Department.

<sup>97</sup> Species at Risk Advisory Committee and National Aboriginal Organization Advisory Group. Meeting notes. April 12, 2010. p. 2.

On October 16, 2009, Mike Landreville, an advisor in the Intellectual Property Office of EC, provided CWS officials with two sets of contracting documents, which he recommended be used to address intellectual property considerations pertaining to the ownership and use of ATK: the bidding documents and information in the Request for Proposals/Notification Stage of the Contracting process; and the contract. Landreville recommended that the Terms of Reference, MERX postings, as well as the contract should contain the following statement concerning intellectual property ownership and use:

Scenario 1: IP Terms for ATK-Related Contracts where Environment Canada does not need to own the Deliverables

Environment Canada desires that Aboriginal Traditional Knowledge (ATK) remain the property of those who hold it and that the knowledge holders themselves have management and control over how this knowledge is collected, captured, used and stored for future generations. Therefore, any intellectual property associated with the collection and capture of aboriginal traditional knowledge shall remain the property of the party providing that information. The Contractor will make every effort to ensure that ATK is captured accurately and in accordance with the knowledge holder's understanding and expectations and that neither the Contractor nor the Crown will claim any ownership in such intellectual property. The Contractor shall obtain a license to this aboriginal traditional knowledge from the originating party sufficient to provide a non-exclusive, perpetual, irrevocable, world-wide, fully-paid and royalty-free license to the Crown to exercise all intellectual property rights in the ATK that vest in the Owner but may limit commercial exploitation by the Crown.

Other than intellectual property rights associated with the capture and storage of ATK, the contractor will own the foreground intellectual property arising from work under this contract subject to providing a non-exclusive, perpetual, irrevocable, world-wide, fully-paid and royalty-free license to exercise all Intellectual Property Rights that may vest in the Contractor but may limit commercial exploitation by the Crown.

Scenario 2: IP Terms for ATK-Related Contracts where Environment Canada needs to own the Deliverables (For example: if the deliverable would be a draft COSEWIC Assessment Report)

Environment Canada desires that Aboriginal Traditional Knowledge (ATK) remain the property of those who hold it and that the knowledge holders themselves have management and control over how this knowledge is collected, captured, used, and stored for future generations. Therefore, any intellectual property associated with the collection and capture of Aboriginal traditional knowledge shall remain the property of the party providing the information. The Contractor will make every effort to ensure that the ATK is captured accurately and in accordance with the knowledge holder's understanding and expectations and neither the Contractor nor the Crown will claim

any ownership in such intellectual property. The Contractor shall obtain a license to this Aboriginal traditional knowledge from the originating party sufficient to provide a non-exclusive, perpetual, irrevocable, worldwide, fully-paid and royalty-free license to the Crown to exercise all intellectual property rights in the ATK that vest in the owner, but may limit commercial exploitation by the Crown.

Other than intellectual property rights associated with the capture and storage of ATK, Environment Canada has determined that any intellectual property arising from the performance of the work under the Contract will vest in Canada in accordance with exception 6.4.1 of the Treasury Board's Policy on *Title to Intellectual Property Arising Under Crown Procurement Contracts* on the grounds that the deliverable will be used to generate knowledge and information for public dissemination.<sup>98</sup>

On October 21, 2009, EC provided the Advisory Group with a copy of an internal email concerning Aboriginal contracting. Jim Jordan, National Strategic Procurement and Policy Advisor at EC, advised on development of a process for contracting for ATK sessions. He provided the following key points:

- a) using recognized Aboriginal bodies, for example, Provincial and Territorial Organizations could help the review process, as there is an expectation that these groups will have the connections necessary to deliver the project;
- b) try to get submissions in before the Christmas season to avoid end-of-year crunch;
- c) if working south of 60, the Procurement Strategy for Aboriginal Business (PSAB) applies and should be considered. The set-aside as part of this process could be beneficial, as it can be used to restrict competition to Aboriginal firms, which will be beneficial to delivering the ATK sessions;
- d) if working north of 60, most areas will have Comprehensive Land Claim Agreements (CLCAs); these claims have contracting requirements that must be respected. Also note some areas of Labrador, Quebec and British Columbia have CLCAs; and
- e) It is possible to split a contract over two fiscal years, providing that you know there will be funds the following fiscal year.<sup>99</sup>

Jim Jordan also recommended that the work statements adopt a nationally consistent format, where possible, to facilitate any processing and approval that would be required by the Procurement Review Board. He provided an example of a work statement from Quebec. The sole-source justification provided raised additional issues concerning how EC was fulfilling its obligations to consult Aboriginal Peoples:

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98 M. Landreville to C. Bathgate. "Re: IP Clauses for ATK Contracts." 14 Oct. 2009. E-mail.

99 M. Vance to the National Aboriginal Organization Boreal Caribou Advisory Group. 21 Oct. 2009. E-mail.

Environment Canada plans to ask the First Nations of Quebec and Labrador Sustainable Development Institute and the Cree Regional Authority to carry out the project in question, as that is the desire of the Aboriginal communities to be consulted. The Aboriginal communities want to develop their abilities to realize this type of project and want the work to be performed by the organizations indicated. These consultants represent the only available option for Environment Canada to fulfill its obligations to consult under SARA. These are the only organizations with a network of contacts and the support of the communities, two key elements in the success of the project.

This sole source justification made no reference to Aboriginal Peoples who are not part of the First Nations of Quebec or the Cree Regional Authority.

In June 2010, the NAO Advisory Group continued to express its concern about the waiver of moral rights clause used in contracts being let for the recovery process. These concerns related directly to the obligations of Canada under the *United Nations Declaration on the Rights of Indigenous Peoples*, which has specific provisions covering ATK.

For example, Article 31 states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

SARA is a result of the *UN Convention on Biological Diversity* and is an important instrument for the protection of ATK in the context of biodiversity conservation. EC officials assured the Advisory Group that no participants in the ATK process had been asked to waive their moral rights and provided members with a standard contract being used. They assured the Advisory group that the balance of contracting clauses made no references to intellectual property issues or the ownership of ATK.

Members of the Advisory Group remained concerned that there would be clauses in the contracts granting non-exclusive, perpetual, irrevocable, worldwide license to ATK. There was no convincing reason advanced by EC officials as to why there was not full disclosure of the contracting clauses, so that the Advisory Group could receive legal advice from their respective NAO counsels.

In June 2010 meeting, the Advisory Group was informed by EC that the Aboriginal community meetings "...would begin by explaining the overall process, including an explanation of the difference between consultations and the ATK process, an overview of SARA, and answering

any questions from participants.<sup>100</sup> Members of the Advisory Group were concerned about the relationship between *consultation* and the *ATK collection activities* and whether or not community level participants would truly understand the important differences.

In July 2010, the Advisory Group repeated their concerns about problematic wording in the intellectual property rights clause contained in the Invitation to Bid for contractors and the lack of willingness of EC to provide any information on protocols or agreements for Boreal caribou ATK collection. There was never any satisfactory resolution of this core issue.

### ***Consultation and the National Recovery Strategy***

The NAO Advisory Group was also concerned that the process for drafting of the Recovery Strategy was restricted to EC officials and that the collaborative process and consultation on key elements of the Recovery Strategy would not be taking place. In addition to the lack of involvement in the drafting, the Advisory Group members had in August 2010, requested an opportunity to review the ATK reports coming from the various contractors. EC officials had indicated that the approach for the review and the consideration of the ATK reports had not yet been determined. They indicated that sharing of the ATK summary reports would be discussed with the contractors performing the work. In the references section of the Recovery Strategy, the following is cited: *Boreal Caribou Aboriginal Traditional Knowledge (ATK) Reports. 2010-2011. Compiled June 2011. Ottawa: Environment Canada.* This publication was never made available to the NAOs.

By June 2011, the NAO Advisory Group had ceased its activities under protest. The reasons for dissolving the group were diverse, but the lack of capacity and the unrealistic expectations by EC of what the advisory group could achieve were *de facto* reasons.

On January 7, 2011, a teleconference took place between EC and the Congress of Aboriginal Peoples concerning the Development of a National Recovery Strategy for Woodland Caribou (Boreal population) in Canada. This teleconference was part of a series of teleconferences that EC held with the NAOs to discuss the conservation of Boreal caribou and secure input from the NAOs on key elements of the National Recovery Strategy that was being developed. This NAO input was one of several sources of information that EC officials were using to inform the National Recovery Strategy. EC officials indicated that some of this information could be used to develop the Action Plan, once the Recovery Strategy was finalized. The NAOs were asked what process they thought would work best for developing the Action Plans, who should be involved, and what feedback they had for the process currently underway.<sup>101</sup>

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100 National Aboriginal Organization Boreal Caribou Advisory Group. Meeting Notes. June 10, 2010, p. 2.

101 Virc, Stephen. [NCR] "Working Together to Recover Boreal Caribou. Development of a National Recovery Strategy for Woodland Caribou (Boreal population) in Canada." PowerPoint Presentation. January 7, 2011.

It is unclear if any financial resources or capacity was provided to the NAOs to support their engagement with the national recovery strategy. Without these resources for the NAOs, the development of consultation processes would lack the qualitative input and experience of the representative organizations.

On October 1, 2009, Shawn-A-in-chut Atleo, former National Chief of the Assembly of First Nations (AFN), wrote to Jim Prentice, former Minister of the Environment, concerning the participation of First Nation communities in the Advisory Group and in the consultation process to take place with Aboriginal Peoples concerning the Boreal woodland caribou. The National Chief indicated that the listing of the Boreal woodland caribou would impact the traditional territory of an estimated 288 First Nations communities. He stressed the importance of the direct involvement of these First Nations and that there would be costs associated for these communities with the listing of the species.

Examples of these costs were those associated with the use of sustainable practices, mitigation efforts, developing and implementing Recovery Strategies, Action Plans, management plans, and enforcement costs. Former National Chief Atleo informed the Minister that a consultation method relying on a workbook on the SARA public registry did not meet the federal duty of consultation and accommodation as set out by the courts in *Taku* and *Haida*.<sup>102</sup>

During the July 2010 AFN Annual General Assembly, a resolution was passed entitled *Consultation with First Nations on Recovery Strategies under SARA*. The resolution referenced an estimated 233 First Nation communities, which Environment Canada would need to consult. The resolution also indicated that the current process being used by Environment Canada for the collection of ATK was not inclusive of all First Nations within the Woodland Caribou Boreal population habitat and there were insufficient protections for ATK under SARA.<sup>103</sup>

During the AFN Special Chiefs Assembly held in December 2010, a resolution was passed entitled *Support for Beaver Lake Cree Nation to protect the Woodland Caribou in their Traditional Territories*. The movers of the resolution stated, "The Government of Canada has failed to protect Caribou Herds and thereby failed to ensure that the rights of the Beaver Lake Cree Nation were protected."<sup>104</sup>

The assembly adopted the resolution to "Affirm their political support for the Beaver Lake Cree Nation in their Federal Court Action pursuant to the *Species at Risk Act* to protect the Caribou Herds within their traditional territories."

