



507 Place d'Armes # 1100  
Montréal, Québec  
Canada H2Y 2W8  
TEL 514-842-0748  
FAX 514-842-9983  
[www.dionneschulze.ca](http://www.dionneschulze.ca)

[dschulze@dionneschulze.ca](mailto:dschulze@dionneschulze.ca)

**COMMENTS OF THE INNU OF EKUANITSHIT  
ON THE COMPREHENSIVE STUDY REPORT**

**Labrador - Island Transmission Link Project**  
CEAR No. 10-03-51746

David Schulze  
DIONNE SCHULZE

July 27, 2013



## Preface

These submissions are not to be taken as agreement by the Innu of Ekuanitshit as to the adequacy of their consultation and accommodation with respect to this project, nor with the accuracy of the comprehensive study report (CSR) issued by the Canadian Environmental Assessment Agency (the Agency).

## Introduction

The Woodland caribou has been recognized as a threatened species pursuant to the *Species at Risk Act*, S.C. 2002, c. 29 (SARA), since it came into force in 2003: Sched. 1, Part 3. This means “that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction”: s. 2(1).

Environment Canada’s recovery strategy for Woodland caribou under SARA has specifically recognized that among the “activities that are likely to result in the destruction of critical habitat” is “any activity resulting in the fragmentation of habitat by human,” including “hydroelectric corridors”: *Recovery Strategy for the Woodland Caribou* (*Rangifer tarandus caribou*), *Boreal population, in Canada*, p. 36.

The Government of Canada’s decision on the environmental assessment of the Labrador-Island Transmission Link Project is therefore its opportunity for something to be done to reverse the Woodland caribou’s decline towards extirpation or extinction.

## Protection for the Red Wine Mountain Herd under provincial law

In 2002, the Government of Newfoundland also recognized Woodland caribou as threatened: *Endangered Species List Regulations*, NLR 57/02, Sched. B.

This designation meant that it was “likely to become endangered if nothing is done to reverse the factors limiting its survival,” where being endangered meant it would face imminent extirpation or extinction”: *Endangered Species Act*, SNL 2001, c. E-10.1, s. 7.

In 2004, Newfoundland’s biologists concluded that recovery of the Red Wine Mountain Herd, along with that of the other two sedentary woodland caribou herds in Labrador (the Lac Joseph and Mealy Mountains herds), “is ecologically and technically feasible.”

It added that the herd’s “inherent capacity... to recover is excellent” if challenges posed by hunting, resource development and extraction activities “can be managed or overcome”: I. Schmelzer, et al., *Recovery strategy for three Woodland caribou herds* (*Rangifer tarandus caribou*; *Boreal population*) in *Labrador* (Department of Environment and Conservation, Government of Newfoundland, 2004), pp. v-vi.



Even after the release of the provincial recovery strategy, however, environmental groups noted its shortcomings:

- it contained “no requirements to maintain roadless areas for caribou”: Canadian Parks and Wilderness Society/Sierra Club of Canada, *Uncertain Future: Woodland Caribou and Canada’s Boreal Forest; A report on government action*, May 2006, p. 11;
- it “failed to adequately identify mitigation strategies for future industrial impacts”: p. 17;
- “proposed roads that could affect caribou were not addressed by mitigative strategies”: p. 17.
- “threats to the survival of the species, including any habitat loss, are not adequately addressed (SARA, Section 41 (1))”; and
- “a schedule of studies to identify critical habitat is not provided (SARA, Sec. 41)”: Sierra Club of Canada, *A Review of Labrador’s Draft Recovery Plan for Woodland Caribou*, April 2005, pp. 10-11.

But the intervening years demonstrated that the most serious shortcoming in the provincial Recovery Strategy was inaction. While it provided for “an accompanying Action Plan, to be drafted within the next 2 years,” to “be updated as new information becomes available, and revised every five years until recovery has been achieved” (Schmelzer 2004, p. vi), none has ever been adopted.

More particularly, the promised “process of designating critical habitat” (p. 11) has never been completed. Such a designation would have required the provincial Minister of Environment and Conservation to “release to the public a statement outlining how the habitat will be protected”: *Endangered Species Act*, s. 25.

