



Council of
Forest Industries

Bill C-5, the Species at Risk Act (SARA): Issues Relating to COFI's Key Areas of Change

<u>Contents</u>	
1.0 Introduction.....	2
2.0 COFI's Submission Proposes 12 Main Changes to the Bill.....	2
3.0 COFI's Testimony Focused on Three Key Changes.....	3
4.0 COFI's Proposed Changes Enhance the Public Policy Inherent in the Bill.....	4
5.0 Questions & Answers about the Three Key Changes.....	5

July 2001

The Council of Forest Industries (COFI) is the provincial voice of the BC forest industry. COFI and its six member associations represent more than 100 forest companies. These companies operate throughout British Columbia and elsewhere; manage forest resources; manufacture lumber, pulp, paper, plywood and other value added forest products; and sell these products locally, nationally and internationally.

Bill C-5, the Species at Risk Act (SARA): Issues Relating to COFI's Key Areas of Change

1.0 Introduction

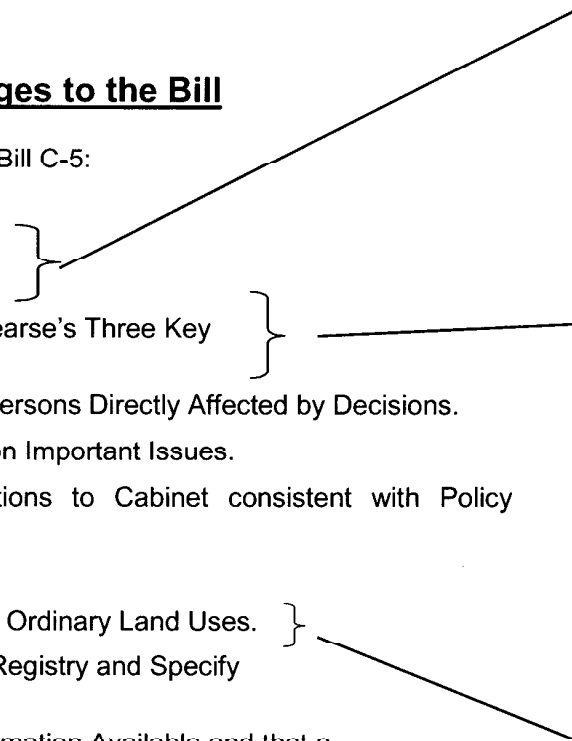
In a submission to government and in testimony before Parliament's Standing Committee on Environment and Sustainable Development, COFI has expressed its views on Bill C-5.

COFI continues to be a strong supporter of a federal Species at Risk Act.

COFI has proposed amendments to improve Bill C-5. Some questions have been asked about these proposals. This paper addresses these questions.

2.0 COFI's Submission Proposes 12 Main Changes to the Bill

COFI's submission on SARA proposes 12 main changes to Bill C-5:

1. Add Socio-Economics to the Purposes Section.
 2. Add Socio-Economics to Recovery Strategies.
 3. Revise the Compensation Provision to Reflect Dr. Pearce's Three Key Recommendations.
 4. Provide for Cooperation between Government and Persons Directly Affected by Decisions.
 5. Expand the Groups which Government will Consult on Important Issues.
 6. Make Requirements for Minister's Recommendations to Cabinet consistent with Policy Discretion.
 7. Replace Due Diligence with Intent.
 8. Ensure the Exemption/Transition Provisions Apply to Ordinary Land Uses.
 9. Expand the Information to be Included in the Public Registry and Specify Time Limits for Filing this Information.
 10. Require Key Decisions to be Based on the Best Information Available and that a Rationale for these Decisions be Provided.
 11. Promote Partnership by Removing the Federal Safety Net.
 12. Give Priority in the Bill to Voluntary vs. Regulatory Measures.
- 

Bill C-5, the Species at Risk Act (SARA): Issues Relating to COFI's Key Areas of Change

3.0 COFI's Testimony Focused on Three Key Changes

COFI's testimony before Parliament's Standing Committee on Environment and Sustainable Development highlighted three areas:

