often long after the event has occurred. As such, Canada, which bears a significant global responsibility associated with the vast expanse of marine shoreline within its jurisdiction, should be actively looking toward undertaking a proactive ecosystem-based management plan for *Cetaceans* within its waters, and not simply reacting to issues that could have been prevented with forethought and planning.

IV. *SPECIES AT RISK ACT*

(a) Introduction

The *Species at Risk Act*, commonly known by the acronym *SARA* came into force between December 12, 2002, and June 1, 2004.[55] The Act was created to fulfill part of Canada's commitment as a signatory to the United Nations *Convention on Biological Diversity* signed at the United Nations Conference on the Environment and Development (UNCED) in Rio de Janeiro, Brazil, in June 1992.[56] The purposes of the *Species at Risk Act* are described in s. 6:

> 6. 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.[57]

The Act attempts to accomplish these goals through a three-pronged approach of coordination of government infrastructure, species assessment and sanctions for offences.[58] It is important to keep in mind that the *Species at Risk Act* applies only with respect to matters falling within federal constitutional jurisdiction. However, there is little question that the federal government has constitutional jurisdiction, and hence the *Species at Risk Act* applies, to species at risk inhabiting aquatic environments[59] wherever they occur.[60]

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[55] Section 141.1 came into force on assent on December 12, 2002; ss. 1,134-136 and 138-141 came into force on March 24, 2003; ss. 2-31, 37-56, 62, 65-76, 78-84, 120-133 and 137 came into force on June 5, 2003; ss. 32-36, 57-61, 63, 64, 77 and 85-119 came into force on June 1, 2004.

[56] The Convention was a focal policy initiative of the Chretien Liberal government of the day. As a consequence, the Canadian delegation was actively involved in the negotiations, the Prime Minister personally signed the Convention at UNCED and Canada became the first industrialized country to ratify the Convention. The Convention, which has 150 signatories, came into force on December 29, 1993, was signed by Canada on June 11, 1992 and ratified on December 4, 1992.

[57] *Supra* note 10, at s. 6.

[58] This 3 part approach is set out in a number of Government of Canada websites and documents. See for example Environment and Climate Change Canada "Species at Risk Act", <https://www.ec.gc.ca/alef-ewe/default.asp?lang=en&n=ED2FFC37-1>.

[59] Section 91(12) of the *Constitution Act, 1867* provides that the Parliament of Canada has the exclusive authority to make laws with respect to "...Sea Coast and Inland Fisheries". This includes the power to protect all marine and freshwater habitat required to protect

The primary protection offered to any species to which the *Species at Risk Act* applies is found in s. 32(1) of the Act, which provides:

> 32(1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.[61]

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the fisheries resource. It is generally accepted that provincial constitutional boundaries include all land inland from the ordinary low tidewater mark and federal boundaries extend from the ordinary low watermark seaward to the 200 nautical mile limit. There is also a strong argument that the *Species at Risk Act* receives federal Constitutional authority with respect to marine-based species by virtue of the federal residual power over "Peace Order and Good Government" set out in the preamble to s 91 of the *Constitution Act, 1867* by virtue of either the "gap" or "national concern" branches of the Peace, Order and Good Government (P.O.G.G.) power. See PW Hogg, *Constitutional Law of Canada*, Third Edition (1992) at 435-452. See also *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (S.C.C.) wherein the Supreme Court of Canada upheld the constitutional jurisdiction of the federal Government to enact the *Ocean Dumping Control Act* on the basis that the P.O.G.G. power provided the federal Government with constitutional jurisdiction over matters of national concern, and specifically, marine pollution. By logical extension this same federal jurisdiction should apply to marine water pollution which "kills" or "harms" marine species such as *Cetaceans* listed under Schedule 1 of the *Species at Risk Act*, contrary to the prohibitions set out in s 32(1) of the Act. However, to date the *Species at Risk Act* has never been used as an enforcement mechanism in marine pollution cases.

[60] Strangely overlooked in the legal analysis and commentary surrounding the *Species at Risk Act* are the comments of LeDain J. on behalf of the majority of the Supreme Court of Canada in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (S.C.C.) at 432:

> For a matter to qualify as a matter of national concern, . . .it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is irreconcilable with the fundamental distribution of legislative power under the Constitution.
>
> In finding that matters of marine pollution meet this test, LeDain (at 436) stated that ". . . marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole" and (at 434) that "It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment". These comments lead to the very important question of whether the interrelatedness of the intra-provincial and extra-provincial aspects of the *Species at Risk Act* also requires a single or uniform legislative treatment? Put another way, is the issue of the protection of species at risk across Canada of sufficient national concern to require a uniform approach across the Country, and if so, could the federal jurisdiction under the *Species at Risk Act* be more expansive than currently accepted today?

[61] Section 97(1) of the Act makes it an offence to violate s. 32(1) of the Act:

> 97(1) Every person commits an offence who
>
> (a) Contravenes subsection 32(1). . ..