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102 Shawn A-in-chut Atleo, National Chief of the Assembly of First Nations to The Honourable Jim Prentice, Minister of Environment. October 1, 2009. Letter.

103 Assembly of First Nations Annual General Assembly. July 2010. Resolution #33/2010

104 Assembly of First Nations Special Chiefs Assembly. December 2010. Resolution #63/2010

In June 2011, Chief Allan Adam of the Athabasca Chipewyan said:

We have asked the federal government to protect caribou, but nothing has been done. Alberta is also doing nothing to provide meaningful protection. The courts are the only route left to us. We have launched this legal action because we are demanding that the federal government call an immediate halt to the destruction of our lands, the land that sustains the caribou, our treaty rights and our culture.<sup>105</sup>

On July 28, 2011, the Federal Court found that the Recovery Strategy for the Boreal Woodland Caribou was four years overdue, and gave the federal Minister of Environment until September 1, 2011 to release a draft of the strategy.

The case of the Boreal woodland caribou exemplifies the difficulties EC has had in fulfilling their statutory obligation to work in cooperation with Aboriginal organizations and to meet the deadlines contained in SARA. It is a striking fact that the department missed the legal deadline to submit a draft Recovery Strategy for the Boreal Woodland Caribou by four years. The draft Recovery Strategy was only released in August 2011, as a direct result of the successful legal action taken by Athabasca Chipewyan First Nation, Beaver Lake Cree Nation, Enoch Cree Nation, Alberta Wilderness Association and the Pembina Institute.

Under the timelines set out in SARA, the final Recovery Strategy should have been posted in November 2011, but instead it was released on October 5, 2012. It reported that one Aboriginal government and four Wildlife Management Boards had contributed information for the Recovery Strategy. The department attributed the lateness of the posting of the final Recovery Strategy to the volume and nature of the comments received. They advised that the survival and recovery of the species would not end with the posting of the Recovery Strategy and that they looked forward to subsequent jurisdictionally led action planning which would lead to future amendments. They also advised that consultation and cooperation with Aboriginal communities would be important during the development of Action Plans.<sup>106</sup> In the Preface of the Recovery Strategy, the following appeared:

Additional effort was made by Environment Canada to engage Aboriginal communities that the minister considered directly affected by the recovery strategy. These efforts included two rounds of engagement, one before and the second one after the proposed recovery strategy was posted on the Species at Risk Public Registry, to gather information on Boreal caribou and to provide communities with an opportunity to comment on the proposed recovery strategy.<sup>107</sup>

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105 Woodward & Company. Media Release. June 22, 2011. p. 2.

106 SAR Secretariat [NCR] to National Aboriginal Council on Species at Risk. "Re: Posting of the Final National Recovery Strategy for Boreal Caribou." 14 March 2012. E-mail.

107 Environment Canada. 2012. *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada*. Species at Risk Act Recovery Strategy Series. Environment Canada: Ottawa. p. III.

EC reported in the Recovery Strategy that they had sought “a considerable involvement from Aboriginal communities in the development of the Recovery Strategy for Boreal Caribou.”<sup>108</sup> EC had committed approximately \$750,000 to carry out the Boreal caribou ATK work across Canada. The funds were distributed through the CWS regions and amongst the Aboriginal organizations undertaking work for the department. The costs for the various approaches for gathering ATK varied in relation to the approach taken and the travel costs involved.<sup>109</sup>

Two rounds of engagement were undertaken, seeking input and sharing of information with Aboriginal communities. EC contacted over 260 Aboriginal communities located within and adjacent to the current distribution of Boreal caribou. In Round 1 (2009-2011), the department contacted 271 Aboriginal communities and 161 participated. In Round 2 (2011-2012), EC contacted 265 Aboriginal communities and 87 participated. The department reported that they had received 25 formal submissions from Aboriginal communities and organizations.<sup>110</sup>

In Round 1, 161 Aboriginal communities participated and in Round 2, 87 Aboriginal communities participated. There was no explanation offered by EC as to why 74 Aboriginal communities had dropped out of the Round 2 process.

On May 4, 2013, EC officials made a PowerPoint presentation to NACOSAR concerning Aboriginal engagement and ATK processes for the Boreal Caribou Recovery Strategy. EC reported that a significant challenge was the scale of the undertaking with over 250 Aboriginal communities located within and adjacent to Boreal caribou distribution. In addition to this was the pressure of timelines, including the EC review and verification processes.

EC officials stated that they recognized this as a new process that would require innovation on their part and increased effort to engage all Aboriginal communities. EC recognized that there was varying capacity of Aboriginal groups and that concerns had been expressed over how the ATK was to be used and how Aboriginal communities could control the future use of the information. The challenge from the point of view of EC was striking a balance between providing direction and leaving sufficient flexibility to have an Aboriginal group conduct interviews.<sup>111</sup>

Also in the same PowerPoint presentation, EC reported to NACOSAR on the lessons learned in the Aboriginal engagement and ATK processes for the Boreal Caribou Recovery Strategy. Officials recognized the importance of having Aboriginal groups gathering information and that it was helpful to have some standardization on how it would be reported.

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108 *ibid.*, appendix B. p. 58.

109 K. Harris to National Aboriginal Organization Advisory Group. “Re: Boreal caribou.” 27 May 2010. E-mail.

110 Environment Canada. 2012. *Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou), Boreal population, in Canada*. Species at Risk Act Recovery Strategy Series. Environment Canada: Ottawa. Appendix B. p. 58.

111 Virc, Stephen. [NCR, CWS, EC]. “Aboriginal Engagement and Aboriginal Traditional Knowledge Processes for Boreal Caribou Recovery Strategy.” PowerPoint Presentation. Meeting of the National Aboriginal Council on Species at Risk. March 4, 2013.

They also recognized the benefit of having multiple review steps built into this process. EC officials indicated that recovery planning timelines require careful management to ensure that communities are available to engage in the planning process. Finally, there was recognition by EC that resources and capacity are required to support recovery planning and to reach out to many Aboriginal communities.

## **Conclusions**

The case study was unable to find a national report on ATK for the Boreal woodland caribou, which had been promised to NACOSAR in September 2009. The planned national workshop to bring together knowledge holders, members of the Recovery Strategy drafting team, Aboriginal contractors and Environment Canada did not take place and we are unaware of any plans for the department to host such an event. National planning processes need to become more effective and meaningful in working with Aboriginal Peoples and meeting the high standards required in Crown-Aboriginal relationships.

This case example of the Boreal woodland caribou revealed the problems of an *ATK process* being confused with a *consultation process*. Because of the short timelines involved in this work and the lack of capacity funding for the NAOs, the separation of these two activities was not clear to many participants. Establishing and strengthening consultation mechanisms and ATK collection processes is required along with establishing clear mandates.

The EC approach to carrying out ATK collection in Quebec was focused on the First Nations of Quebec and Labrador Sustainable Development Institute and the Cree Regional Authority. This sole source contract approach left out other Aboriginal organizations, including Métis and Non-status Aboriginal Peoples. Effective engagement instruments must be inclusive and avoid the past patterns of discrimination and disrespect towards Non-status Indians and Métis Peoples.

The NAO Boreal Caribou Advisory Group was intended to be an important part of the Recovery Strategy process – in particular dealing with the many issues and questions dealing with ATK collection. The NAOs received no capacity support to be involved with this vital Advisory Group and when it was disbanded on April 6, 2011, all members unanimously agreed that this entity was not working. There are many concerns and issues related to this failure and it falls into the general struggle of Aboriginal Peoples to maintain an essential role in the carrying out of SARA legislation.

The challenge for the competent departments in reaching contractual agreements with Aboriginal Peoples that are fully respectful of intellectual property rights, fairness and equity remains outstanding. The legal language needs to be acceptable to all national Aboriginal organizations before moving on to implementing agreements at the community level. This work needs to have robust policy space in the work of EC, DFO and PCA.

EC officials indicated on several occasions that recovery planning for the Boreal woodland caribou would be a long process and that their goal was to develop long-term relationships. The case study was unable to find any evidence that such relationships have been established.

In May 2010, EC had met with NAOs to outline the use of ATK in Recovery Strategy development. The PowerPoint presentation used offered a perspective on what success would look like. At that time, in their view, success would have had ATK and western science being equally considered throughout the Recovery Strategy, with areas of congruence and discrepancy acknowledged. This case study was unable to support such a finding concerning the final Recovery Strategy and its development.

The inescapable truth is that Boreal woodland caribou are facing a deepening crisis and in certain regions are facing extinction with industrial expansion into the Boreal region. To achieve successful protection and restoration of the species will require a more effective and influential role for Aboriginal Peoples in the recovery planning and Actions Plans. The federal government's game plan for the recovery of this species is complex and subject to concessions, changes and amendments as it works through intergovernmental processes.

Dr. David Suzuki has said that "...a world class effort to protect the boreal will depend in large measure on the support and leadership from Aboriginal people."<sup>112</sup> When F/P/T meetings take place to discuss engagement and cooperation, Aboriginal organizations will need to be highly active and visible.

According to Pamela Palmater, noted Aboriginal rights lawyer, "The socio-economic histories of Aboriginal Nations reflect years of exclusion, discrimination and disrespect for both their people and their rights".<sup>113</sup>

Socio-economic considerations for Aboriginal Peoples need to be described with accuracy and clarity and broadened to include the cultural, spiritual and ecological values of the Boreal woodland caribou.

As resource-based industries such as the oil and gas sector move in and near caribou ranges, the integrity of their habitat is endangered. Rational policy making requires that this industrial footprint be carefully monitored for degradation of critical habitat for the caribou, and effective measures put in place to restore their habitat.

The matter of developing on-the-ground relationships and mutual legal contractual arrangements for the meaningful involvement and participation of Aboriginal Peoples in developing Recovery Strategies is an issue worth pausing over, since it goes to the very core of the relationship between Aboriginal Peoples and the Crown for the implementation of SARA. A major disconnect remains between the officials of federal and provincial jurisdictions and Aboriginal Peoples in the full involvement of Aboriginal Peoples in the implementation of the Boreal woodland caribou Recovery Strategy.

