Legal Battles, Lost Opportunities, and the Long Road to Species Protection

Several environmental groups went to Ottawa in 2018 to take a stand for caribou. Photo AWA Archive

BY NATHAN SCHMIDT

Endangered species are a prominent example of what happens when we fail to manage our environment adequately. Species like orcas and caribou capture public attention when their existence is threatened. Lesser-known species like western chorus frogs or sage-grouse also find themselves in the news cycle when their disappearance becomes imminent, prompting calls to action from non-governmental organizations (NGOs) and the public.

The *Species at Risk Act* (SARA) is the primary legislation in Canada used to identify and protect species threatened with extinction or extirpation. It is a set of guidelines and legal tools governments use to take steps — either restricting activities or ameliorating problems — to reverse species loss and stabilize remaining populations. Understanding these guidelines and leveraging these tools is crucial not only for governments, but also NGOs and individuals advocating to protect threatened species of all kinds.

SARA's guidelines can be considered legal rules ensuring its tools are used in accordance with other laws, especially our *Constitution*'s division of powers between the provinces and federal government. Available tools range from processes for identifying species and their critical habitat; creating voluntary conservation agreements between governments, individuals, or Indigenous groups; adding protective measures to federal land and in extreme circumstances provincial and private land; issuing emergency protection orders for critically low populations; and handing out penalties like fines or even jail time for harm to species, their residences, and critical habitat.

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In practice, achieving these outcomes or even reaching the point where the tools can be used is difficult. Like most problems associated with the *SARA*, this is rooted in issues of jurisdiction between levels of government and a lack of political will to prioritize conservation over other, often economic, priorities.

Difficulties applying the *SARA* persist even though we know which species and habitat need protection. This is thanks to the dedicated work of the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), an independent advisory body composed of experts who provide reports and recommendations to the Minister of the Environment and Climate Change. In theory, the Minister and Governor in Council (the Cabinet of the government in power) use these materials to make decisions about listing a species under *SARA* to activate its protections.

However, mandatory steps like *Recovery Strategies* are vulnerable to chronic delay because they are ultimately political decisions left in the hands of elected officials causing critical habitat to be left unidentified and unprotected despite knowing for years, and even in some cases decades, that a species is quickly disappearing.

Situations like this are often the catalyst for concerned parties outside of government to become involved in the process. Effective public advocacy is always necessary, but with the complex rules and norms surrounding environmental protection, understanding the guidelines and tools in the SARA is crucial for any chance of success.

Alberta Wilderness Association (AWA) was involved as the named party in several legal challenges for the critically endangered sage-grouse found in southern Alberta and Saskatchewan. Years of government delay brought the species to the brink of extirpation in Canada, leading to over half a decade of legal proceedings in collaboration with other conservation groups led by lawyers from Ecojustice.

Over multiple court proceedings from 2009 to 2013, AWA and its partners asked the Federal Court of Canada and Federal Court of Appeal to find that the government had failed to identify critical habitat, that adequate information about the status of a pending emergency protection order (EPO) was being withheld, and that the government had to decide on an EPO for the sage-grouse and justify its decision.

AWA and its partners were successful in each proceeding, with certain caveats, and the government

eventually identified adequate critical habitat and issued an EPO in 2014, 11 years after the sage-grouse was first listed under the *SARA*.

In cases where the government has completed required protection plans, enforcement measures become available through the federal jurisdiction broadly referred to as the "criminal law" power. A unanimous 1997 Supreme Court of Canada decision in *R v Hydro-Quebec* found that the federal government has clear jurisdiction to use its constitutional criminal law power when enforcing environmental protections under otherwise constitutionally compliant legislation.

Some of *SARA*'s most effective tools rely on this power to enforce penalties and even jail time for the destruction of critical habitat and harm caused to identified species. The power to enforce SARA's enforcement provisions is much different to the government-led actions of the protection processes. Enforcement is led by law enforcement agencies and Crown prosecutors who both have considerable discretion in investigating and prosecuting environmental violations just as they do with criminal offences.

Two cases from Alberta demonstrate *SARA*'s effectiveness when it functions as intended. In *R v Lake Louise*, the Lake Louise Ski Resort was found guilty of destroying 38 whitebark pine trees during summer maintenance operations. The Court issued $2.1 million in fines and directed 95 percent towards the Environmental Damages Fund, a Government of Canada program that funds environmental restoration. Lake Louise subsequently took steps to correct their processes to better comply with environmental laws.

R v French involved the destruction of a crossing on Racehorse Creek containing westslope cutthroat trout during a motocross competition. Brooks Motorcross Club and one of its officers were found guilty of violating *SARA* (and the *Fisheries Act*) for their role in planning the impugned activities. Together, they were ordered to pay $70,000 in

Sage-grouse are an endangered species in Canada, and could soon be extirpated if more action isn't taken. Photo © C. Olson

fines, with portions also going to the Environmental Damages Fund. The court further ordered them to publish a notice of their convictions in an approved publication to advise other members of the motorcross community of their penalty, to educate and warn others about activities that endanger protected wildlife and habitat.