Penalties upon indictment or summary conviction for such an offence are set out in s. 97(1.1) of the legislation:

> 97(1.1) Every person who commits an offence under subsection (1) is liable
>
> (a) on conviction on indictment,

There are several key issues when considering the enforcement provisions found in s. 32(1) of the *Species at Risk Act* to protect *Cetaceans*. Each of these issues is considered below.

(b) Does the *Cetacean* Species/Population Fall Within the Jurisdiction of the Act?

Unlike the *Marine Mammal Regulations*, the *Species at Risk Act* does not apply to all *Cetaceans*. Thus, the first key issue when contemplating using s. 32 protections under the Act is to determine whether the species/population of *Cetacean* under consideration falls within the jurisdiction of the legislation. The Government of Canada maintains a list of all plant and animal species/populations federally recognized as being of extirpated, endangered, threatened or special concern in Canada under Schedule 1 of the *Species at Risk Act*, also known as the "List of Wildlife Species at Risk".[62] There are currently 19 species/populations of *Cetaceans* listed under the 4 parts of Schedule 1 of the Act:

- *Part 1—Extirpated Species*
  - Grey Whale (*Eschrichtius robustus*) Atlantic population
- *Part 2 - Endangered Species*
  - Blue Whale (*Balaenoptera musculus*) Atlantic population
  - Blue Whale (*Balaenoptera musculus*) Pacific population
  - Killer Whale (*Orcinus orca*) Northeast Pacific southern resident population
  - North Atlantic Right Whale (*Eubalaena glacialis*)
  - North Pacific Right Whale (*Eubalaena japonica*)
  - Northern Bottlenose Whale (*Hyperoodon ampullatus*)
  - Sei Whale (*Balaenoptera borealis*) Pacific population
- *Part 3—Threatened Species*
  - Beluga Whale (*Delphinapterus leucas*) St. Lawrence Estuary population
  - Fin Whale (*Balaenoptera physalus*) Pacific population
  - Humpback Whale (*Megaptera novaeangliae*) North Pacific population

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(i) in the case of a corporation, other than a non-profit corporation, to a fine of not more than $1,000,000,

(ii) in the case of a non-profit corporation, to a fine of not more than $250,000, and

(iii) in the case of any other person, to a fine of not more than $250,000 or to imprisonment for a term of not more than five years, or to both; or

(b) on summary conviction,

(i) in the case of a corporation, other than a non-profit corporation, to a fine of not more than $300,000,

(ii) in the case of a non-profit corporation, to a fine of not more than $50,000, and

(iii) in the case of any other person, to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both.

[62] For a regularly updated listing of all species at risk in Canada see the Species at Risk Public Registry at <http://www.registrelep-sararegistry.gc.ca/species>.

- Killer Whale (*Orcinus orca*) Northeast Pacific transient population
- Killer Whale (*Orcinus orca*) Northeast Pacific northern resident population
- Killer Whale (*Orcinus orca*) Northeast Pacific offshore population

- *Part 4 — Special Concern Species*
  - Harbour Porpoise (*Phocoena phocoena*) Pacific Ocean population
  - Bowhead Whale (*Balaena mysticetus*) Bering-Chukchi-Beaufort population
  - Fin Whale (*Balaenoptera physalus*) Atlantic population
  - Grey Whale (*Eschrichtius robustus*) Eastern North Pacific population
  - Sowerby's Beaked Whale (*Mesoplodon bidens*)

From a practical perspective, this means that regulatory enforcement protocols should require enforcement officers to consult with a *Cetacean* biologist (and presumably the Crown) early in the investigation to determine whether the species/population of *Cetaceans* which are the focus of a harassment investigation can be identified, and if so whether that species/population falls within the jurisdiction of the *Species at Risk Act*, thereby allowing the investigation to proceed.

It is the stated intention of the *Species at Risk Act* that species listed under Schedule 1 of the Act receive legal protections under the legislation, including the protection of individuals, populations, and their habitat from harm. With respect to the issue of habitat protection, s. 58(1) of the Act states:

> 58(1) Subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species or of any listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada — if
>
> (a) (the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;
>
> (b) the listed species is an aquatic species; or
>
> (c) the listed species is a species of migratory birds protected by the Migratory Birds Convention Act, 1994.