1. **Socio-Economics:** we recommend two changes to the Bill to ensure government is entitled to take into account socio-economic objectives when acting to protect and recover Species at Risk:
 - (A) **Purpose (s.6):** we recommend that s.6 of the Bill be amended to expressly reflect that the purpose of the Bill, and therefore the manner in which government is entitled to act in applying the Bill, is to protect and recover species at risk *in a manner consistent with the socio-economic objectives of Canadians.*
 - (B) **Recovery Strategies (s.41):** we recommend that s.41 be amended to expressly enable the government to consider and, if thought advisable, to address socio-economic issues when developing recovery measures.
2. **Compensation (s.64):** we recommend that s.64 of the Bill be amended to enable the government to act on the basis of three key principles from Dr. Pearse's independent report on compensation:
 - (A) **Compensate Tenure Holders:** where the legal rights of tenure holders are impaired by action under SARA, compensation should be paid just as it is to be paid when the legal rights of property owners are impaired.
 - (B) **Fair Market Value is Basis of Compensation:** compensation should be based on the fair market value of the rights that are impaired and an offer of compensation must be in cash, although the parties should be free to negotiate an alternative form of compensation if they wish.
 - (C) **Provide Procedural Protection:** the process for determining and providing compensation should provide procedural protection to those whose rights have been impaired.
3. **Exemptions and Transition (ss. 73 to 77 and 83):** we recommend that these provisions be revised:
 - (A) **Transition for Provincial Tenures:** to provide transition rights for provincial tenures at least equivalent to the rights provided to federal tenure holders; and
 - (B) **Exemptions for Ordinary Land Use:** to enable the government to provide, when considered advisable, exemptions for ordinary uses of land, a power that is currently missing from the Act.

**Bill C-5, the Species at Risk Act (SARA):
Issues Relating to COFI's Key Areas of Change**

4.0 COFI's Proposed Changes Enhance the Public Policy Inherent in the Bill

For the three key areas identified by COFI, the following table compares the government policy inherent in the Second Reading version of Bill C-5 with what it would be under the Bill with the three key changes recommended by COFI.

It is submitted that Canadians will perceive the Bill with the proposed changes as more reasonable than the Second Reading version of Bill C-5.

Issue	Government Policy Inherent in:	
	Second Reading Version of Bill C-5	Bill C-5 with COFI's Proposed Changes
	It is the policy of the Government of Canada that:	It is the policy of the Government of Canada that:
Socio-economics	<ul style="list-style-type: none"> • Purpose: socio-economic considerations: <ul style="list-style-type: none"> ➢ are not relevant to; and ➢ are not to be taken into account in determining, the Purpose of Bill C-5, or the powers of the government under C-5. • Recovery Strategies: socio-economic considerations are not relevant to, and are not to be taken into account in developing, Recovery Strategies. 	<ul style="list-style-type: none"> • Purpose: socio-economic considerations: <ul style="list-style-type: none"> ➢ are relevant to; and ➢ are to be taken into account in determining, the Purpose of Bill C-5, and the powers of the government under C-5. • Recovery Strategies: socio-economic considerations are relevant to, and are to be taken into account in developing, Recovery Strategies.
Compensation	<ul style="list-style-type: none"> • Compensation to Tenure Holders: the government should be entitled to impair the legal rights of tenure holders without paying compensation for doing so. • Fair Market Value: the government, when paying compensation, should be entitled to: <ul style="list-style-type: none"> ➢ pay a person less than the fair market value of the rights of that person impaired by a government decision; and ➢ unilaterally determine what form the compensation should take. • Procedural Protection: there is no reason or need for the government to assure Canadians that they will be entitled to procedural protection if their legal rights are impaired by government action. 	<ul style="list-style-type: none"> • Compensation to Tenure Holders: the government recognizes that when it impairs legal rights – whether property or contract – it should compensate. • Fair Market Value: the government acknowledges and is committed to applying two well recognized principles related to impairment of legal rights through takings: <ul style="list-style-type: none"> ➢ compensation should equal the fair market value of the impaired right ➢ the person affected is entitled to cash but other forms of compensation can be negotiated. • Procedural Protection: the government recognizes that Canadians are entitled to assurance that when their legal rights are impaired by government decisions, they will be given procedural protection consistent with other compensation legislation.
Exemptions & Transition	<ul style="list-style-type: none"> • Exemptions: there will never be any need to provide any opportunity for exempting any of the ordinary activities of land use from prohibitions under the Act. • Transition: there is no need to provide transition rules for provincially authorized land use even though the vast majority of land use offered by SARA is so authorized. 	<ul style="list-style-type: none"> • Exemptions: it is reasonable to provide for the opportunity to grant exemptions for ordinary land use activities, on the merits, on a case by case basis. • Transition: the principle of transition has been recognized for federally authorized land use and should be recognized for provincially authorized use as well.