According to the Agency’s comprehensive study report on this project:

If the Project is approved, Newfoundland and Labrador will require Nalcor to obtain a Section 19 Economic Activity Permit under the provincial *Endangered Species Act*. As part of this permit, Nalcor will be required to prepare and submit to the provincial Minister of Environment and Conservation for approval a Species at Risk Project Impacts Mitigation and Monitoring Plan. Approval of this plan will be a precondition to the issuance to Nalcor of the required Economic Activity Permit under section 19 of the *Endangered Species Act*.

p. 35

The reference is to the following power:



19. (1) The minister may, with the approval of the Lieutenant-Governor in Council, issue a permit to a person to engage in an activity affecting a designated species, the residence of a specimen of a designated species or critical or recovery habitat, where, in the opinion of the minister,

(a) the impact on the designated species is incidental to the carrying out of an activity that is economically beneficial to the province;

(b) there is no reasonable alternative; and

(c) the activity will not prevent the recovery or survival of the designated species.

It is difficult if not impossible to understand on what basis the provincial Minister of the Environment and Conservation could reach a reasonable conclusion under s. 19(c) that this project would not prevent “survival of the designated species,” given that the Minister still has not identified the Red Wine Mountain herd’s critical habitat.

### **Protection under federal law**

In 2012, Environment Canada concluded: “Recovery of all boreal caribou local populations across Canada is technically and biologically feasible.” See: *Recovery Strategy for the Woodland Caribou*, p. vi (emphasis added).

Note that the Minister had previously told the Federal Court that this recovery strategy would be posted by the summer of 2011 and conceded that by then, he had already failed to respect the time limits set out in SARA: *Adam v. Canada (Environment)*, 2011 FC 962, para. 61, 29. In fact, the strategy should have been published by June 5, 2007: SARA, s. 42(2).

According to the federal government, recovery of a species at risk has the following meaning:

#### **2.1 What is Recovery?**

This is a topic of much discussion. Formally:

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

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



Department of Fisheries and Oceans, Habitat Program Services Branch, *Practitioners Guide to the Species at Risk Act (SARA) for Habitat Management Staff – Draft*, March 2006<sup>1</sup>, p. 58 (emphasis added)

The Government of Canada is therefore committed to the “long-term persistence in the wild” of the Red Wine Mountain herd.

When recovery is deemed feasible, *SARA* provides that critical habitat must be identified in the recovery strategy or the action plan. In order to postpone the identification of critical habitat from the recovery strategy to the action plan stage, a schedule of studies must be specified in the strategy to collect the information required: s. 41(1)(c.1).

For the Red Wine Mountain herd, the recovery strategy identified “the geographic boundary within which critical habitat is located”: Figure J-98. However, it explicitly provided that more detailed identification of the critical habitat would be postponed until range plans and action plans are complete: p. vii. In the recovery strategy, Environment Canada has committed to completing “one or more action plans under this recovery strategy by December 31, 2015”: p. 43. It has committed to completing range plans within three to five years, that is, by 2017.

### **The federal government’s duties under *CEAA***

The geographic boundary within which critical habitat of the Red Wine Mountain herd is located, according to the federal Woodland caribou recovery strategy, encompasses the Churchill River between Churchill Falls and Happy Valley – Goose Bay: Figure J-98. This is a significant portion of the project area in Labrador.

The federal recovery plan for Woodland caribou states that in face of “habitat alteration as a result of human land-use activities,” it is “urgent” to “protect key areas for boreal caribou through appropriate habitat management and protection mechanisms (e.g. legislated protected areas, no development zones, mixed use zones, and conservation agreements)”: p. 26.

The responsible authorities (RAs) under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*CEAA*), “must identify the adverse effects of the project on the listed wildlife species and its critical habitat”: *SARA*, s. 79(2).

Then, “if the project is carried out,” the RAs “must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans”: *SARA*, s. 79(2).

---

1

<http://www.dsao.net/Resources/DFO%20fact%20sheets/March%202006%20Practitioner%27s%20Guide%20to%20SARA%20for%20HMP.pdf>



As the federal government has admitted, “under CEAA, in order for the project to proceed, mitigation measures have to be implemented so that the project is not likely to cause significant adverse environmental effects,” but under SARA, mitigation measures “must be taken to avoid or lessen all adverse environmental effects, not only the significant ones”: *Practitioners Guide to the Species at Risk Act (SARA) for Habitat Management Staff – Draft*, p. 58.

In another guide, the federal government has explicitly stated that: “Recovery actions may be undertaken at any point in the process, and should not be delayed until the strategy and action plan have been developed.” See: National Recovery Working Group, *Recovery Handbook; Recovery of Nationally Endangered Wildlife*, 2005-2006 ed., p. 4.