The addition of species to Schedule 1 is performed annually by the Minister of the Environment, based on formal assessment recommendations made by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC),[63] described by the Government of Canada as ". . .a committee of experts that assesses and designates which wildlife species are in some danger of disappearing from Canada."[64] A listing on Schedule 1 of the Act mandates the formation of a species recovery team and recovery strategy to identify ". . .what needs to be

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[63] Committee on the Status of Endangered Wildlife in Canada, Government of Canada, <www.cosewic.gc.ca/eng/sct5/index_e.cfm>. See for additional information, Government of Canada, "COSEWIC Assessment Process, Categories and Guidelines" <www.cosewic.gc.ca/pdf/Assessment_process_and_criteria_e.pdf>.

done to arrest or reverse the decline of a species".[65] Unfortunately, there is a developing body of evidence that indicates that the *Species At Risk Act* is not achieving its stated goals. For example, a 2014 science policy study concluded:

> Contrary to the intent of endangered species legislation in Canada, the probability of a species improving in status did not increase with the number of generations since initial listing under SARA. Moreover, species had a greater probability of deteriorating in status with the number of generations since listing. . .. In contrast, species recovery in the United States was strongly correlated with the number of years of protection under the Endangered Species Act, indicating that endangered species legislation can be effective. These results suggest a potential failure of Canadian legislation, its subsequent implementation, or both.[66]

This criticism is supported by the 2013 findings of the Auditor General of Canada, which conducted an audit of the implementation of the *Species at Risk Act* with the following parameters:

> The audit focused on all species declared at risk for which a recovery strategy, action plan, or management plan was due as of 31 March 2013. For each of these species at risk, the audit determined if the necessary recovery strategies, action plans, and management plans were established in accordance with the requirements of the Species at Risk Act. We did not examine the adequacy or implementation of the strategies and plans for the recovery of species at risk.[67]

The Auditor General concluded as follows with respect to federal compliance with the *Species at Risk Act*:

> 6.35 Environment Canada, Fisheries and Oceans Canada, and Parks Canada have not met their legal requirements for establishing recovery strategies, action plans, and management plans under the Species at Risk Act. While organizations have made varying degrees of progress

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[64] Government of Canada, "About COSEWIC" <www.cosewic.gc.ca/eng/sct6/index_e.cfm>.

[65] See generally, Environment Canada, *Species at Risk Act Recovery Strategy Series* at <http://publications.gc.ca/site/eng/9.505071/publication.html> which provide information regarding recovery strategies for those species for which a strategy has been developed. For recovery strategies for *Cetaceans*, see Fisheries and Oceans Canada, "Aquatic Species at Risk, Recovery Planning" at <www.dfo-mpo.gc.ca/species-especes/recovery-retablissement-eng.htm>.

[66] B Favaro, DC Claar, CH Fox, C Freshwater, JJ Holden & A Roberts et al, "Trends in Extinction Risk for Imperiled Species in Canada" (2014) PLoS ONE 9(11): e113118. Doi.10.137/journal.pone.0113118. It is worth noting that authors of this peer reviewed study were based in Memorial University of and the University of Victoria, and that study funding support included *inter alia*, the National Sciences and Engineering Research Council of Canada and the University of Victoria.

[67] Office of the Auditor General of Canada, *2013 Fall Report of the Commissioner of the Environment and Sustainable Development*, "Chapter 6—Recovery Planning for Species at Risk".

> since our 2008 audit in completing the recovery strategies they are responsible for. 146 recovery strategies remain to be completed as of 31 March 2013. Over 90 percent of the action plans required to guide and direct the implementation of these recovery strategies have yet to be completed. The required management plans for species of special concern were not completed in 42 percent of cases.[68]

The Auditor General went on to paint a rather bleak picture for the outlook for recovery of species at risk in Canada in light of the lack of Government compliance with the Act:

> 6.38 Given that many of the required recovery strategies, action plans, and management plans remain to be completed, the overall goals, objectives, and necessary actions have not been established for the recovery of species at risk. While the lack of strategies and plans do not preclude recovery activities from taking place, their absence leaves responsible organizations without the tools for identifying, directing, and coordinating recovery efforts, or benchmarks against which to monitor and report on progress.[69]

The proposition that there have been significant problems with the implementation of the *Species at Risk Act* is also receiving considerable support from Canadian courts in the context of *Cetaceans*. In 2012, in *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)* the Federal Court of Appeal considered an appeal from a trial decision[70] which held that the Minister of Fisheries and Oceans had failed to make an order under ss. 58(1)(4) of the *Species at Risk Act* protecting the critical habitat of the Northeast Pacific Northern and Southern population of killer whales. The Federal Court of Appeal upheld that part of the trial decision which found that the compulsory critical habitat protection scheme set out in s. 58 of the *Species at Risk Act* could not be substituted with the discretionary fisheries management scheme established under the *Fisheries Act* and it regulations. In reaching this decision a unanimous Court noted:

> [148] This Court should not approve the substitution of the non-discretionary and compulsory critical habitat protection scheme of section 58 of the SARA by the discretionary fisheries management scheme established under the Fisheries Act and its regulations.
> [149] The protection of critical habitat should not be confused with the management of critical habitat. The SARA calls for both the protection of critical habitat under section 58 and for management measures to ensure the recovery of that habitat through action plans and other methods.[71]

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[68] *Ibid.* at para 6.35

[69] *Ibid.* at para 6.38.