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112 Suzuki, David. "Canada's Aboriginal people are the key to Boreal agreement's success." David Suzuki Foundation. 2010. <http://www.davidsuzuki.org/blogs/science-matters/2010/05/canadas-aboriginal-people-are-the-key-to-boreal-agreements-success/> (accessed 14/6/14)

113 Palmater, Pamela D. *Aboriginal Rights Litigation. "In My Brother's Footsteps?; Is R. v. Powley the Path to Recognized Aboriginal Identity for Non-status Indians?"* Toronto: LexisNexis Canada Inc. 2003. p. 151.

## ***Recommendations***

### ***Communications and Awareness***

EC and PCA lack appropriate communications and awareness building activities with Aboriginal representative organizations concerning the Recovery Strategy and Action Plans. Communications and awareness building with Aboriginal organizations must be an implementation priority and a guiding principle in the Recovery Strategy and Actions Plans for the Boreal woodland caribou.

### ***Inclusiveness***

Section 35. (2) of the *Constitution Act, 1982* references the Aboriginal Peoples of Canada to include the 'Indian, Inuit and Métis peoples.' The Recovery Strategy and Action Plans for the Boreal woodland caribou need to be respectful and inclusive of *all* Aboriginal Peoples and properly consider the complex interests, issues and concerns that are at stake.

### ***Intergovernmental Processes – Federal, Provincial, Territorial, Aboriginal***

Aboriginal representation is required on federal, provincial and territorial committees established to work on implementation of the Recovery Strategy and Action Plans for the Boreal woodland caribou.

### ***Clarity in Consultation Processes***

When Aboriginal organizations participate in the collection of ATK, it must be clear that this participation does not fulfill the duty to consult and is not a partial fulfillment of the duty to consult.

### ***Precautionary Principle***

A lack of information or scientific uncertainty should not delay actions essential to achieving the recovery of the Boreal woodland caribou.

### ***Socio-Economic Analyses***

Socio-economic evaluations must be broadened to ensure the impact analyses include the cultural, spiritual and ecological values of Aboriginal Peoples and that they are carried out in a consistent and transparent manner. Analyses must include issues and concerns related to the potential loss of resource access and use, as well as compensation.

### ***Aboriginal Traditional Knowledge***

The science-based approach to recovery of the Boreal woodland caribou requires greater involvement of the *Two-eyed Seeing Approach*, which needs to be an integral part of Recovery Strategies and Action Plans.

### ***Increase Representation from Aboriginal Peoples in the SARA Conservation Cycle***

Committees involved in drafting Action Plans, Management Plans, or undertaking additional research on the Boreal woodland caribou must have representation from Aboriginal Peoples.

### ***Makeup of Recovery Teams***

Federal officials participating on Recovery Teams should act in the capacity of *ex officio* members, so as to allow the committee the freedom to communicate directly with the competent minister.

### ***Management Plans Must Include Engagement with Aboriginal Peoples***

A Management Plan(s) for the Boreal woodland caribou should include the key pillars of recovery and management, including engagement with Aboriginal Peoples and transboundary management issues.

### ***Annual Report***

The conservation and recovery of the Boreal woodland caribou can only be achieved with the cooperation and support of Aboriginal Peoples. An annual report on the participation of Aboriginal Peoples in the Recovery Strategy, Action Plans and Management Plans should be provided by CWS to NACOSAR.

## Inner Bay of Fundy Atlantic Salmon

<b>Scientific name:</b>	<i>Salmo salar</i>
<b>Canadian Range:</b>	NS, NB, Atlantic Ocean
<b>Competent Ministry:</b>	Fisheries and Oceans Canada
<b>COSEWIC Status History:</b>	Designated Endangered in May 2001. Status re-examined and confirmed Endangered in April 2006. Status re-examined and confirmed Endangered in November 2010.
<b>SARA Status:</b>	Schedule 1, Endangered, June 5, 2003.
<b>SARA Recovery Documents:</b>	Final Recovery Strategy posted on May 4, 2010. No Proposed Action Plans posted (overdue as of May 4, 2014).
<b>SARA Critical Habitat Protection:</b>	One Gazette Description for Critical Habitat in Fundy National Park posted on August 7, 2010.

### Background

30 years ago, the iBoF Atlantic salmon supported fisheries on rivers emptying into the eastern or inner end of the Bay of Fundy – today, this species is facing extinction. iBoF Atlantic salmon spawn in freshwater; however, the species spends much of its life at sea. The species are genetically different than other Atlantic salmon and they do not participate in migration to the waters around Greenland and instead feed in the Bay of Fundy and the Gulf of Maine, before returning to their home rivers to spawn.<sup>114</sup>

DFO reported that in the mid-1980s, iBoF salmon runs were comprised of 30,000 to 40,000 fish. The hard fact is that this population declined to less than 500 in 1998, and below 200 in 2008. The department attributed this rapid decline to low marine survival and the reasons for this are unknown, but could be due to ecological changes in the Bay of Fundy and damage to spawning grounds and riverbanks. Other factors involved in the decline are thought to be tidal barriers, commercial salmon farms and illegal fishing of wild salmon.<sup>115</sup> The most severe declines were reported in 32 rivers of the inner Bay of Fundy. Numerous rivers in the Southern Upland region of the Atlantic coast of Nova Scotia have iBoF Atlantic salmon that are either threatened with extirpation or have already been extirpated.<sup>116</sup>

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114 Parks Canada Agency. *Inner Bay of Fundy Salmon Population in Fundy National Park*. "What are the Inner Bay of Fundy Salmon?" <http://www.pc.gc.ca/eng/nature/eep-sar/itm5/eep-sar5e.aspx> (accessed 23/6/14)

115 Fisheries and Oceans Canada. *Aquatic Species at Risk - Atlantic Salmon (Inner Bay of Fundy)*. <http://www.dfo-mpo.gc.ca/species-especes/species-especes/salmon-atl-saumon-eng.htm>. (accessed 23/6/14)

116 Fisheries and Oceans Canada. 2009. *Canada's Conservation Policy for Wild Atlantic Salmon*. <http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/wasp-pss/wasp-psas-2009-eng.htm>. (accessed 25/6/14)

Atlantic salmon is socially, culturally and spiritually the most important fish for Mi'kmaq, Maliseet and Passamaquoddy peoples:

More than just a source of food, it is an important spiritual component of traditional family and community feasts. It is also a manifestation of a long history with fishery resources, relationship building, trade and other aspects of the distinctive cultural values. Always under a watchful eye because of its importance, the Mi'kmaq and Maliseet peoples came to view the abundance of Atlantic salmon as a barometer of the overall health of the waters and an indicator of the abundance of other riverine aquatic life. Thus the recent loss of access to iBoF Salmon is viewed by Aboriginal peoples as impacting their cultural well-being and considered a serious setback to conservation practices.<sup>117</sup>

The loss of the ability to exercise Aboriginal and Treaty Rights to fish iBoF Atlantic salmon is of crucial importance to the Mi'kmaq, Maliseet and Passamaquoddy peoples. The extraordinary impact of this loss calls into question the honour of the Crown and whether or not it has met its constitutional duty to consult concerning these impacts on Aboriginal and treaty rights. In 2004 and 2005, the Supreme Court of Canada delivered decisions in a trilogy of cases, *Haida*, *Taku River* and *Mikisew Cree*, all dealing with the duty to consult. They held that federal and provincial jurisdictions have a legal obligation to consult with Aboriginal People, and where appropriate, to accommodate our interests when the Crown has knowledge of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. In 2005, the Supreme Court rendered its decision in *Mikisew Cree*, which contained similar principles. The hard fact is that progress will be slow until the consultation process with Aboriginal Peoples has been concluded.

### ***Assessment and Listing Consultation***

The iBoF Atlantic salmon did not go through a listing consultation process with Aboriginal Peoples, since the species was listed as Endangered in Schedule 1 of SARA when the legislation was enacted in 2002.<sup>118</sup>

### ***Recovery Strategy Consultation***

In the pre-SARA period, the first Atlantic Salmon Recovery Strategy was prepared by Fisheries and Oceans Canada and Parks Canada Agency, with advice from the iBoF Atlantic Salmon Conservation and Recovery Team. In 2000, this team had been assembled by DFO in response to the decline in iBoF Atlantic salmon. Members included: Department of Fisheries and Oceans;

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117 Fisheries and Oceans Canada. *Recovery Strategy for the Atlantic Salmon (Salmo salar), inner Bay of Fundy populations* [Final]. 2010. In *Species at Risk Act Recovery Strategy Series*. Ottawa: Fisheries and Oceans Canada. p. 17.

118 VanderZwaag, David L. and Maria Cecilia Engler-Palma, Jeffrey A. Hutchings. *Canada's Species at Risk Act and Atlantic Salmon: Cascade of Promises, Trickle of Protection, Sea of Challenges*. *Journal of Environmental Law and Practice*. p. 270.

Parks Canada Agency; Environment Canada; Government of Nova Scotia; Government of New Brunswick; Stakeholders; and Aboriginal Peoples from the inner Bay of Fundy area.

This recovery team was built on top of an existing coalition of conservation, sportsman, and Aboriginal groups that had come together in the late 1990s.<sup>119</sup> The coalition exemplified the volunteerism, cooperation and participation necessary for recovery of the iBoF Atlantic salmon.

In 2009, the pre-SARA terms of reference were redrafted to include a revised role for the Recovery Team, including action planning needs, membership and administrative details, as well as links with a DFO Planning Group.<sup>120</sup> This departmental Planning Group included the following subcommittees: Assessment and Monitoring; Freshwater and Marine Habitat; Genetics: Preservation and Restoration; Communications; and Aboriginal.<sup>121</sup> The redrafted terms of reference indicated that a primary objective for the Recovery Team was to provide input into the draft SARA Recovery Strategy for the iBoF Atlantic salmon.

The next phase in the recovery process was to be development of one of more Action Plans to implement the Recovery Strategy. In the background to the terms of reference, the importance of stakeholder input and advice “to create robust SARA Action Plans”<sup>122</sup> was indicated. No specific reference was made to the input of Aboriginal Peoples, but were included in the Membership section as “Aboriginal groups and communities.”<sup>123</sup> The activities of the Recovery Team would be “subject to the availability of funding and other required resources and priorities...”<sup>124</sup>

Under a section entitled Purpose, reference was made to consultation. The Recovery Team was seen as “a forum for discussion, **consultation** [emphasis added], and communication on iBoF Atlantic salmon recovery research, conservation and outreach initiatives.” Under Roles it stated, “In an ongoing manner, serve as a venue for discussion and **consultation on initiatives** [emphasis added], plans and actions in support of the survival and recovery of the iBoF salmon.”<sup>125</sup> Under the section Administration, the terms of reference clearly indicated that the Recovery Team was not intended to serve as a decision-making body, but as an advisory body.<sup>126</sup>

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119 K. Robichaud-LeBlanc to J. McNeely. “Re: iBoF Atlantic Salmon Recovery Team - Terms of Reference and new RT chair.” 2 Oct. 2009. Email.