This is in line with the national program for the Recovery of Nationally Endangered Wildlife (RENEW), initially established by the Wildlife Ministers’ Council of Canada in 1988. Among its five national objectives, the second is that: “2. No species will be allowed to become threatened or move from threatened to endangered status.”

Of course, the responsible authorities must also consider the “cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out”: *CEAA*, s. 16(1)(a).

It is precisely this requirement that led the Agency to conclude “that, taking into account cumulative effects, the Project is likely to cause significant adverse environmental effects on the RWMH, even if the Project itself will only minimally contribute to these effects”: *CSR*, p. 40.

We would point out that it is impossible to reconcile this conclusion with the Agency’s conclusion “that the Project is not likely to cause significant adverse environmental effects on the current use of land and resources for traditional purposes by Aboriginal peoples, taking into account the implementation of the mitigation proposed”: *CSR*, p. 53.

The proponent Nalcor has admitted that the Red Wine Mountain herd is in decline (*CSR*, p. 40) and the Agency has concluded that this project is likely to be a crucial factor in accelerating that decline. Given that the caribou hunt is one of the most important current uses of the land and resources for traditional purposes by Aboriginal peoples, it is impossible to understand how the extirpation of an entire herd would be anything but a significant adverse effect on them.

### **The Red Wine Mountain herd and decision-making under CEAA**

Significantly, the provincial Recovery Strategy in 2004 foresaw exactly the issue identified by the Canadian Environmental Assessment Agency in its Comprehensive Study Report into this project:



Potential threats may arise from proposed industrial developments, particularly hydro-electric operations and commercial forestry (Chubbs et al 1993), and the associated road development and changes in human access and use these entail. For example, the development of the facility in Churchill Falls, and the subsequent creation of the Smallwood Reservoir flooded portions of the ranges of both the Lac Joseph and Red Wine Mountains caribou herd ranges. The proposed development on the lower Churchill River could affect the range of the RWMH caribou. [...]

p. 35 (emphasis added)

More recently, the Report of the Joint Review Panel (JRP) on the Lower Churchill Hydroelectric Generation Project concluded “that any adverse effect of the Project on individual animals within the Red Wine Mountain caribou herd would result in significant adverse effects”: p. 9.

The JRP therefore recommended (7.6) that if the Project were to be approved, the provincial Department of Environment and Conservation should “ensure that adequate resources are available so that all reasonable efforts to ensure the recovery of the Red Wine Mountains caribou herd are taken”: p. 30.

In its response, released on March 15, 2012,<sup>2</sup> the Government of Newfoundland promised that an updated recovery strategy for the herd would be published during the course of the year. That deadline has come and gone and the province’s promise has gone unfulfilled.

As for the proponent of this project, Nalcor Energy, the province’s Crown corporation, it blithely stated in the addendum to its environmental impact statement that the transmission lines would have no impact on the viability of the Red Wine Mountains herd since its fate was already sealed and the herd’s decline was inevitable.

Recall that under *SARA*, if the project is carried out, the RAs “must ensure that measures are taken to avoid or lessen those effects and to monitor them... in a way that is consistent with any applicable recovery strategy and action plans”: *SARA*, s. 79(2).

The federal Woodland caribou recovery strategy sets out that:

A strong relationship exists between habitat disturbance and whether a local population is stable, increasing or decreasing. As the quantity and/or severity of disturbance increases, there is increasing risk that a local population will be in decline (Environment Canada, 2011b), as further described in Appendix E.

---

<sup>2</sup> [http://www.env.gov.nl.ca/env/Response\\_to\\_Panel\\_Report.pdf](http://www.env.gov.nl.ca/env/Response_to_Panel_Report.pdf)





This recovery strategy identifies a minimum of 65% undisturbed habitat in a range as the disturbance management threshold, which provides a measurable probability (60%) for a local population to be self-sustaining. This threshold is considered a minimum threshold because at 65% undisturbed habitat there remains a significant risk (40%) that local populations will not be self-sustaining.

p. 34

As pointed out by Ekuanitshit's expert, this is quite a different proposition from the Agency's suggestion in the CSR that, under the strategy, "habitat recovery objectives" for Woodland caribou "include that 65-percent of critical habitat for each herd remains undisturbed, providing a measurable probability (60-percent) for a local population to be self-sustaining": p. 31.

Far from there being a "measurable" probability of 60% that the herd will be self-sustaining if 65 per cent of that critical habitat remained untouched, the recovery strategy actually identifies that level of habitat protection as the minimum required to maintain the risk of extirpation at no more than two out of five (40 per cent).