[70] 2010 FC 1233 (F.C.) per Russell, J., additional reasons 2011 CarswellNat 1510 (F.C.), reversed in part 2012 CarswellNat 262 (F.C.A.)

[71] *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)*, 2012 FCA 40, (*sub*

Two years later in 2014 this issue of a failure by the Government of Canada to implement the protection of species at risk as legally required by the *Species at Risk Act* was again considered by the Federal Court of Canada in *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*.[72] An application was brought to the Federal Court for an administrative law remedy on the grounds that the federal government had not complied with the mandatory requirements of the *Species at Risk Act* with respect to the development and publication of recovery strategies for 4 species at risk. The basis for the application was summarized by the Court as follows:

> [2] The Minister of Fisheries and Oceans did not comply with the statutory timelines for the preparation and publication of recovery strategies for the White Sturgeon, Nechako River population, . .and the Humpback Whale, North Pacific population. . . . Nor did the Minister of the Environment comply with the statutory timelines for the preparation and publication of recovery strategies for the Marbled Murrelet and the Woodland Caribou, Southern Mountain population.[73]

In its decision, the Federal Court not only found that the Minister of Fisheries and Oceans had failed to comply with the mandatory requirements of the *Species at Risk Act* with respect to the development and implementation of recovery strategies for the 4 species which formed the basis of the application, the Court went on to make the astounding finding that recovery strategies had not been prepared for an additional 167 species protected by the Act. The Court even went so far as to attribute the massive failure to an "enormous systemic problem" within the relevant Federal Government departments:

> [85] It is, moreover, apparent that the delays encountered in these four cases are just the tip of the iceberg. There is clearly an enormous systemic problem within the relevant Ministries, given the respondents' acknowledgment that there remain some 167 species at risk for which recovery strategies have not yet been developed. In this regard it is noteworthy that the Ministers acknowledge that they have not complied with the statutory timelines for the preparation and posting of proposed recovery strategies for any of the other 167 species.[74]

The Court further concluded that ". . .the cause of much of the delay. . .ultimately boils down to a question of resources. . .".[75]

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nom. David Suzuki Foundation v. Canada (Fisheries and Oceans)) [2013] 4 F.C.R. 155 (F.C.A.) at paras. 148-149, per Mainville JA.

[72] *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*, 2014 FC 148 (F.C.).

[73] *Ibid*, at para 2, per Maetavish J.

[74] *Ibid*, at para 85, per Maetavish J.

[75] *Ibid*, at para 83, per Maetavish J. The issue of extensive cutbacks to Federal Government resources allocated to protecting *Cetaceans* in Canada has come under increasing criticism from science policy critics during the past decade. See for example C Harnett,

Finally, when considering the question of whether a *Cetacean* species/population falls within the jurisdiction of the Act, it is important to note that the *Species at Risk Act* has received considerable criticism in recent years from the scientific community with respect to an apparent failure by the Government of Canada to list and offer the protections of the Act to a large and growing number of species (over which the Act has jurisdiction) which are recommended by COSEWIC. One recent science policy study summarized the perceived Federal Government failure as follows:

> . . .the implementation of SARA has fallen short at several steps, hampering recovery of species at risk in Canada. First, the listing of any species, not just marine, has completely stalled. Since 2011, none of the new recommendations for listing received by the Minister of the Environment from COSEWIC have been accepted by the government (with the exception of three bat species that were listed following a request by the Nova Scotia government for emergency assessment). The 67 newly evaluated species from COSEWIC join a total of 154 species waiting for listing or relisting, some of them waiting since 2005 (the average waiting time now stretches over 1500 days). Second, even after species listing, recovery strategies are often not completed within the time frame required by law. Third, a full identification of critical habitat is often not provided for listed species. Finally, in the thirteen years since SARA was passed, Canada has only released 13 of the required action plans, none of them being for a marine fish or marine mammal species.[76]

The study looked at possible sources of this failure and offered the following conclusions:

> . Previous studies have identified biases, limitations, and a general lack of implementation associated with at-risk species legislation in Canada . . . . For instance, harvested species and those found in northern territories are less likely to be listed under SARA, as are those threatened by biological resource use, including those that are unintentionally harvested. . . .Moreover, COSEWIC itself has been criticized for its assessment criteria and apparent biases. For example, species with low information availability tend to receive less severe assessments than would be suggested under the precautionary principle.[77]

"Killer Whale Expert Out of Work as Ottawa Cuts Ocean-Pollution Monitoring Positions", *National Post*, May 20, 2012. See also J Sisler, "Research Cutbacks by Government Alarm Scientists: Federal Government Has Dismissed More Than 2,000 Scientists in Past 5 Years", *CBC News*, January 10, 2014.

[76] M Bailey et al, "Canada at a Crossroad: The Imperative for Realigning Ocean Policy with Ocean Science", *International Journal of Ocean Affairs*, Marine Policy 63 (2016) 53-60.

