



Species At Risk Act: Section 11 & Section 12 First Nations Opportunities

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Species At Risk Act

- *Species at Risk Act*, S.C. 2002, c. 29 (“SARA”) is federal legislation
- SARA was designed to meet one of Canada's commitments under the UN Convention on Biological Diversity
- SARA emerged from an extensive process of consultation and collaboration and with Indigenous peoples, recognizes the *Constitution Act, 1982* section 35 Aboriginal and Treaty rights

Species At Risk Act

- SARA appears to have been an early attempt at what The Royal Commission on Aboriginal Peoples has referred to as “recognition legislation” and is now being termed “legislative reconciliation”
- Canada’s attempt to recognize and protect inherent Aboriginal rights to facilitate the implementation of Aboriginal and Treaty rights. This type of legislation is not the source of Aboriginal rights, and “proceeds on the premise that these rights exist”

First Nation Jurisdiction in Conservation: Inherent Rights

First Nation Laws/Legal Orders

- First Nation laws exist independent of federal, provincial or territorial laws
- First Nation law, pre-exists the two other sources of law (federal and provincial/territorial), is a third source of law
- First Nation laws are composed of the customs and traditions central to the culture of First Nations, and maintained through oral traditions including storytelling, and song

First Nation Jurisdiction in Conservation: Inherent Rights

First Nation Laws/ Legal Orders

- First Nation laws are often contained in oral stories with values and principles that have been passed on generation to generation since time immemorial

First Nation Jurisdiction in Conservation: Inherent Rights

Leader of the Caribou

“One year a boy went caribou hunting with the men...

Caribou have a leader who always travels far ahead of the rest of the herd. Now with Dene people, we have a custom to not shoot the leaders of the caribou. **We believe that the leaders are medicine-power caribou and they use their power to take care of the rest of the herd.**

The boy knew this because he had been taught well by his father and Elders. He sat waiting for the caribou when the leader of the caribou stopped right in front of him and stared.

First Nation Jurisdiction to address CWD: Inherent Rights

When the boy's father and grandfather saw this, they yelled out to the boy, "Don't shoot the leader! Don't shoot the leader! Something bad will happen to you."

The leader walked right up to the boy. Although it was frightening, the boy was not tempted to shoot the leader. He sat perfectly still, but was very surprised when the caribou began to talk to him...

"I will share some of my medicine power with you because I like you," said the caribou. "You are a good person, fit for medicine power..."

George Blondin, *Trail of the Spirit: the mysteries of medicine power revealed* (Edmonton, NeWest Press, 2006) at 176.

First Nation Jurisdiction in Conservation: Inherent Rights

First Nation Laws/ Legal Orders

- The Dene story of the Leader of the Caribou contains numerous aspects of the laws of the Dene, including how to respect the sacred and vital relationship with caribou, the fact that First Nation people can speak to animals, and cultural keystone species such as caribou are medicine for First Nation people
- First Nation Laws, and jurisdiction can be recognized in SARA, as per the original intent of SARA

Species At Risk Act

- SARA mandates federal cooperation with First Nations, based on First Nations' traditional knowledge, and through the participation of the National Aboriginal Council on Species at Risk (NACOSAR)
- SARA section 11, and section 12 supports and promotes the negotiation of agreements between the Crown and First Nations, focusing on future-oriented partnerships

Species At Risk Act

- SARA Section 11 Agreements: for species that **are listed** under SARA, ie: woodland caribou, boreal population are listed as threatened
- SARA Section 12 Agreements: for species that **are not listed** under SARA, ie: barren ground caribou are not listed
- SARA Section 13 states funding may be provided for Section 11 and Section 12 agreements

Species At Risk Act

SARA Section 11 states:

- an applicable federal minister can ... “enter into a conservation agreement with **any government in Canada**, organization, or person to benefit a species at risk or enhance its survival in the wild” (“Section 11 Agreement”)
- any government in Canada includes a First Nation government

Species At Risk Act

SARA Section 11(2) states:

Agreements are to provide conservation measures and may, include:

- (a) monitoring the status of the species;
- (b) developing and implementing education and public awareness programs;
- (c) developing and implementing recovery strategies, action plans and management plans;
- (d) protecting the species' habitat, including its critical habitat; or
- (e) undertaking research projects in support of recovery efforts for the species.

Species At Risk Act

Cost Benefit Analysis is recommended to be included in a s. 11 or s. 12 agreement.

Currently under SARA, a cost benefit analysis is conducted at 3 stages of the SARA process:

1. listing;
2. recovery planning action plans (specified as possible measure in s. 11 agreements); and
3. five years after a plan comes into effect.