120 K. Robichaud-LeBlanc to undisclosed-recipients. “Re: iBoF Atlantic Salmon Recovery Team - Terms of Reference and new RT chair.” 1 Oct. 2009. E-mail.

121 Fisheries and Oceans Canada. *Recovery Strategy for the Atlantic Salmon (Salmo salar), inner Bay of Fundy populations* [Final]. 2010. In *Species at Risk Act Recovery Strategy Series*. Ottawa: Fisheries and Oceans Canada. p. 74.

122 Inner Bay of Fundy Atlantic Salmon Conservation and Recovery Team. *Terms of Reference*. [FINAL] November 2009. p. 1.

123 *ibid.*, 2.

124 *ibid.*, 1.

125 *ibid.*, 2.

126 *ibid.*, 4.

The following Aboriginal organizations participated on the Conservation and Recovery Team: Maritime Aboriginal Aquatic Resources Secretariat; Maritime Aboriginal Peoples Council; Native Council of Nova Scotia Netukulimkewé'l Commission; Fort Folly First Nation; Indian Brook First Nation; New Brunswick Aboriginal Peoples Council; Millbrook First Nation; Annapolis Valley First Nation; St. Mary's First Nation; Glooscap First Nation; Millbrook First Nation; Ikanawtiket; Wacobah First Nation; and Unama'ki Institute of Natural Resources. The participation of these organizations was not consistent throughout the period 2000 to 2014. Some organizations participated on a regular basis, whereas others only appeared once in the official record. The Recovery Team met twice a year, with some email exchanges taking place between meetings. MAPC and other Aboriginal organizations did not consider their participation in this Conservation and Recovery Team as fulfilling the need for Aboriginal consultation.

In October 2006, a Recovery Strategy for the iBoF Atlantic salmon was released. In this version it stated, "Aboriginal People have a vital role and a duty owed by Federal and Provincial governments to ensure they are directly supported and involved in all aspects of the implementation of the SARA." In the 2010 version, this text was edited and appeared as "Aboriginal peoples play a role and are involved in the conservation of wildlife pursuant to SARA."<sup>127</sup> The 2006 version of the Recovery strategy had also referenced the *Mikisew* case:

"...the principle of consultation both at the procedural level and the substantive Rights level. This means, apart from the requirement in SARA legislation to consult with Aboriginal Peoples, that also at a strategy and strategy implementation level Aboriginal Peoples have to be consulted as a procedural process."<sup>128</sup>

The 2010 version of the Recovery Strategy deleted reference to *Mikisew*.

In 2009, MAPC notified DFO that the 2006 Recovery Strategy for the iBoF Atlantic salmon required additional information from both freshwater and marine habitats and that "Indigenous Knowledge of Aboriginal Peoples continuing to live on Traditional Ancestral Homelands had not been tapped."<sup>129</sup> As of March 2014, DFO still has not accessed ATK concerning the iBoF Atlantic salmon from this constituency of Aboriginal Peoples.

In Spring 2009, a draft version of the Recovery Strategy for the iBoF Atlantic salmon was circulated broadly for consultation. In Appendix V of the draft Recovery Strategy, a Record of Consultations appears. First Nations and Aboriginal organizations had an opportunity to provide additional input, as well as those who were participating on the Recovery Team. The Recovery Strategy was published as 'proposed' and posted on the Species at Risk Public Registry in Winter 2009 for an additional 60-day comment period.

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127 Recovery Strategy for the inner Bay of Fundy Atlantic salmon [PROPOSED] July 2006. p. 11.

128 *ibid.*, 12.

129 J. McNeely to K. Robichaud-Leblanc. "Re: iBoF Atlantic Salmon Recovery Team - Terms of Reference and new Recovery Team chair." 1 Oct 2009. E-mail.

Letters were sent to First Nations and Aboriginal organizations announcing the proposed Recovery Strategy and informing the recipients that this was an additional opportunity for comment.<sup>130</sup>

In April 2010, DFO and PCA released the final Recovery Strategy for the iBoF Atlantic salmon. It was acknowledged that the document had been prepared with advice from the iBoF Atlantic salmon Conservation and Recovery Team. Appendix V entitled, Record of Consultations indicated that:

Aboriginal peoples were **significantly engaged** [emphasis added] in the activities of the Recovery Team and formed an Aboriginal subcommittee to input into the Recovery Strategy. The final draft document was also circulated to relevant First Nations and Aboriginal communities to provide an opportunity for any additional input into this strategy. All comments received during this review were considered for incorporation into the document.

Under Section 39(d) of SARA, a Recovery Strategy must be prepared in cooperation with

every aboriginal organization that the competent minister considers will be directly affected by the recovery strategy;

The DFO claim that Aboriginal Peoples were “significantly engaged” was not supported by Aboriginal organizations working on the Conservation and Recovery Team. The Department had worked through this multi-stakeholder, multi-interest Recovery Team to address different sections of the draft Recovery Strategy. All First Nations within the inner Bay of Fundy had been invited by DFO to participate on the Conservation and Recovery Team. The participating Aboriginal organizations had formed an Aboriginal subcommittee and provided input into the Recovery Strategy, including specific sections such as the Aboriginal and Treaty Rights, Cultural Significance to Aboriginal Peoples, Aboriginal Activities and Recovery Strategy Implementation and Significance to Aboriginal Peoples. The participating Aboriginal organizations viewed their participation as having taken place on a cooperative basis and not a fulfillment of the Crown’s duty to consult and accommodate. DFO views the cooperation that took place as a good practice in the preparation of a Recovery Strategy.

The department recognizes that there is a difference in perspective between DFO and some of the Aboriginal participants as to whether the Recovery Team meetings constituted consultation. DFO’s position is that these meetings were part of the consultation, since they provided an opportunity to share information and views and a similar approach is being undertaken for the development of the Action Plan for the iBoF Atlantic salmon.<sup>131</sup>

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130 K. Robichaud-Leblanc to A. MacPhee. “Re: iBoF Atlantic salmon consultations.” 31 Mar 2014. E-mail.

131 *ibid.*

This case study finds that clarity is lacking in this process concerning what is significant engagement, consultation or what would be considered as part of consultation. The fairness of the process is called into question by the vagueness and the resulting difference in views between the Crown and the participating Aboriginal organizations.

The structure of the Conservation and Recovery Team included representation from DFO and PCA officials. The inclusion of these officials in the team prevented it from communicating directly to the Minister of Fisheries and Oceans. In November 2010, the Nova Scotia Salmon Association (NSSA) indicated their interest in making a motion to protect the species and that aquaculture had been identified as a threat. They proposed that a letter be sent to the Minister of Fisheries and Oceans Canada on behalf of the Recovery Team in regard to the St. Mary's Bay aquaculture site proposal.<sup>132</sup> This NSSA initiative was supported by MAPC. The DFO Chair delayed this action while he considered the appropriateness of signing off on such a letter to the Minister. The result of this DFO intervention was that no motion was made and no letter was sent to the Minister on behalf of the Recovery Team.

In October 2011, the terms of reference for the Recovery Team were unilaterally revised by DFO and described as "minor revisions and clarifications to the Recovery Team's roles."<sup>133</sup> The members of the Recovery Team had agreed to change the terms of reference to reflect that the team was now implementing and reporting on the Recovery Strategy through Action Plans; however, DFO had gone beyond this direction and had made significant changes. Under a section entitled Scope, the revised terms of reference now indicated that, "The Recovery Team is not a forum for introducing motions or actions that would be a conflict of interest for DFO (e.g. letters to the Minister sent by the Recovery Team)."<sup>134</sup> This provision represented a significant limitation on the ability of the Recovery Team to advance its work. Under a section entitled Expectations of Meeting Participants, the members were requested to notify in advance, the Chair and the SARA Recovery Planner of specific questions or issues to be raised at the meeting, and they would decide on the relevancy of the questions and whether or not the questions were in the scope of the committee.<sup>135</sup> Further on in the same section, an additional restriction was inputted:

DFO members participate as representatives of Fisheries and Oceans Canada and as such must comply with the Values and Ethics Code for the Public Service. DFO members also participate as representatives of their respective sectors within the department and as such are required to respond and follow-up on actions as appropriate through their work as a DFO employee.<sup>136</sup>

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132 iBoF Atlantic Salmon Conservation and Recovery Team. Amherst, Nova Scotia. *Meeting Minutes*. November 17, 2010. p. 26.

133 iBoF Atlantic Salmon Conservation and Recovery Team. *Terms of Reference*. [REVISED] October 2011. p. 1.

134 *ibid.*, 2.

135 *ibid.*, 4.

136 *ibid.*

Under a section entitled Administration, reference was made to the Chair of the Recovery Team:

The Chair of the Recovery Team participates as a representative of Fisheries and Oceans Canada and as such must comply with the Values and Ethics Code for the Public Service and the 'duty of loyalty' and therefore cannot write or sign letters to the department or any sector within the department on behalf of the Recovery Team.<sup>137</sup>

Under this restriction on the role of the Chair, participating Aboriginal organizations could not look to the Chair of the Recovery Team to write or sign letters to the DFO minister or to the department itself to advance Aboriginal concerns and interests.

Also under Administration, reference was made to media events:

However in the spirit of cooperativeness, groups who are interested in holding media events related to DFO-led project[s] are requested to notify DFO of their intentions beforehand.<sup>138</sup>

Rather than being in the spirit of cooperativeness, this provision indicated that DFO was seeking to control media events and restrict access to the media by Recovery Team members.

In an email message dated October 21, 2011, MAPC questioned the revised terms of reference and warned DFO that the changes were a restriction on the work of the Recovery Team:

Comparing the adopted ToR with this new revision, I get the impression that the changes were made to prevent members from raising specific issues for action, such as the recent request by one non-government member to raise a motion to issue advice to the Minister concerning salmon aquaculture impacts in the Bay on the wild iBoF salmon. That request was denied by the DFO Chair, based on advice from Ottawa and an interpretation of the Canada Public Service Value and Ethics Code. My impression from the discussion in summary was that in effect, the Chair's duty to protect the Minister trumps the Recovery Team's duty to advise the Minister. In a spirit of respect for our new Chair, I refrained from challenging the Chair on his interpretation of the Value and Ethics Code. Instead, I raised the principles of RENEW to foremost seek open and transparent decisions on recovery through a Recovery Team model. The Chair did not have an answer, hence the reason for my raising the Action Item [for the DFO Region to make an inquiry into DFO-HQ's future vision for the Recovery Team].