[77] *Ibid*. Similarly, concern has been expressed in recent years regarding species for which protections have been downgraded. For example, in 2014 the Federal Government announced that it was downgrading the level of protection afforded to the North Pacific

Taken together, the evidence of problems with the identification and listing of species at risk combined with the widespread failure of the Federal Government to offer recovery plans, action plans and management plans as well as a general reluctance to make firm commitments with respect to the identification of critical species habitat has significantly limited the effectiveness of the *Species at Risk Act*.

(c) Determining the Regulatory Standard Established by the Legislation

A key issue when considering the use of s. 32(1) of the *Species at Risk Act* as a legal tool for the protection of *Cetaceans* is to answer the definitional question of what regulatory standard is established by the legislation.[78] The Act sets out a choice of five standards, depending upon whether a *Cetacean* has been "killed", "harmed", "harassed", "captured" or "taken" by a suspected offender. The terms "killed", "captured" or "taken" generally do not created definitional problems in this context. The terms "harmed" and "harassed" are often more problematic. To date the Act does not appear to have been used in Canada as a regulatory enforcement mechanism in any fact situation where it has been alleged that a *Cetacean* has been killed, harmed, captured or taken. As such, this examination will primarily focus on the issue of "harassment", to which the Act has been employed.[79]

(i) Normative vs. Quantitative Standard of Regulatory Protection

Consistent with the *Marine Mammal Regulations*, the *Species at Risk Act* adopts a normative approach to regulation of undesirable human behaviors involving *Cetaceans* rather than prohibiting quantitatively defined activities. Also consistent with the *Marine Mammal Regulations*, the *Species at Risk Act* does not define the key term "harass" nor does it provide examples of activities which may constitute harassment. Rather, the legislation is content to leave definitional issues involving the regulatory standard of "harassment" in the hands of the courts to address on a case-by-case basis. As such, in attempting to address the definitional issues that have arisen when considering the term "harass" the courts have tended to rely upon the "broad and general approach" advocated by the Supreme Court of Canada in *R. v. Canadian Pacific Ltd.*[80] when interpreting environmental/natural resource protection legislation (and recommended above when applying s. 7 of the *Marine Mammal Regulations*) should also be used when interpreting the regulatory standards established under s. 32(1) of the *Species at Risk Act*.

Humpback Whale from "threatened" to a "species of concern". This reclassification meant that it was no longer protected by the prohibitions set out in s. 32 of the Act and its critical habitat would also no longer be legally protected.

78 This is consistent with the approach to be taken with s. 7 of the *Marine Mammal Regulations*, as per discussion *supra*.

79 *R. v. Peterson* and *R. v. Smith*. See discussion *supra*.

80 (1995), 99 C.C.C. (3d) 97 (S.C.C.).

(ii) Defining the Standard "Harass"

As with the normative standard of "disturb" found in the *Marine Mammal Regulations*, consideration of the regulatory standard of "harass" found in s. 32 of the *Species at Risk Act* leads down a definitional rabbit hole wherein a prescribed legal standard which requires scientific evidence to meet the standard has no direct nexus to science or to the scientific community. Put another way, there appears to be a definitional disconnect between the stated standard of "harassment" upon which the regulatory scheme depends, and the scientific standard of "interference with normal life processes" which the scientific community has indicated that it understands and relies upon. As a result, the normative regulatory protection currently embodied within s. 32 of the *Species at Risk Act* may suffer from a lack of consistency and predictability in its application. Specifically, in attempting to resolve the larger jurisprudential issue of legally defining the term "harass" in the context of *Cetaceans*, and determining whether the actions of an accused fit within that definition, the legal system has failed to recognize that in many fact situations "harassment" of *Cetaceans* is not the primary mischief, and hence is not the real legal issue. If the object of the regulatory scheme is to protect *Cetaceans* from harm, and if the scientific community is being depended upon to advise the legal system if and in what situations that harm occurs – when the normal life processes of *Cetaceans* harmfully interfered with – then the prohibition must once again be redefined as one of "interference with the normal life processes" of *Cetaceans* and not the rather vague notion of "harassment".[81]

Prior to the enactment of the *Species at Risk Act* there was some limited jurisprudence wherein courts attempted to define the term "harass" in the context of the protection of *Cetaceans*, with mixed results. In *R. v. Richards*[82] the British Columbia Provincial Court considered a charge under the *Cetacean Protection Regulations*,[83] a precursor regulation to the current *Marine Mammal Regulations* enacted under the *Fisheries Act*. Section 4 of that *Regulation* prohibited the hunting of *Cetaceans* without a licence. The *Regulation* defined the word "hunt" to include "...harass cetaceans in any manner". In reaching its decision the Court adopted the following definition of the term "harass" in the context of killer whales:

> I interpret the word "harass" to mean any act or series of acts which tends to disturb, alarm or molest whales.[84]

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[81] This in turn opens up the important question as to if, and if so, how the legal standard of "disturbance" found in s. 7 of the *Marine Mammal Regulations* may be distinguished from the legal standard of "harassment" set out in s 32 of the *Species at Risk Act*?