Species At Risk Act

Socio-economic cost benefit analysis

49 (1) An action plan must include, with respect to the area to which the action plan relates,

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

Species At Risk Act

Cost Benefit Analysis

- compensation provisions of SARA for First Nations are under-utilized. First Nations, ought to develop a cost-benefit analysis model and First Nations, can then conduct a compensation assessment
- a cost benefit analysis (broader than what is mandated under SARA and TB) based on First Nation values must include a valuation of the cost to First Nations if the Minister decides not to list a cultural keystone species, yet the species is considered to be threatened by First Nation governments
- costs to First Nations whether a species is listed or not

Species At Risk Act: Section 11 Agreement with Athabasca Chipewyan First Nation and Mikisew Cree

- March 2022, Athabasca Chipewyan First Nation and Mikisew Cree, entered into an agreement with Canada pursuant to section 11 of SARA to support the recovery and protection of boreal caribou
- 2 year term with option for renewal
- provisions which state the parties are to be guided by UNDRIP, informed by TRC's Calls to Action, and the precautionary principle

Species At Risk Act: Section 11 Agreement with West Moberly & Saulteau First Nations

- February 21, 2020, Canada, BC, West Moberly First Nation (“West Moberly”) and Saulteau First Nations (“Saulteau”) finalized two agreements for the central group of Southern Mountain Caribou, under Section 11 of *SARA*;
- Conservation Agreement between Canada and British Columbia; and
- Partnership Agreement between West Moberly, Saulteau, Canada, and British Columbia (30 year term)

Species At Risk Act: Section 11 Agreement with West Moberly & Saulneau First Nations

- First Nations have been leading recovery actions using First Nations methods including; a voluntary moratorium on hunting caribou, establishing and managing a maternal pen, implementing traditional predator-management programs, undertaking habitat mapping and restoration, and carrying out other First Nations traditional knowledge based activities, with financial and technical support from Canada and BC
- these actions along with the provincial government's steps and actions taken by other First Nations and collaborators have resulted in caribou population increases

Species At Risk Act

SARA Section 12 states:

An applicable federal minister can “...enter into an agreement with **any government** in Canada, organization or person to provide for the conservation of **a wildlife species that is not a species at risk**”

- currently no SARA Section 12 Agreements

Species At Risk Act

- Canada thus far, has been reluctant to enter into any SARA s. 12 agreements
- Even though there may not be any section 12 agreements, First Nation governments can explore with Canada the possibility of an agreement under SARA section 12

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Section 12 Agreements are mandated by SARA to provide conservation measures and may, include:

- (a) monitoring the status of the species;
- (b) developing and implementing education and public awareness programs;
- (c) protecting the species' habitat; and
- (d) preventing the species from becoming a species at risk.

Anatomy of a SARA Section 11 or Section 12 Agreement: process from Negotiation to Implementation

Procedures for a Section 11 and Section 12 agreement

Typical Steps:

1. Preparing for Negotiations:
2. Conducting Negotiations
3. Implementing Agreements

Anatomy of a SARA Section 11 or Section 12 Agreement: Process from Negotiation through Implementation

Preparing for Negotiations

- Process to obtain a Section 11 Agreement or to obtain a Section 12 Agreement, considerations:
 - is a cultural keystone species at risk?
 - is the species listed or not listed?
 - does the First Nation want the species to be listed or not?

Anatomy of a SARA Section 11 or Section 12 Agreement: Process from Negotiation through Implementation

Preparing for Negotiations

- SARA & negotiation training is essential, ie. the role of NACOSAR, COSEWIC and a Cost Benefit Analysis
- what is the First Nations' traditional knowledge regarding the species?
- if the negotiations are not successful, is the First Nation willing to litigate?

Anatomy of a SARA Section 11 or Section 12 Agreement: Process from Negotiation through Implementation

Conducting Negotiations

- time it takes to complete a Section 11 Agreement or to obtain a Section 12 Agreement can be affected by:
 - how seriously the Minister takes the First Nation
 - willingness of the Minister to treat the First Nation as a partner and not with skepticism
 - funding and capacity for the First Nation

Anatomy of a SARA Section 11 or Section 12 Agreement: Process from Negotiation through Implementation

Conducting Negotiations

- state of the First Nation governance: strong leadership and internal communication
- availability of professional studies in a timely manner, ie: Cost Benefit Analysis

Anatomy of a SARA Section 11 or Section 12 Agreement: Process from Negotiation through Implementation

Implementation

- monitoring the status of the species
- implementing education and public awareness programs
- protecting the species' habitat

Species At Risk Act

- SARA is a strong legislative tool to utilize in advocacy, as it enables a Nation to Nation partnership recognition of First Nation laws, based on cooperative federalism between First Nations, Canada, and with the provinces, and territories
- Agreements under SARA can incorporate UNDA, the TRC Calls to Action, the precautionary principle, and Two Eyed Seeing or the First Nation principles that reflect the unique values of the First Nation

Species At Risk Act

- SARA allows Canada to address First Nations rights as a priority and apply SARA in a proactive manner
- First Nation governments, governing with or without either historical or modern Treaties, can continue to assert their inherent and Treaty rights, their jurisdiction and authority over land and culturally significant species, and have First Nation laws codified with Canada through SARA

Species At Risk Act

- by incorporating principles of self-determination, SARA can uphold and recognize First Nations' inherent and Treaty rights
- Inherent, and Treaty rights which are also protected by s. 35 of the Constitution
- can ensure a cost benefit analysis, based on First Nations values, is conducted, for a compensation assessment

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Questions/Comments?



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