Overall, the courts have demonstrated a strong understanding of the purpose of *SARA* and the scientific principles underlying the protection of species at risk. The body of case law involving *SARA* is consistent in its articulation of the importance of the preservation of Canada's ecological heritage — often featuring compelling writing about environmental protection.

The approach of our courts to species protection is promising but can't effectively support and enforce the long-term solutions needed for species at risk. Even in decisions strongly condemning government actions, remedies available to the courts are limited to the issues at hand, which are often narrower than the greater issue of creating accountability over the time necessary to restore a species to sustainable levels. Steps in the right direction resulting from legal decisions eventually become weighed down by political horse trading and lobbying by powerful interest groups typically connected to industry resulting in further delay.

The EPO for sage-grouse is one example in a long list of partial victories. An EPO stops harmful activity in the area under its control but has no power to compel actions that encourage population growth and habitat restoration. Ruiping Luo, a conservation specialist with AWA, handles the sage-grouse file. Her regular updates in the *Advocate* show continued declines in population and inadequate measures to restore the 6 percent of the sage-grouse's traditional range where they still survive (which itself is not entirely covered by the EPO).

Writing in the Fall 2022, she noted Alberta counted only 22 males in the province, indicating a decline since the issuing of the order in 2014. Recovering sagebrush habitat is key to reversing this trend, something that the EPO cannot do. This falls instead to the provincial and federal governments to restore habitat on the lands they control and incentivize private landowners to do the same.

After years of inaction, it may once again fall to NGOs and concerned individuals to act where the government refuses. This cycle is not sustainable as

Despite being listed as 'threatened' under *SARA* since 2003, federal progress reports since 2018 show that Alberta has not effectively protected critical habitat for woodland caribou on provincial lands. Photo © P. Sutherland

it requires significant resources over years or even decades to challenge the government in court simply to force it to do what it is legally required to do. For the sage-grouse, it certainly isn't sustainable for their continued survival.

Lacklustre implementation of *SARA* also limits the effectiveness of enforcement, which can only be used after species are listed and critical habitat is identified. The small number of written court decisions involving *SARA* prosecutions reflects this shortcoming — the two cases mentioned in this article represent the only two significant published decisions of *SARA* enforcement. This does not necessarily mean the enforcement provisions have only been used twice, as not all proceedings result in written or published decisions, but it is certainly indicative of how little these powers have been used over their 20-year history.

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For those who care about species protection, seeing the failures of this complex, cumbersome system can make you feel powerless.

And like many political policies of the last decade, protecting wildlife and their habitat has become embroiled in partisanship and the perception it is a "left vs. right" issue. Historically though, protecting the environment was not subject to ideology and was thought of as a public good.

For example, much of the foundational American legislation for environmental protections came to life along bipartisan lines. *SARA*'s US equivalent, the *Endangered Species Act 1973* (the ESA), was enacted under President Richard Nixon and passed in the US House of Representatives 355 to 4. This happened 30 years before *SARA* and has been extremely effective in preventing biodiversity loss, with some studies estimating it has saved almost 250 species from extinction or extirpation. Despite controversies along the way, the ESA continues to attract strong public support from Americans, with one study of multiple opinion polls estimating approval at around 80 percent of the population.

There is similarly broad public support for species protection in Canada. A 2017 poll from the science journal *Facets* found that 89 percent of respondents were "strongly committed to species conservation in principle" and 80 percent agreed we must "limit industrial development" for these purposes. More recent polls commissioned by CPAWS and the Nature Conservancy of Canada in 2022 found similar levels of support in Canada, including close to 80 percent for "Canada and the provinces and territories to speed up progress and make strong commitments to protecting nature."

So why does it continue to be so difficult to effectively use the tools we have and hold our leaders accountable when most of us seem to agree? On a practical level, it comes down to the path of least resistance for governments as they seek to stay in power in an uncertain economy with increasingly scarce resources.

To change this trend, the relationship between advocacy, court decisions, and public pressure may be a key part of improving Canada's commitment to species at risk and their habitat. As the history of *SARA* shows, we have the tools to prevent extinction and extirpation, but we lack the will to make tough decisions.

Creating a culture where we expect governments to save species at risk just like we expect them to maintain a healthy economy or keep us safe could reverse trends of delay and inaction. Canadians care about species at risk and want governments to follow their legal obligations as the courts have told them time and time again. But when the hard decisions come across a minister's desk, public consensus is drowned out by more immediate priorities and powerful industry lobbying.

Recently, news outlets reported on the failure of the voluntary conservation agreement between Alberta and the federal government to reverse the loss of caribou, originally put in place to avoid the federal government stepping in to protect critical habitat. Perhaps this is the perfect opportunity to put public consensus to the test and see if our governments are willing to face the consequences of what happens when they fail to prevent the loss of an iconic species familiar to all Canadians, just so they save a few more quarters.