Bill C-5, the Species at Risk Act (SARA): Issues Relating to COFI's Key Areas of Change

5.0 Questions & Answers about the Three Key Changes

Questions & Answers about Socio-Economics

Q: Could the absence of any reference in the Purpose section of the Bill to socio-economic considerations, undermine the government's stated intent to take into account social and economic factors when making decisions under the Bill?

A: Yes. The Canadian legal principles relevant to this question are clear:

- when exercising a statutory decision (as Cabinet and the Minister will do under SARA), the decision maker must not take into account any irrelevant factors; and
- in the context of determining what matters may be relevant or irrelevant, the Purpose statement (s.6 of the Bill) is significant:

"purpose statements reveal governing principles and policies...

"Unlike preambles, they ...are part of what is enacted into law. This makes them binding... they carry the authority and weight of duly enacted law.

"Sometimes a purpose statement sets out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases...In some cases purpose statements point in a single direction and guide interpreters toward a particular outcome."

(Dreidger on the Construction of Statutes. 1994. @ p.264)

In the case of s.6 of Bill C-5, it is a purpose statement that points in a single direction -- the protection of species. There is no mention of socio-economics. This Purpose is binding on government and the courts. Thus, if the government makes a decision under SARA that takes into account socio-economics, it will be taking into account factors that are not specified in the Purposes section. As a result, such decisions could be taking into account "irrelevant factors" and may be struck down.

The Bill should be amended not only to avoid this potential outcome but also to more clearly reflect the government's stated intention to take socio-economic factors into account.

Q: Could the absence of any reference to socio-economics in the Recovery Strategy section prevent the government from taking socio-economic considerations into account when developing these strategies?

A: Yes. Although the government has indicated it will take socio-economics into account when developing these strategies, s.41, which sets out the contents of these strategies, does not include such considerations. This is in contrast to s.49(1)(e), which expressly provides that socio-economic considerations are to be included in action plans.

Again, the legal principles are well established:

Bill C-5, the Species at Risk Act (SARA): Issues Relating to COFI's Key Areas of Change

"One of the so-called maxims of statutory interpretation is ...to express one thing is to exclude another.

"An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring it was deliberately excluded. Although there is no express exclusion, exclusion is implied.... The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

"Once a pattern of words has been devised to express a particular purpose or meaning, the pattern is used [by legislative drafters] each time the occasion arises.

"Failure to follow an established pattern... may form the basis for an applied exclusion argument."

(Dreidger on the Construction of Statutes. 1994. @ pp. 168 and 170)

In the case of Bill C-5, the inclusion of socio-economics in the content of action plans, combined with no mention of socio-economics for recovery strategies could yield the conclusion that the government is not entitled to take socio-economics into account in developing the strategies. As this is contrary to the government's intent, the Bill should be amended to expressly include socio-economics in the list of items to be included in the strategies under s.41.

Questions & Answers about Compensation

- Q: Do Dr. Pearse's proposals force the federal government to pay compensation?
A: No. In every case, the triggering decision rests entirely with the federal government. Only if the government decides to act in a certain manner will the compensation provisions be triggered.
- Q: Will Dr. Pearse's proposals generate windfall gains to those who are compensated?
A: No. Those eligible for compensation will be entitled only to the fair market value of the legal rights that are impaired by a government decision. That value will be determined through the application of well-established valuation principles.
- Q: Will Dr. Pearse's proposals enable those eligible for compensation to reject simple, co-operative solutions to hold out for an entire buy out of their property?
A: No. If a person who might be eligible for compensation rejects a simple solution (eg fencing a small area of property or delaying activity for a short period of time) and that solution is ultimately implemented unilaterally by government, the only compensation payable will be the fair market value of the impairment caused by the government decision (eg the fence or the short delay), not the entire value of the property or other legal right.

Bill C-5, the Species at Risk Act (SARA): Issues Relating to COFI's Key Areas of Change

Q: Isn't Dr. Pearce's proposal to compensate resource tenure holders inconsistent with general legal principles?