[82] *R. v. Richards* (August 23, 1991), Doc. Por: Hardy 7290 (B.C. Prov. Ct.).

[83] (June 17, 1982), Order-in-Council PC 1982-1790.

[84] *Supra* note 88, at para. 8, per Bracken J.

Again, in *R. v. Andrews* the British Columbia Supreme Court did not draw a distinction between the terms "disturb" and "harass" under the *Marine Mammal Regulations*:

> [22] I find that the purpose of s. 7 of the *Marine Mammal Regulations*, contained within legislation designed to provide protection to whales from unauthorized injury, capture or harassment, is to regulate the conduct of persons who may pose a threat to the regular behaviour of marine mammals.[85]

In *Richards*, the Court concluded that chasing a killer whale with a motorized boat constituted harassment:

> It makes common sense to say that chasing or teasing any wild animal is to harass it.[86]

That Court also concluded that activities which create the potential for killer whales to be injured by a propeller strike constitutes harassment:

> It makes common sense to say that exposing such animals to machinery which may injure the animal if it comes into contact with it should be prohibited.[87]

Finally, in *Richards*, the Court concluded that harassment occurs in a variety of circumstances where a response is not necessarily observed in the whales:

> It makes common sense to prevent people from interfering with the normal activities of feeding and social interaction of such animals. There are no doubt other examples of activities that do not require a response or reaction from the whales to convince us that such activities constitute harassment as I have defined that term. It is for these reasons that I do not believe evidence of a reaction from the whales is necessary to prove an offence under the Regulations.[88]

In considering the interpretation to be given to the term "harass" in *Richards* the Court expressly discounted any definition of the term which included the requirement of multiple disturbances:

> Defence counsel, Mr. Mancell, provided me with a series of dictionary definitions of the word "harass". One of the characteristics of those definitions is that an element of repetition is included. For example, Webster's Dictionary (1974) defines the word as "...to attack repeatedly; to worry; to trouble." I do not believe that the intent of the Regulations or the plain meaning of the word requires repeated actions to constitute harassment. So long as the activity in question is such that it tends to disturb, alarm or molest, it is my view sufficient to offend the Regulations even if it is a single act.[89]

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85 *R. v. Andrews*, 2000 CarswellBC 3032 (S.C.).

86 *Ibid*, at para. 9, per Bracken J.

87 *Ibid*, at para. 9, per Bracken J.

88 *Ibid*, at para. 9, per Bracken J.

89 *Ibid*, at paras. 8-9, per Bracken J.

The issue of the definition to be applied to the term "harass" in the context of the *Species at Risk Act* has received very limited consideration by the courts. In fact, in the 14 years that the Act has been in existence, it appears that only 8 species have benefitted from the Act's protection provisions enforced through the trial process.[90] To date the Act has been used to enforce protections involving a small eclectic group of wildlife species across Canada including:

- Part 2—Endangered Species
  - Banff Springs Snail (*Physella johnsoni*)[91]
  - Piping Plover (*Charadrius melodus melodus*)[92]
  - Spotted Turtle (*Clemmys guttata*)[93]
  - Western Yellow-breasted Chat (*Icteria virens auricollis*)[94]
- Part 3—Threatened Species
  - Canada Warbler (*Cardelina Canadensis*)[95]
  - Western Rattlesnake (*Crotalus oreganus*)[96]

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[90] For a discussion on this issue see *Ecojustice*, "Failure to Protect: Grading Canada's Species at Risk Laws 2012".

[91] *R v Townsend* (Unreported). Conviction under s 58(1)(b) of the *Species at Risk Act* for destroying critical habitat of a listed endangered species as a result of swimming in the Cave and Basin National Historic Site of Canada near Banff, Alberta. Court assessed a penalty of $2,500.

[92] *R v Mallet* (Unreported). Conviction under s 32(1) of the *Species at Risk Act* for harassing Piping Plover nesting sites as a result of operating an all-terrain vehicle on Plover Ground North Beach in Gloucester County, New Brunswick. Court assessed a penalty of $500.

[93] *R. v. So* (September 10, 2008), Unreported; *R. v. Chung* (August 5, 2009), Unreported; *R. v. Nahdee* (May 6, 2010), Unreported; 3 separate judicial processes relating to one event involving capture of a Spotted Turtle and 26 Blanding's Turtles. Court assessed a penalty of $10,000 and 3 years' probation; Chung a penalty of 9 months in jail and 3 years' probation and Nahdee a penalty of 4 months imprisonment and 3 years' probation.