The Chair stated that in his ruling Mr. Purcell's motion was based on advice he received from Ottawa and his interpretation of the Canada Public Service Values and Ethics Code. However, I do not believe that the Chair's ruling reflects the intent and substance of the Code nor the RENEW program. Nowhere in the Code does it state or elude to the duty of a public servant to protect the interests or face of a Minister. Although the Code

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137 *ibid.*, 5.

138 *ibid.*, 6.

states that the public servants are to “loyally implement Ministerial decisions”, it also states that the duty of a public servant is to give full, honest, and impartial advice to the Minister; support accountability and transparency of ministries; make decisions in the public interest; and always act in a manner that bears the closest public scrutiny. The RENEW framework calls for recovery to be based on the open participation of a wide segment of the public and the voluntary sector, working with governments, industry and academia in a recovery team format. Though a Recovery Team is not specifically required by SARA, RENEW is quite clear that it is the preferred choice as in most cases, recovery can only be effective if all positions and concerns can be brought to the table and collaboratively worked out for the benefit of the species.<sup>139</sup>

### *Consultation and the impact of aquaculture on the iBoF Atlantic salmon*

In 2006, COSEWIC had identified key threats responsible for the decline of iBoF Atlantic salmon and acknowledged aquaculture as one of them:

Aquaculture: interactions with farmed and hatchery salmon (e.g., genetic inbreeding, competition with escapees for food, parasite and disease outbreaks, and modified predator interactions);<sup>140</sup>

When the Recovery Strategy for the iBoF Atlantic salmon was released in 2010, it referenced COSEWIC’s finding and clearly identified salmon farming as a marine threat. It referenced science studies showing the transmission of disease and parasites, but reported that evidence of linking disease outbreaks with the recovery potential of iBoF Atlantic salmon was lacking. The Recovery Strategy also referenced the fact that “...salmon farming has led or could lead to the loss of genetic fitness due to mixing of farmed escapees with wild salmon.” This interbreeding was acknowledged by COSEWIC as having significant negative effect on wild salmon.<sup>141</sup>

In 2011, Transport Canada undertook a review of a proposal to establish two marine finfish aquaculture sites for the purpose of growing Atlantic salmon in St. Mary’s Bay, Digby County, Nova Scotia. On April 29, 2011, the Assembly of Nova Scotia Mi’kmaq Chiefs (ANSMC) released a statement strongly opposing the development of these aquaculture facilities and indicated that they had a zero tolerance policy on the approval of any new aquaculture farms in St. Mary’s Bay.

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139 J. McNeely to K. Robichaud-Leblanc. “Re: IBoF Salmon Recovery Team - Revised ToRs.” 21 Oct 2011. E-mail.

140 Fisheries and Oceans Canada. *Recovery Strategy for the Atlantic salmon (Salmo salar), inner Bay of Fundy populations*. [Final]. 2010. In *Species at Risk Act Recovery Strategy Series*. Ottawa: Fisheries and Oceans Canada. p. 23.

141 *ibid.*, 24.

The concerns of ANSMC were:

- The absence of scientific certainty of the reason for continued decline of wild salmon population in NS;
- The viability of the Mi'kmaq communal commercial fishery within or near the project area;
- The protection of submerged Mi'kmaq archaeological resources;
- The privatization of marine areas and ocean resources in NS;
- Serious and detrimental environmental impacts related to farm escapees, disease, the use of pharmaceuticals and antibiotics, salmon farm discharges, feed resources and cumulative impacts of intensive aquaculture;
- Nineteen (19) known Species at Risk are found, plus Flora and Fauna are also identified within or near the proposed project sites. Some include: **Inner Bay of Fundy Atlantic Salmon** [emphasis added], Beluga Whale, Atlantic Cod, Piping Plover, Right and Blue Whales, etc.,<sup>142</sup>

The ANSMC release statement indicated that a Mi'kmaq-Nova Scotia-Canada Consultation Process had been ratified on August 31, 2010. The terms of this agreement did not limit the ability of the Parties to engage in consultation independent of the consultation process set out in the terms of reference.

In 2010, DFO released the Recovery Strategy for the Atlantic salmon (*Salmo salar*), inner Bay of Fundy populations, in which they clearly identified aquaculture as a marine threat:

The development of salmon farming in coastal areas of the Bay of Fundy and Gulf of Maine over the last 20 years may have increased the transmission of disease and parasites (e.g., infectious salmon anemia [ISA] virus, sea lice) to wild salmon. Some wild salmon intercepted near salmon farms in the Bay of Fundy have been ISA positive (Carr and Whoriskey 2002), whereas others have been clear of parasites or diseases (Lacroix and Knox 2005). Although evidence linking disease outbreaks with the recovery potential of iBoF salmon is lacking, outbreaks of diseases and parasites in salmon farms have been linked to increased mortality of nearby wild salmon stocks in the northeast Atlantic (Johnsen and Jensen 1994, Grimnes and Jakobsen 1996; Finstad *et al.* 2000).<sup>143</sup>

On March 25, 2011, Transport Canada released a Screening Report concerning the proposed large-scale aquaculture sites for culture of Atlantic salmon in St. Mary's Bay. The department had the responsibility to ensure that an environmental assessment was conducted in accordance

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142 Mi'kmaq Rights Initiative. News Release. "Nova Scotia Mi'kmaq Leaders Question Reasoning Behind the Development of an Aquaculture Farm in St. Mary's Bay." April 29, 2011.

143 Fisheries and Oceans Canada. *Recovery Strategy for the Atlantic salmon (Salmo salar), inner Bay of Fundy populations* [Final]. In *Species at Risk Act Recovery Strategy Series*. 2010. Ottawa: Fisheries and Oceans Canada. p. 24.

with section 15(1) of the *Canadian Environmental Assessment Act*. The screening report indicated that on June 7, 2010, the department had sent **consultation letters** [emphasis added] to 13 Aboriginal groups. The Native Council of Nova Scotia (NCNS) was one of the recipients of the letter but was not aware of the growing concerns and issues about the proposed St. Mary's Bay aquaculture sites. NCNS's subsequent efforts to receive more detailed explanations on how the project would impact iBoF Atlantic salmon received little response from officials. No information was provided concerning the risk of potential harm to iBoF Atlantic salmon populations.

The final decision of Transport Canada to approve the project stood in juxtaposition to the precautionary approach of DFO's Wild Atlantic Salmon Conservation Policy.

On April 9, 2011, Dr. John Ritter, former DFO Science Manager of the Diadromous Fish Division for the Maritime Region, wrote to Transport Canada indicating his concerns about the proposed aquaculture operations and that they would:

...contravene Section 32 of SARA (no person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed)...and the risk of harm and possible loss is to entire populations rather than individual fish only. Any losses of this nature would enhance the risk of extinction of this unique race of Atlantic salmon."<sup>144</sup>

On June 13, 2011, after review by the Government of Nova Scotia, the Canadian Environmental Assessment Agency and DFO, the two aquaculture sites were approved for St. Mary's Bay. The province indicated that in addition to the environmental screening, it had participated in a First Nations **consultation** [emphasis added] with Transport Canada and DFO.<sup>145</sup> A request was sent by this case study to the Government of Nova Scotia for a list of the Aboriginal Peoples/organizations that were consulted, but no response was received.

### ***Strategic Environmental Assessment Consultation***

A Strategic Environmental Assessment (SEA) is undertaken on all SARA recovery planning documents as called for by the *Cabinet Directive on the Environmental Assessment Policy, Plan and Program Proposals*.<sup>146</sup> All federal departments and agencies are required to use these guidelines to conduct a SEA on a policy, plans and programs to identify potential environmental impacts and propose mitigation measures where, "Ministerial or Cabinet approval of the initiative is required; and important, positive or negative, environmental effects may result."<sup>147</sup>

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144 Letter from Dr. John Ritter to Transport Canada. April 9, 2011.

145 Government of Nova Scotia. News Releases. Fish Farms Approved for St. Mary's Bay. June 13, 2011. <http://novascotia.ca/news/release/?id=20110613002>. (accessed 23/6/14)

146 Canadian Environmental Assessment Agency. Strategic Environmental Assessment. *The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*. <https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=B3186435-1>. (accessed 25/6/14)

147 Fisheries and Oceans Canada. Strategic Environmental Assessment. <http://www.dfo-mpo.gc.ca/communic/sea/index-eng.htm>. (accessed 26/6/14)

Under section 4.6 of the Cabinet Directive, sources of information on concerns could include, “First Nations, Inuit, Métis and other Aboriginal groups.”<sup>148</sup> No SEA was ever undertaken on the iBoF Atlantic salmon recovery or on the impact of the major aquaculture sites in St. Mary’s Bay.

## *Recovery Potential Assessment Consultation*

Section 40 of SARA states:

In preparing the recovery strategy, the competent minister must determine whether the recovery of the listed wildlife species is technically and biologically feasible. The determination must be based on **the best available information** [emphasis added], including information provided by COSEWIC.<sup>149</sup>

In 2008, a Recovery Potential Assessment (RPA) was completed to inform the Recovery Strategy for the iBoF Atlantic salmon. This work was carried out by the Canadian Science Advisory Secretariat (CSAS), which coordinates the peer review of scientific issues for DFO. CSAS undertakes regional processes such as the one provided for the iBoF Atlantic salmon. The report of this process included a summary of understanding related to the distribution, abundance, trends, extinction risk, and current state of this aquatic species. The targets are described and models help to better understand the likelihood of achieving these targets.<sup>150</sup> Ten Aboriginal organizations appeared in the RPA as contributing to the iBoF Atlantic salmon recovery planning. The assessment indicated that these organizations had provided a resource base for information. There was no reference to specific information provided by Aboriginal Peoples, since in the record of the proceedings, comments are not attributed to individuals.<sup>151</sup>

Section 40 of SARA uses the phrase “the best available information” which is defined in the DFO guidance document as:

“...The Committee on the Status of Endangered Wildlife in Canada (COSEWIC), an independent body of experts, carries out its functions on the basis of the **best available information** [emphasis added] on the biological status of a species, including scientific knowledge, community knowledge and ATK.”<sup>152</sup>

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148 Canadian Environmental Assessment Agency. Strategic Environmental Assessment. *The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*. <https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=B3186435-1>. (accessed 25/6/14)

149 *An Act respecting the protection of wildlife species at risk in Canada*, S.C. 2002, c.29; referred to as the Species at Risk Act (SARA). s.40.