A: No. In fact, not to compensate would be inconsistent with such principles. Resource tenure holders have contracts with the government. These contracts give those resource tenure holders legal rights and impose on them legal obligations. If the government takes a decision to unilaterally take away those rights, that's the same as breaking a contractual promise. The law says that when one party to a contract breaks a contractual promise, the other party is entitled to damages. Compensation for resource tenure holders under SARA would be a similar concept.

Q: But in most cases, the provincial governments hold the contracts, not the federal government, so why should the federal government have to pay?

A: As it is the federal government, using its legislative powers, that is stepping in to impair the resource tenure holders rights, it makes sense that it would be responsible for the compensation.

Q: Shouldn't the provinces be required to pay, since they granted the rights in the first place?

A: If a provincial government was taking action that impaired a person's rights, that government would be responsible under general legal principles. However, under SARA, it is the federal government that is taking the action, and it must take the responsibility for its own actions.

Nevertheless, SARA contemplates co-operative arrangements between the federal and provincial / territorial governments. Just as these governments enter into cost sharing arrangements for everything from transportation infrastructure to health care, it makes sense that they enter into arrangements to share the costs of species protection and recovery, including related compensation costs.

Q: Isn't it true that governments can impair the legal rights of Canadians and Canadian businesses without having any responsibility to compensate the affected person or business?

A: The law in Canada is clear: as a first principle, the courts will always presume that government did not intend to impair the rights of its citizens or businesses without paying compensation. However, if the government passes special legislation making it clear that it wishes to harm a person's rights and not compensate, the traditional view has been that the courts will recognize the supremacy of the government to do so. But, this traditional view has been questioned in the context of the federal government's legislated attempt to repudiate the Pearson airport contracts without compensation (see Professor Patrick J. Monahan, Osgoode Hall Law School, 1996. *Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government*).

Q: Assuming the federal government accepts the principle that compensation should be paid, should the word "may" in s.64 be changed to "must"?

A: Yes. All compensation language, including the federal government's own *Expropriation Act* (s. 25), uses the word "must" (or "shall") to clearly indicate the government is obligated to compensate affected Canadians. If the word "may" is used, that means, under the government's own *Interpretation Act* (s. 11), that there is no obligation -- it is a matter of discretion that rests with the government, entitling the government to pay some people but not others. However, using the word "must" does not force the government to compensate every person for everything. Criteria, established in legislation, must be met, but if those criteria are met, then Canadians who meet them are assured of compensation.

Bill C-5, the Species at Risk Act (SARA): Issues Relating to COFI's Key Areas of Change

- Q: Would it be appropriate for the word "may" to stay in the Act, then simply specify the "must" in the regulations on compensation that are to follow?
- A: No. In both common law and statute, including the federal *Interpretation Act* (s. 11), "must" (or "shall") and "may" have two distinct and inconsistent meanings. The former requires mandatory action, the latter provides for discretion. Providing one approach in the Act and the other in the regulation creates a conflict between the enabling statute and its regulations. In this case, the statute indicates the matter is discretionary while the regulation indicates it is mandatory. In cases of conflict between "regulatory provisions ...[and] their own enabling legislation...the statutory provision prevails." (*Dreidger on the Construction of Statutes*. 1994. p.185). Thus, while a court would attempt to reconcile the conflict between "may" in the Act and "must" in the regulation, the decision may very well be that the discretion prevails over the mandatory regulation. If the government has agreed in principle that compensation should be paid in specified circumstances, then, to avoid potential conflict this principle should be reflected in the statute.

Questions & Answers about Exemptions and Transition

- Q: Is the federal government constitutionally prevented from providing exemptions or transition under SARA for provincially authorized activities?
- A: No. Assuming the federal government has the legislative power to affect these activities (which the government asserts it has), it must also have the power to provide exemptions and transition for the effects created by its legislation. Put another way, the provincial governments have no legislative jurisdiction to provide exemptions or transition under SARA, even for provincially authorized activity. Thus, if the federal government does not provide for the transition and exemptions, they will not be available. As such exemptions and transition are largely missing from SARA, the federal government has not given itself the power it needs to allow much of the ordinary land use in Canada to benefit from transition under the Bill, or to receive an exemption when the government considers it appropriate.

For further information:

**Council of Forest Industries
Two Bentall Centre
1200—555 Burrard Street
PO Box 276
Vancouver, British Columbia
V7X 1S7**

**Tel: 604-684-0211
Fax: 604-687-4930
E-mail: info@cofi.org
Web: www.cofi.org**