[94] *R. v. Waite and Calderwood* (February 16, 2009), Unreported (B.C. Prov. Ct.) Conviction under s 32(1) of the *Species at Risk Act* relating to commercial photographers who pleaded guilty to charges stemming from damage of a residence belonging to the Western Yellow-breasted Chat and the removal of a nearby rosebush for the purpose of photographing the adult birds while they fed their young. Court assessed a penalty of $4,000 to Waite and $2,000 to Calderwood plus 1 year probation for each offender. They were also prohibited from profiting from the photographs.

[95] *R. v. Canaport LNG Limited Partnership* (December 15, 2015), Unreported (N.B. Prov. Ct.) Conviction under s 32(1) of the *Species at Risk Act* relating to the death of a large number of migratory birds which died as a result of direct or indirect contact with burning natural gas from a flare stack operated at the Canaport LNG facility. During a period of fog and low cloud cover, a large, mixed flock of nocturnal migratory birds was apparently attracted to the natural gas flare at the Canaport facility and died as a result of trauma following exposure to the very high temperatures emanating from the flare stack. Court assessed a penalty of a $100,000. An additional charge and penalties under s 5.1(1) of the *Migratory Birds Convention Act* was assessed a penalty of $650,000 plus a creative sentence relating to the mitigation of mortality of migrating birds in the Bay of Fundy region.

- Blanding's Turtles (*Emydoidea blandingii*)[97] Great Lakes/St. Lawrence population
- Killer Whales (*Orcinus orca*) Northeast Pacific offshore population[98]

The courts have considered 2 cases involving allegations of harassment of *Cetaceans* under the *Species at Risk Act*. The issue was considered for the first time in *R. v. Peterson*.[99] In that case, a private pleasure craft operator was charged with harassing a species at risk under s. 32 of the Act on the basis of activities which included repeated close approaches to whales while the vessel was under power. In *Peterson*, the Crown's *Cetacean* expert witness gave evidence that as a *Cetacean* biologist he was not aware of any scientific definition of the term "harassment" and went on to define the term as a "sequential set of repeated disturbance events":

> 7. Regarding harassment in the context of the evidence in this case, Dr. Ford defined it as a "sequential set of repeated disturbance events", there not being, to his knowledge, any scientific definition of harassment.[100]

The Court considered this approach to defining the term, but modified it somewhat in consideration of the definition "signle disturbance" preferred by the Court in *R. v. Richards*:

> 9. The last submission relates to harassment. Dr. Ford's definition of the word, quoted in para. 7 above, is consistent with dictionary definitions. I will add, however, that context is important, specifically the legislated intention to protect killer whales. The decision of this court in R. v. Richards [1991] BCPC Port Hardy Registry No. 7290 is persuasive. It was a case of a Zodiac "badgering" whales. The court interpreted "harass" to mean "any act or series of acts which tends to disturb, alarm or molest whales". . .[101]

In *R. v. Smith*, the Court again considered expert evidence with respect to a definition for the term "harass" and opted for the "multiple disturbance" definition offered by the Crown's scientific expert:

> The distinction between disturbance and harassment is a difficult one I think and the definitions are by no means clear for a variety of contexts

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[96] *R. v. Gruse* (October 13, 2011), Unreported (Alta. Prov. Ct.) Conviction under s 32(1) of the *Species at Risk Act* pertaining to the illegal importation of the Western Rattlesnake into Canada. Court assessed a penalty of $10,000 plus $1,400 toward the care of the seized animals.

[97] See *supra* note 93.

[98] *R. v. Peterson* (August 7, 2012), Campbell River Registry File No. 35577 (B.C. Prov. Ct.) and *R. v. Smith* (January 30, 2014), Campbell River Registry File No. 35578 (B.C. Prov. Ct.).

[99] *R. v. Peterson* (August 7, 2012), Campbell River Registry File No. 35577 (B.C. Prov. Ct.).

[100] *R. v. Peterson* at para. 7, per Saunderson J.

[101] *Ibid.* at para. 9, per Saunderson J.

> and the behavioural responses to – to vessel activity by killer whales is certainly one of those, but to me disturbance involves–could be or would refer mostly to single events, one or two. Harassment is something that I believe involves repetitions of a disturbance effect, persistence of that disturbing influence, and at a certain point where it could lead to more significant changes in the animal's behaviour state than a single event would. This would constitute a harassing influence.[102]

In *Smith* the Court convicted the accused on a charge of "disturbance" of a marine mammal under s. 5(2) of the *Marine Mammal Regulations*, but acquitted the accused on a charge of "harassing" a species at risk under s. 32 of the *Species at Risk Act* without providing written reasons.

Again, as with the standard of "disturbance" found in s. 7 of the *Marine Mammal Regulations*, in the *Species at Risk Act* Parliament has established a normative standard to protect a limited number of *Cetaceans* using the rather ambiguous standard of "harassment". As with the standard of "disturbance" discussed earlier, expert scientific evidence given during recent enforcement proceedings (*Peterson* and *Smith*) indicates that the scientific community may be more comfortable providing expert scientific evidence with respect to a standard with a direct nexus to science, such as "interference with a *Cetacean's* normal life processes" rather than the vague and scientifically unrecognized notion of "harassment".