150 Fisheries and Oceans. 2008. *Recovery Potential Assessment for Inner Bay of Fundy Atlantic Salmon*. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2008/050. p. 1.

151 T. Worcester to A. MacPhee. “Re: RPA for iBoF Atlantic Salmon.” 4 July 2014. E-mail.

152 Fisheries and Oceans Canada. *Guidance on Considering Aboriginal Traditional Knowledge in Species at Risk Act Implementation*. DRAFT – Phase 2, V7. 2011. Ottawa: Fisheries and Oceans Canada. p. 15.

This definition also appears in the draft Species at Risk Policies produced by Environment Canada in 2009.<sup>153</sup> In the same year, in *Wilderness Association v. Minister of the Environment*, the Federal Court found that EC was unreasonable in its approach to require the highest level of deference before it identified any critical habitat. The department had argued in court that, “the critical habitat finding was a finding of fact and is entitled to the highest level of deference.”<sup>154</sup>

### ***Action Plan consultation***

The *Recovery Strategy for the Atlantic Salmon (Salmo salar), inner Bay of Fundy populations* was released in Spring 2010. In the Preface, it indicated that the strategy would be “...complemented by one or more Action Plans that will provide details on specific recovery measures to be taken to support conservation for the species.”<sup>155</sup> The strategy provided a Statement on Action Plans, which indicated that the first Action Plan would be developed within four years or at an earlier date.<sup>156</sup> This was not achieved, and as of June 2014 no Action Plan has been released. DFO has indicated that it held a workshop in November 2012 to seek early input and advice from the Recovery Team. DFO has informed the case study that development of the SARA Action Plan is an ongoing initiative and that a draft document is nearing completion and will be circulated in the next few months.<sup>157</sup>

Section 48(1) of SARA states that the Action Plan must be prepared in cooperation with various parties, including under section 48(1)(d):

Every aboriginal organization that the competent minister considers will be directly affected by the action plan.

Under section 49(1)(e) the Action Plan must include:

an evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation;

Under section 48(1) of SARA, the statutory obligations for the Action Plan are qualified by use of the phrase “to the extent possible”. From a practical standpoint, the meaning of the phrase “to the extent possible” is vague and in practice, has meant federal officials having to work within budgets and timelines over which they have no control. This situation compromises the fairness of the process.

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153 *Species at Risk Act Policies and Guidelines Series*. DRAFT. Ottawa: Environment Canada. 2009. p. 4.

154 *Alberta Wilderness Association v. Canada (Minister of Environment)* 2009 FC 710, [2009] 4 F.C.R. D-2. at para. 45.

155 Fisheries and Oceans Canada. 2010. *Recovery Strategy for the Atlantic salmon (Salmo salar), inner Bay of Fundy populations* [Final]. In *Species at Risk Act Recovery Strategy Series*. Ottawa: Fisheries and Oceans Canada. Preface.

156 *ibid.*, 44.

157 H. Schaefer to A. MacPhee. “Re: Action Plan for Inner Bay of Fundy Atlantic Salmon.” 7 July 2014. E-mail.

Section 3 of SARA remains the overriding statute concerning the impact of action planning on Aboriginal and treaty rights:

For greater certainty, nothing in the Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

In the Statement on Action Plans that appears in the Recovery Strategy for the iBoF Atlantic salmon, it states, "The plans must also demonstrate respect for, and take into account, the activities and approaches which Aboriginal peoples wish to undertake."<sup>158</sup> MAPC is unaware of any Action Plan(s) that have been developed by a Recovery Team or Recovery Implementation Group:

In fact, of the Recovery Teams in the Atlantic that have advanced to completing a recovery strategy, stakeholders have made continued requests to the federal government for the Recovery Team to take the lead on developing action plans, or for the Recovery Team to develop Recovery Implementation Groups to develop action plans. These requests have been continually denied or ignored. In fact, in the Atlantic the only action plans we know of were developed by federal government department staff with little or no involvement from a broad-based Recovery Team or Recovery Implementation Group, other than to provide cursory approval of the federal government document.<sup>159</sup>

The Species at Risk Management Division of DFO, Maritimes Region, has continued its work through the multi-interest stakeholder Conservation and Recovery Team and has encouraged Aboriginal involvement and engagement in Recovery Planning processes and activities. Capacity for Aboriginal organizations to be involved with the Recovery Strategy for the iBoF Atlantic salmon has been supported through the Aboriginal Fund for Species at Risk (AFSAR) and the Habitat Stewardship Program (HSP). Since release of the Recovery Strategy in 2010, Aboriginal organizations in Nova Scotia and New Brunswick have received funding to undertake iBoF Atlantic salmon projects. Between the fiscal years 2010-2011 and 2013-2014, AFSAR funded nine projects where the iBoF Atlantic salmon was listed as a benefitting species from the initiative. The total amount of EC funding for these nine projects was \$541,145. IBoF Atlantic salmon is specifically mentioned in four projects and is included in all nine projects that were funded. While the AFSAR program strengthens capacity of Aboriginal communities for SARA implementation, it is not part of the Crown's constitutional duty to consult Aboriginal communities in matters that affect our rights and interests.

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158 Fisheries and Oceans Canada. 2010. *Recovery Strategy for the Atlantic salmon (Salmo salar), inner Bay of Fundy populations* [Final]. In Species at Risk Act Recovery Strategy Series. Ottawa: Fisheries and Oceans Canada. p. 44.

159 McNeely, Joshua E. and Roger. J. Hunka. *Policy Critique of the Draft Species at Risk Act Overarching Policy Framework: Perspectives for the Improvement of the Government of Canada's Implementation of the Species at Risk Act*. January 2011. Maritime Aboriginal Peoples Council - IKANAWTIKET. Truro Heights: Nova Scotia. p. 59.

## ***Critical Habitat***

Critical Habitat is defined under section 2 of SARA as:

...the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species.<sup>160</sup>

During the May 2011 iBoF Atlantic salmon Conservation and Recovery Team meeting, MAPC brought attention to the specific statutory obligations for Action Plans in Sections 59(1) and (2) of SARA:

- (1) The Governor in Council may, on the recommendation of the competent minister after consultation with every other competent minister, make regulations to protect critical habitat on federal lands.
- (2) The competent minister must make the recommendation if the recovery strategy or an action plan identifies a portion of the critical habitat as being unprotected and the competent minister is of the opinion that the portion requires protection.<sup>161</sup>

Section 59 (2) of SARA clearly sets out the requirement that once Critical Habitat is identified in a Recovery Strategy and/or Action Plan, protection of Critical Habitat must take place. The 2010 Recovery Strategy for the iBoF Atlantic salmon identified Critical Habitat for the species in ten Live Gene Bank freshwater rivers and their tributaries. While the Recovery Strategy provided for freshwater Critical Habitat, it did not protect the marine Critical Habitat of the iBoF Atlantic salmon.

The reason for this gap in the strategy was that:

...habitat requirements for iBoF Salmon are not well known in the marine environment. In the absence of sufficient knowledge on the precise spatial and temporal use of the marine environment by the iBoF Salmon, marine critical habitat is not identified in this recovery strategy and will be developed at a later date in an action plan. A schedule of studies that lays out the key research activities necessary to help determine, identify and describe the marine critical habitat requirements for the species is provided.<sup>162</sup>

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160 *An Act respecting the protection of wildlife species at risk in Canada*, S.C. 2002, c.29; referred to as the Species at Risk Act (SARA). s. 2.

161 *ibid.*, s. 59(2) and iBoF Atlantic Salmon Conservation and Recovery Team. Amherst, Nova Scotia. Meeting Minutes. May 18, 2011 p. 10.

162 Fisheries and Oceans Canada. *Recovery Strategy for the Atlantic salmon (Salmo salar), inner Bay of Fundy populations*. [Final]. 2010. In *Species at Risk Act Recovery Strategy Series*. Ottawa: Fisheries and Oceans Canada. p. 3.

Members of the iBoF Atlantic salmon Conservation and Recovery Team collectively viewed Critical Habitat as a vital issue.<sup>163</sup> The identification and protection of Critical Habitat for the iBoF Atlantic salmon, whether in the freshwater or marine environment, would require Aboriginal participation as well as stakeholders. ATK is a potential source of information for the species and this needs to be explored, documented and utilized in the action planning stage. The Recovery of Nationally Endangered Wildlife (RENEW), the national recovery program for species at risk, set out the importance of Aboriginal Peoples' involvement in recovery teams and recovery implementation groups for drafting implementation, as well as oversight of Recovery Strategies and Action plans. MAPC supports the RENEW process for the involvement of Aboriginal Peoples:

The preferred recovery planning process for Aboriginal Peoples, would be to have direct involvement in Recovery Teams and Recovery Implementation Groups, under RENEW guidance, from point of brainstorming to final recovery document posting, followed by formal consultation with representatives of Aboriginal Peoples, and finally, Recovery Team or Recovery Implementation Group, with Aboriginal Peoples, oversight of Recovery Strategy implementation.<sup>164</sup>

In 2011, MAPC had criticized the lack of progress in identifying Critical Habitat for iBoF Atlantic salmon:

DFO has been slow to protect the identified critical habitat. Squeaking under the wire at the last minute of the three month timeline allowed by SARA, DFO did release a "Gazette Description" statement that the critical habitat found within one national park was considered protected. However, to date, DFO has been silent as to the status of protection for the other 90% of the identified critical habitat, which lies outside the protection afforded by the National Park. In fact, there has been little or no discussion at the Recovery Team level as to approaches to best achieve protection of critical habitats identified by a Recovery Team in the iBoF Atlantic Salmon Recovery Strategy.<sup>165</sup>

In April 2010, the Recovery Strategy for the iBoF Atlantic salmon was released. It had taken six years to produce this Recovery Strategy after the listing of the species on the Public Registry. The first Action Plan was promised within four years of the posting of the Recovery Strategy. Addressing marine Critical Habitat for the species was identified as a priority; however, potential marine areas of Critical Habitat were not identified. The Recovery Strategy acknowledged that there was uncertainty concerning the distribution and habitat of the iBoF Atlantic salmon in the marine environment.<sup>166</sup> While the Strategy acknowledged problems in the marine environment, it was silent on how they would be addressed.