Moreover, all that is known at present is that the project by itself will not disturb more than 35 per cent of the area within the geographic boundary identified for the Red Wine Mountain herd's critical habitat: Recovery Strategy, Figure J-98. For now, it is impossible to know how much of the herd's actual critical habitat will be disturbed by the project, since that critical habitat has not yet been identified pursuant to the action plan and the geographic boundary takes in areas such as the Churchill Reservoir or the Town of Happy Valley – Goose Bay.

It is obvious that at this point that the only reasonable conclusion to which the federal Minister of the Environment could come, based on a rational reading of the CSR, is that the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances. The project will clearly create adverse effects for "a non-self-sustaining population" of a threatened species when that herd is already "declining in number": CSR, p. 40.

The only reasonable way for the Minister to conclude that this project is justified would be for her to take into account the implementation of mitigation measures sufficient to reverse that decline, but they have yet to be identified: the measures described in the CSR as planned by Nalcor and those suggested by the Agency are clearly insufficient.

Nalcor proposes "monitoring potential impacts" and developing a follow-up program "through collaboration with the provincial Department of Environment and Conservation (Wildlife Division) [to] be informed by the Labrador Woodland Caribou Recovery Team": CSR, p. 18. The Recovery Team is an organization from which the Québec Innu are excluded and is the same entity that produced the provincial recovery strategy in 2004 but has yet to produce the action plan it promised by 2006.





As for the Agency, it has recommended more follow-up, specifically monitoring of “off-highway vehicle use within the ranges of the RWMH,” of “caribou use of the Project area within the ranges of the RWMH” and of “caribou crossing of the project ROW [right-of-way]”: CSR, p. 40.

The hope that monitoring will protect the caribou is based on the notion that hunting is the primary risk. Instead, the primary risks come from habitat destruction and from wolf predation caused by the construction, as pointed out by Ekuanitshit’s expert in the accompanying document and as confirmed by the province’s most recent study.

Caribou habitat in Labrador can be directly lost through direct habitat alteration such as that caused by hydroelectric development, timber harvest, mineral exploration and development, natural processes such as fire or through alteration to the seral stage, which can promote the presence of moose and an increased predator presence.

Isabelle Schmelzer, “Range use, life history and trends in abundance of forest-dwelling threatened caribou populations in Labrador: An overview; Draft Document,” Wildlife Division, Department of Wildlife and Conservation, Government of Newfoundland, September 2012, p. 23

It is important to note that these are precisely the adverse effects raised by the Innu of Ekuanitshit at a meeting held at their request on May 23, 2012 with representatives of the federal and provincial governments.

It is also important to note that the Wildlife Division’s draft document was disclosed to Nalcor in 2012, but the proponent never disclosed it to Ekuanitshit, whose representatives only received it from the province in May 2013 and at their specific request after Newfoundland disclosed its existence.

### **Proposed measures**

Clearly, the Red Wine Mountains herd is in urgent need of the range plans that are meant to “outline how a given range will be managed to ensure that critical habitat is protected from destruction”: Recovery Strategy, p. 38. Such a plan would “involve identifying and assessing current projects/activities as well as any foreseeable future projects/activities, and should include a cumulative effects analysis”: p. 40.

However, Environment Canada does not expect a range plan till 2017, according to its recovery plan, which was published five years late. It is relying principally on the province (p. 39), whose own action plan was promised for 2006, but has yet to be released.



Given the urgency of the threat to the Red Wine Mountains herd posed by this project and the decade of delay in adopting specific plans under the federal and provincial endangered species legislation, the Minister of the Environment Canada must exercise her powers under *CEAA* to ensure the implementation of the appropriate mitigation measures and follow-up programs.

More particularly and as recommended by Ekuanitshit's expert, the federal government must ensure:

- a follow-up program that will immediately begin verifying the accuracy of the environmental assessment of this project by identifying and assessing current and future projects within the geographic boundary in which the herd's critical habitat is located, as well as their cumulative effects on the herd;
- the reduction or control of the adverse environmental effects of the project through creation of a network of interconnected permanently protected areas within the herd's current range that is large enough to support its populations and limit disturbance;
- restitution for any damage to the environment caused by the project's effects through replacement or restoration of herd habitat;
- further follow-up through periodic determination of the effectiveness of any measures taken to mitigate the adverse environmental effects of the project.

Without such measures, it would be contrary to both *CEAA* and *SARA* for the federal government to exercise any power that would permit the project to be carried out in whole or in part.