Replacing the normative standard of "harassment" with terminology more closely associated with the true mischief to which the standard is aimed, and which has direct ties with the scientific evidence upon which legal interpretation depends, will significantly improve the value of the protections afforded to *Cetaceans* across a spectrum of risks including marine pollution, underwater seismic testing and commercial shipping traffic, as well as the *eco*-tourism and pleasure vessel issues considered here.

(d) Concluding Observations

The preceding discussion indicates that the *Species at Risk Act* provides a limited degree of protection for some *Cetaceans* in Canadian waters. The primary strength of this regulatory scheme lies in its legislative intention to provide special "customized" protections for those members of the Order *Cetacea* which are most vulnerable to disappearance. While this legislative scheme falls well short of providing a broad ecosystem-based management scheme for Canada's *Cetacean* populations, in theory it does contemplate assessment by a committee of experts empowered to identify those species of *Cetaceans* which are in some danger of disappearing from Canada. Once identified and listed in a schedule to the Act, the legislation mandates the formation of a species recovery team and recovery strategy to identify what needs to be done to arrest or reverse the decline of a species so listed. Unfortunately, the history of the *Species at Risk Act* to date

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[102] *R. v. Smith* Trial Transcript page 40 lines 25–38.

has been one where practice has not come even remotely close to meeting the expectations generated by theory. Science policy analysts, the courts and even the Auditor General of Canada are unanimous in their conclusions that there have been significant problems with the implementation of the *Species at Risk Act*. A number of these problems relate specifically to providing protections to *Cetaceans*. Most notably, legislatively mandated action plans were not completed within a reasonable period of time, and, consequently, recovery strategies were not implemented as required. Equally concerning, Federal Government orders protecting critical *Cetacean* habitat were not made. The reasons for these shortcomings are open to speculation. Certainly the problem of under-resourcing is high on the list. So too is the suspicion that the Stephen Harper Conservative Government which came to power in February, 2006 was not enthusiastic to receive the newly minted *Species at Risk Act* from the departing Liberal Government and did not actively support it. Regardless of the reasons, there is a general consensus that to date the legislation has a disappointing track record for *Cetaceans* as well as many other vulnerable species in Canada.

As with s. 7 of the *Marine Mammal Regulations*, another strength of this legislative scheme is its reliance upon normative standards, a legal tool which offers a significant degree of flexibility when protecting *Cetaceans*. By offering protections to *Cetaceans* which fall within the ambit of the Act in terms of prohibited undesirable outcomes rather than via prohibited activities which may or may not prevent these outcomes, and by facilitating flexibility in sentencing, with important implications for both specific and general deterrence, enforcement personnel and the courts are able to address the unique factual nuances of each case. Unfortunately, as with the *Marine Mammal Regulations*, the strength associated with the use of normative standards is significantly weakened by the apparent disconnect which exists between the current standard of "harassment" upon which the regulatory scheme depends and the scientific standard of "interference with normal life processes" which the scientific community has indicated that it understands and relies upon. Consequently, the normative regulatory protections found within s. 32 of the *Species at Risk Act* are subject to a lack of consistency and predictability in their application. In attempting to resolve the larger jurisprudential issue of legally defining the term "harass" and evaluating whether the actions of a party charged with an offence fit within the definition of that term, the legal system has failed to recognize that in many fact situations "harassment" is not the central issue. Working on the reasonable assumption that the object of the regulatory scheme is to protect *Cetaceans* from harm, and if reliance is placed upon the scientific community to advise the legal system (through expert evidence) if and in what situations that harm occurs — when the normal life processes of the *Cetacean* are harmfully interfered with — then the prohibition must be redefined as one of "interference with the normal life processes" of *Cetaceans* and not the rather vague notion of "harassment".

This brings us to the inevitable question as to what really is the difference between the normative standard of "disturbance" set out in s. 7 of the *Marine Mammal Regulations* and the standard of "harassment" found in s. 32 of the *Species at Risk Act*? Clearly these 2 standards are situated within regulatory schemes which occupy different legislative fields, with the *Marine Mammal Regulations* directed toward offering basic protections to all marine mammals (including *Cetaceans*) whereas the *Species at Risk Act* is aimed at providing a specialized suite of protections to a wide variety of specifically identified species within Canada considered in need of special protections based upon their status, which coincidentally includes some (but not all) *Cetaceans*. It is submitted that a review of recent decisions, and in particular the scientific evidence provided in these decisions, indicates that from the perspective of the scientific community tasked with the responsibility of assisting the legal community with respect to defining and applying these legal standards, this may be a situation where there truly is a legal distinction without a scientifically justified difference. As such, it is the responsibility of lawmakers to amend these regulatory schemes to accurately embody within the law the protections that are required to ensure the future of *Cetaceans* in Canada.