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163 Inner Bay of Fundy Atlantic Salmon Conservation and Recovery Team. *Minutes of meeting*. 2010.

164 McNeely, Joshua E. and Roger J. Hunka. *Policy Critique of the Draft Species at Risk Act Overarching Policy Framework: Perspectives for the Improvement of the Government of Canada's Implementation of the Species at Risk Act*. January 2011. Maritime Aboriginal Peoples Council - IKANAWTIKET. Truro Heights: Nova Scotia. p. 62.

165 *ibid* . 60.

166 Fisheries and Oceans Canada. *Recovery Strategy for the Atlantic salmon (Salmo salar), inner Bay of Fundy populations*. [Final]. 2010. In *Species at Risk Act Recovery Strategy Series*. Ottawa: Fisheries and Oceans Canada. p. 41.

In November 2012, DFO hosted a science peer review meeting entitled *Identification of Important Marine and Estuarine Habitat for Inner Bay of Fundy Salmon*. The general view of the experts at this meeting was that the entire Bay of Fundy should be considered as Critical Habitat for the species; however, DFO officials were reluctant to agree and indicated that the science experts in attendance were not the final authority to identify Critical Habitat. DFO asserted that it alone would be responsible for drafting Critical Habitat maps based on advice from the science peer review, consultations, and its own internal information.

Also during the November 2012 Action Planning Workshop, DFO sought early input and advice from members of the Recovery Team on the identification of marine and estuarine habitat. At the time of writing this case study, the draft outcome document of this meeting has not been completed, but DFO expects to circulate it for comment in the next few months.

As of July 2014, DFO has not identified critical marine and estuarine habitat for iBoF Atlantic salmon. It is unclear how they intend to deviate from what the science peer review advised in 2012. In Fall 2014, this may be part of the amended Recovery Strategy for the iBoF Atlantic salmon. At the time of this case study, DFO has indicated that the Action Plan is nearing completion and will be circulated for comments over the coming months.

The Action Plan will present recovery measures to address the five objectives outlined in the Recovery Strategy for the iBoF Atlantic salmon (2010):

*Objective 1:* Conserve iBoF Salmon genetic characteristics and re-establish self-sustaining populations to iBoF rivers.

*Objective 2:* Identify and remedy anthropogenic threats limiting survival and/or recovery of iBoF Salmon in the marine environment.

*Objective 3:* Identify and remedy anthropogenic threats limiting survival and/or recovery of iBoF Salmon in the freshwater environment.

*Objective 4:* Assess population status, sustainability, and recovery feasibility.

*Objective 5:* Communicate and increase the general awareness of the status and recovery of the iBoF Salmon.<sup>167</sup>

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167 Fisheries and Oceans Canada. *Recovery Strategy for the Atlantic salmon (Salmo salar), inner Bay of Fundy populations*. [Final]. 2010. In *Species at Risk Act Recovery Strategy Series*. Ottawa: Fisheries and Oceans Canada. p. 32.

## *Gaps in collection of ATK for the iBoF Atlantic salmon*

The Knowledge Gaps are set out in Section 2.6 of the final Recovery Strategy for the Atlantic salmon (*Salmo salar*), inner Bay of Fundy populations (2010). In regard to ATK the following is stated:

In addition, SARA states that “*The Traditional Knowledge of the Aboriginal Peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures.*” Aboriginal Traditional Knowledge (ATK) gaps exist because of the lack of mechanisms for supporting Aboriginal peoples’ involvement and lack of a principled approach or protocols for acquiring ATK about the salmon from Aboriginal peoples. To help in achieving success of recovery goals and plans, efforts to include ATK should continue and should be drawn from affected Aboriginal organizations through supported and meaningful consultation throughout the recovery process. The knowledge learned and included in accordance with proper protocols, can provide useful guidance and demonstrate a best effort to include Aboriginal peoples’ worldviews about the iBoF Salmon in all elements of the recovery process.<sup>168</sup>

Legal protection for ATK against misappropriation during collection and reporting stages of SARA is a key issue for Aboriginal peoples.<sup>169</sup>

Responding to a question raised during testimony to the House of Commons Standing Committee on Environment and Sustainable Development concerning obstacles faced by Aboriginal Peoples when attempting to incorporate ATK into a COSEWIC Assessment, Joshua McNeely of MAPC referred the Committee to a recent attempt by several Aboriginal organizations in the East to undertake ATK gathering projects via EC contracts for the first ever “whole range” Atlantic Salmon COSEWIC Status Report. EC’s insistence upon using IPR clauses which were raised by the several Aboriginal organizations as being inappropriate and potentially damaging for Aboriginal Peoples and the lack of response from EC to those concerns directly resulted in each of the Aboriginal organizations refusing to sign the contracts upon legal advice. Thus no ATK was provided to COSEWIC, despite a growing working relationship with the COSEWIC ATK Subcommittee.

“The federal government, and the legal and intellectual property rights qualifications that the government requires of us, is a huge roadblock to sharing our traditional knowledge about the salmon when it’s very clear that we want to, we want to be a part of that assessment, and to help in that assessment with COSEWIC. But it’s an intermediary of the federal government that is the stumbling block because of this relationship we have had over the years with the federal government.”<sup>170</sup>

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168 *ibid.*, 44.

169 Fisheries and Oceans Canada. Workshop on Considering Aboriginal Traditional Knowledge in *Species at Risk Act* Implementation. Verbatim Report. Halifax, Nova Scotia January 24-25, 2013. p. 6.

170 Canada Parliament. 40<sup>th</sup>, Third Session, House of Commons, Standing Committee on Environment and Sustainable Development, Meeting 8, Review of the Species at Risk Act. (Evidence) April 13, 2010. p. 17.

It is a significant fact that this important and evolving issue is impeded by the lack of an accepted definition of traditional knowledge (TK) at the international level. The World Intellectual Property Organization (WIPO) recognizes this and indicates the following:

TK in a general sense embraces the content of knowledge itself as well as traditional cultural expressions including distinctive signs and symbols associated with TK.

TK in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.<sup>171</sup>

The following are examples of provisions under negotiation at WIPO's Intergovernmental Committee: Protection against misappropriation and misuse; Legal form of protection; Subject matter; Eligibility for protection; Beneficiaries; Benefit-sharing; Prior informed consent; Exceptions and limitations; Duration; and Enforcement.

The current intellectual property rights (IPR) language appearing in contracts between the competent departments and Aboriginal organizations has never been the subject of negotiation with the national Aboriginal organizations. This comes as a surprise to this case study, since the legal work is integral to arriving at principled and workable arrangements.

### *Gaps in implementation consultation*

On April 13, 2010, in testimony before the House of Commons Standing Committee on the Environment and Sustainable Development, Joshua McNeely from MAPC stressed the importance of SARA implementation. He stated, "...the best way to improve SARA would be to improve the conditions under which SARA is implemented."<sup>172</sup>

In the 2013 *Report of the Commissioner of the Environment and Sustainable Development*, the commissioner made specific recommendations concerning Recovery Planning for species at risk. He reported that the competent departments had "...not met their legal requirements for establishing recovery strategies, action plans, and management plans under the *Species at Risk Act*".<sup>173</sup> The commissioner recommended that the competent departments should determine the priorities, time frame, and resources that would be required to complete the outstanding recovery strategies, action plans and management plans. He recommended that the organizations report publicly and annually on strategies and plans completed, those outstanding and the time frame for completing the recovery strategies and action plans.<sup>174</sup>

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171 <http://www.wipo.int/tk/en/tk/> (accessed 3/5/14)

172 House of Commons Standing Committee on Environment and Sustainable Development. Evidence Number 08. April 13, 2010. p. 10.

173 Report of the Commissioner of the Environment and Sustainable Development (2013). Office of the Auditor General of Canada. p. 2.

174 *ibid.*, 16.

DFO agreed with the recommendations and reported that it had put in place measures to improve performance in recovery strategies, action plans and management plans and would do so in a more timely fashion, including consultation and cooperation, identifying critical habitat and measures to support species recovery.<sup>175</sup>

## ***Conclusions***

According to DFO, their general approach when undertaking consultation with Aboriginal Peoples involves following the specific consultation and engagement requirements of SARA and using the Government of Canada's *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* and the *Cabinet Directive on Regulatory Management* – the latter being used when the department is preparing statutory instruments. “The level and nature of the consultation and accommodation is dependent on the specific fact circumstances and the process taking place, and the significance of the species to Aboriginal peoples.”<sup>176</sup>

Addressing the spectrum of action in carrying out the doctrine of the duty to consult, from light consultation obligations to deep consultation obligations, requires understanding of the honour of the Crown and the aim of reconciliation. Our review of the DFO consultation and accommodation activities has revealed serious ongoing challenges to the department in meeting its obligations to consult with *all* Aboriginal Peoples and to ensure a high level of procedural fairness throughout the SARA conservation cycle. A mutually respectful long-term relationship between DFO and Aboriginal Peoples remains an ideal.

## ***Recommendations***

### ***Communications and awareness***

DFO and PCA lack appropriate communications and awareness building activities with Aboriginal representative organizations concerning the Recovery Strategy and Action Plans. Communications and awareness building with Aboriginal organizations must be an implementation priority and a guiding principle in the Recovery Strategy and Actions Plans for inner Bay of Fundy Atlantic salmon.

### ***Intergovernmental Processes - federal, provincial, territorial, Aboriginal***

Aboriginal representation is required on federal, provincial and territorial committees established to work on implementation of the Recovery Strategy and Action Plans for the iBoF Atlantic salmon.

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175 *ibid.*, 16.

176 J. Stewart to A. MacPhee. “Re: Response to questions.” 8 July 2014. E-mail.

### ***Increase Representation from Aboriginal Peoples in the SARA Conservation Cycle***

Committees involved in drafting Recovery Strategies, Action Plans or Management Plans, or undertaking research on the iBoF Atlantic salmon, must have representation from Aboriginal Peoples.

### ***Clarity in Consultation Processes***

When Aboriginal organizations participate in the collection of ATK, it must be clear that this participation does not fulfill the duty to consult and is not a partial fulfillment of the duty to consult.

### ***Inclusiveness***

Section 35 (2) of the *Constitution Act, 1982* references the Aboriginal Peoples of Canada to include the 'Indian, Inuit and Métis peoples'. The Recovery Strategy and Action Plans for the iBoF Atlantic salmon need to be respectful and inclusive of *all* Aboriginal Peoples, on and off-reserve and properly consider the complex interests, issues and concerns that are at stake

### ***Aboriginal Traditional Knowledge***

The Recovery Strategy and Action Plan(s) for the iBoF Atlantic salmon needs to be inclusive of Aboriginal traditional knowledge and the *Two-eyed Seeing Approach*.

### ***Precautionary Principle***

A lack of information or scientific uncertainty should not delay actions essential to achieving the recovery of the iBoF Atlantic salmon.

### ***Socio-Economic Analyses***

Socio-economic evaluations must be broadened to ensure that impact analyses include cultural, spiritual and ecological values of Aboriginal Peoples and that they are carried out in a consistent and transparent manner. The analyses must include concerns and issues related to potential loss of resource access and use, as well as compensation.

### ***Makeup of Recovery Teams***

Federal officials participating on Recovery Teams should act in the capacity of *ex officio* members, so as to allow the committee the freedom to communicate directly with the competent minister.

### ***Management Plans Must Include Engagement with Aboriginal Peoples***

A Management Plan(s) for the iBoF Atlantic salmon should include the key pillars of recovery and management, including engagement with Aboriginal Peoples and transboundary management issues.

### ***Annual Report***

The conservation and recovery of the iBoF Atlantic salmon can only be achieved with the cooperation and support of Aboriginal Peoples. An annual report on the participation of Aboriginal Peoples in Action Plans and Management Plans should be provided by DFO to NACOSAR.

## Recommendations to NACOSAR

The following are suggested methods to increase the level of Aboriginal participation in SARA implementation and to meet the promise and expectations contained in the Preambulatory statement in SARA referencing Aboriginal Peoples:

“the roles of the aboriginal peoples of Canada and of wildlife management boards established under land claim agreements in the conservation of wildlife in this country are essential.”

### *Bridging Two Cultures*

The cultural gap between Western science and ATK appears at times to be impossibly wide, resulting in an urgent need for a greater degree of understanding and trust between the two cultures. As science has become more specialized and complex and less aware of ATK, it becomes important to have dialogue about the applications and possibilities of the two cultures working together. Attitudes towards ATK on the part of many politicians and public servants, have not always been informed and responsive. Many important and difficult concerns and issues remain, and increased dialogue and understanding is required.

### *Honour of the Crown*

The Honour of the Crown is always at stake in its dealings with Aboriginal Peoples. “The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honour of the Crown. The Honour of the Crown is always at stake in its dealings with Aboriginal peoples.” [*Haida Nation*, SSC]

### *Recognition and Reconciliation*

From the Preamble of SARA: “All Canadians have a role to play in the conservation of wildlife in this country, including the prevention of wildlife species from becoming Extirpated or Extinct.” People must have a sense of commitment and work together in harmony to achieve this common purpose as part of the overall re-shaping of the Crown-Aboriginal relationship, which includes reconciliation. Engagement with Aboriginal Peoples must be based on the principles of recognition and reconciliation.

### *Reasonableness*

“The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.” [*Halfway River*, BCCA and *Mikisew*, SSC]

### ***Meaningful Consultation***

The Crown and Aboriginal Peoples must settle through negotiation, consultation and accommodation issues involved with SARA implementation. Two important principles should be kept in mind:

“Consultation must be meaningful, but there is not necessarily a duty to reach agreement,...”  
[*Haida Nation*, SCC]

“The Crown must avoid even the appearance of ‘sharp dealing’.  
[*Badger, Haida Nation* and *Mikisew*, SCC]

### ***Good Faith (uberrima fides)***

“At all stages, good faith on both sides is required.” [Haida Nation, SCC]

### ***Mutuality***

The relationship between the two cultures must be based on mutuality and based on the principles of mutual recognition and respect, sharing, and responsibility.<sup>177</sup>

### ***Openness, Transparency and Accountability***

Each step of the consultation and accommodation process must be carried out in a fully accountable, transparent and meaningful way that upholds the honour of the Crown. Even in cases where the minimum acceptable standard is consultation, the defining characteristic must be a process of *bona fide* meaningful consultation and accommodation, with a clear intention of addressing the concerns and interests of Aboriginal peoples.

### ***Aboriginal Accord***

There is a pressing need for the competent departments, provincial and territorial jurisdictions and Aboriginal Peoples to complete the negotiation of an Aboriginal Accord, setting out the principles of Aboriginal engagement in SARA. The Accord must be the anchor of meaningful involvement and participation of Aboriginal Peoples in the implementation of SARA.

### ***NACOSAR***

Meetings between the Minister of the Environment and NACOSAR are vital for providing advice on the implementation of SARA policies. The council must visit affected Aboriginal communities to listen to Aboriginal People directly engaged with a species.

### ***Implementation of UNDRIP***

Implementation of the *UN Declaration on the Rights of Indigenous Peoples* can further the recognition and protection of Aboriginal customary laws, rights and interests in the protection of species at risk.

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177 Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples*. 1996. <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637> (accessed 5/6/14)

### *Use of the term 'consultation'*

Crown-Aboriginal consultation should be guided by the *UN Declaration on the Rights of Indigenous Peoples*, since it is the most comprehensive, universal, international human rights instrument explicitly addressing the rights of Indigenous peoples. It elaborates on the economic, social, cultural, political, spiritual and **environmental rights** [emphasis added] of Indigenous peoples.

### *Conduct of the Crown*

Uncertainty and confusion surrounds consultation and accommodation activities of the competent federal authorities. Clarity is required from these authorities as to when they are undertaking consultation and accommodation with Aboriginal Peoples. Each Recovery Strategy, Action Plan and Management Plan must be prepared in cooperation with every Aboriginal organization directly affected.

### *Engagement with the Federal Species at Risk Committees*

The competent departments are not meeting the Crown duty to consult with Aboriginal Peoples concerning impacts on Aboriginal and treaty rights. These competent departments have recognized that they have been approaching consultations unilaterally and that there is much room for them to work more closely on these processes. Aboriginal organizations must be fully engaged in departmental and interdepartmental species at risk process to help shape SARA policies concerning consultation, full and effective participation, inclusion of ATK, free, prior and informed consent, and other matters which may affect Aboriginal Peoples.

### *Multi-Stakeholder or Multi-Interest Recovery Teams*

Aboriginal participation on multi-stakeholder or multi-interest Recovery Teams is not a consultation mechanism to fulfill the duty to consult, though they are viewed by some Aboriginal organizations and by the RENEW program as vital nodes for organizing recovery actions and the preferred mechanisms for sharing and learning, including ATK, to cooperatively develop draft recovery documents.

### *Capacity and Funding*

The lack of capacity and funding for Aboriginal organizations to adequately participate in a meaningful consultation remains a major concern of Aboriginal organizations.

### *Track Levels of Aboriginal Satisfaction with Consultations*

Effective and meaningful progress on SARA cannot be tracked and evaluated until the competent departments track the level of Aboriginal satisfaction associated with these consultative activities and report to NACOSAR.

### *Inclusion of ATK in Recovery Potential Assessments*

Section 40 of SARA calls for a determination being based on the best available information, including information provided by COSEWIC. Recovery Potential Assessments must contain ATK, in order to comply with the statutory obligation to provide the best available information.

### ***Communication and Awareness***

Increased communication and awareness activities need to be undertaken to ensure that Aboriginal Peoples are aware of SARA and how it is being implemented by EC, DFO and PCA.

### ***Fairness***

Ensure a high level of procedural fairness with respect to processes of EC, DFO and PCA that may result in decisions affecting the rights and interests of Aboriginal Peoples.

### ***A Clearly Defined Process***

A clearly defined process is required by which Aboriginal Peoples can engage with federal and provincial jurisdictions to ensure that our interests and rights are identified, considered and incorporated into species at risk decision making.

### ***Clear Measures of Success***

The level of satisfaction with consultation and accommodation as a performance indicator should be part of the evaluation process of the competent departments.

### ***Collection of ATK***

ATK must be considered as full and equal to science knowledge and the collection activity must not be viewed as a consultative activity. Negotiation needs to take place between the competent departments and Aboriginal representative organizations, to arrive at legal language that is acceptable to all parties before moving on to implementing agreements at the community level.

### ***Intellectual Property Rights***

The competent departments need to negotiate the terms by which intellectual property policy is written and included in contractual agreements with Aboriginal organizations. Existing terms in SARA agreements are based on Treasury Board intellectual property policy, which was developed without Aboriginal traditional knowledge being taken into consideration. Negotiations need to take place concerning information involved through a waiver of moral rights. Only after developing mutually agreed terms will this intellectual property rights obstacle be overcome.

### ***Lack of final policies***

The draft (May 31, 2008) EC policies and guidelines must be updated. The absence of a coherent and robust final policy on SARA implementation has been a significant limiting factor. The three competent departments have unilateral approaches and the lack of policy cohesion has resulted in weak performance in SARA implementation.

### ***Impartial Recovery Teams***

Recovery Teams must have the capacity and resources to act impartially and avoid the appearance of bias, so as to provide the best available information, advice, and recommendations to the competent Minister and department for the effective recovery of species at risk.

### *Drafting of the Recovery Strategy, Action Plans and Management Plans*

Aboriginal Peoples must be involved in the collaborative process of drafting the Recovery Strategy, Actions Plans and Management Plans. The RENEW program strongly recommends that the best collaborative process is through multi-stakeholder or multi-interest Recovery Teams and Recovery Implementation Groups, and if not feasible, then through direct and early engagement with recovery document writers and other experts via workshops, strategy sessions, and reporting sessions.

### *Socio-Economic Assessments*

The competent departments must broaden their approaches to socio-economic valuation, to ensure that the assessments include Aboriginal cultural, spiritual and ecological values.

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The objective of IKANAWTIKET Environmental Incorporated is: to promote the preservation of the natural environment by educating and informing the public about environmental issues, biodiversity in the Maritime Provinces, Aboriginal culture, Aboriginal worldview, and traditional knowledge in relation to the environment.

IKANAWTIKET advances education by undertaking research which is made available to the public, providing training and instruction, offering courses, seminars, convening conferences, meetings, and developing educational tools related to understanding and respecting the environment.

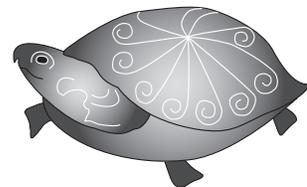
The charitable work of IKANAWTIKET Environmental Incorporated benefits the community by preserving and protecting the environment through the preservation, protection, and restoration of habitats, and increasing the public's understanding about the environment and its importance to all life.

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*"Is controlling nature worth  
Destroying our environment  
And our biodiversity, killing  
Our young, and poisoning  
Our food, water, and air?"*



*Who will support our friends in need?*

