

Submission on Bill No. 4 – Biodiversity Act

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The East Coast Environmental Law Association is a public interest environmental law charity that advocates for the fair application of innovative and effective environmental laws in Atlantic Canada through education, collaboration and legal action.

Although our office is located in the Schulich School of Law, our 3 lawyers work in locations across the province, one is based in Halifax, one in Margaree, Cape Breton, and I am in Grand Pre.

I am practicing member of the Nova Scotia Barrister's Society. I have a Masters of Environmental Studies from Dalhousie's School for Resource and Environmental Studies. I have been practising exclusively environmental law for more than 25 years, including drafting legislation for federal and provincial governments. Relevant to our topic today, I chaired the Nova Scotia Roundtable on Environment and Economy in 1994 and was a member of the 3-person public consultation panel for the creation of the Nova Scotia *Environment Act*, which became law in 1995. I also chaired the Legislative Review Advisory Committee charged with the mandatory public review of the *Environment Act* in 2000.

Regarding the proposed Biodiversity Act, I, along with my colleague, Karen McKendry, from the Ecology Action Centre, have invested significant time and expertise over the past 4 years to provide government and the public with research and recommendations to assist in creating a law that could provide a meaningful contribution to address the biodiversity crisis. Karen provided an excellent history of our work in this area during her earlier presentation and highlighted our concerns around the public engagement, or lack thereof during that time.

Our recommendations which were drawn from biodiversity law and policy initiatives in other jurisdictions focused primarily on ensuring that the law had a clear purpose and principles, that there were opportunities and requirements for the Minister to gather information about the state of biodiversity in the province, share that information with the public and through a public process set goals and targets that would help to set Nova Scotia on a path toward stopping biodiversity decline.

I would like to acknowledge that the version of the Bill that I reviewed quickly this morning, includes a purpose section, a requirement that all new and substantially amended regulations be subject to public consultation, a requirement that the Biodiversity Act undergo a mandatory public review in 5 years and that a state of biodiversity report be made available to the public in not more than 3 years. We would prefer to see that the setting of goals and targets be a requirement rather than at the discretion of the Minister, but acknowledge that the Bill will require public consultation on the goals and targets before they are set. We

support these important public aspects of the Bill and ask that they not be amended or removed.

Nova Scotia may be the first Canadian province to create a biodiversity law, but the development of biodiversity law and policy is far from new. In fact, Canadian Prime Minister Brian Mulroney was the first leader of any country to sign and ratify the United Nations Convention on Biological Diversity almost 30 years ago. Just 6 years after Prime Minister Mulroney signed the Convention, Nova Scotia passed the *Endangered Species Act*.

I provided a table to you that compares the proposed Biodiversity Act (as introduced) to the Endangered Species Act, the Environment Act and the Wilderness Areas Protection Act.

Despite the fact that the most current version of the Bill removes even the potential for any offences under the Act and all fines, I would like to take a moment simply to point out that the Endangered Species Act, which has been law for more than 25 years includes prohibitions to protect species and habitat similar in structure to the prohibitions contemplated by the Biodiversity Act.

Despite the fact that the ESA was written more than 20 years ago, the fines for individuals and corporations are exactly the same as the fines that were included in the Biodiversity Act, as introduced.

The Endangered Species Act applies to protect all species that are listed in the regulations regardless of where they are located, crown land or private land. In addition, the ESA gives the Minister the authority to designate core habitat, defined as habitat that is necessary for the survival of the species, for endangered or threatened species on private land without the consent of the landowner. These provisions have been in place since 1998, so it is simply not true to say that the proposed Biodiversity Act as it was introduced provided unprecedented powers of over-reach to government.

Rather than being concerned that government will over-exercise their authority, the 25 year history of the Endangered Species Act has demonstrated government's failure to implement even the most basic elements of the law to protect species. This was confirmed by Justice Brothers of the SCNS in her recent decision on the Act.

The Endangered Species Act, the Environment Act and the proposed Biodiversity Act are public welfare laws. These laws play a very valuable role in our society because they address issues that are of broad public concern. Over the past year we have become very familiar with another public welfare law, the Nova Scotia Health Protection Act. This is the law that has provided our Chief Medical Officer of Health, Dr Robert Strang, the authority to issue orders to protect public health as we collectively navigate the pandemic.

Last week the Supreme Court of Canada released their decision on the *Greenhouse Gas Pollution Pricing Act*. In the decision the court found that the law was of national concern

because it is critical to our response to an existential threat to human life in Canada and around the world.

The COVID-19 pandemic, climate change and biodiversity decline are crisis that can only be effectively addressed if we allow our government to exercise appropriate authority in the public interest and we trust in the rule of law. The way forward is a principled approach based on science, public engagement, transparency, accountability and integrity. A deliberate fear-based campaign of exaggeration and misinformation that is intended to divide people and pit one group against another is not the way forward for our province. I would echo Karen McKendry's comments from earlier today around the urgent need for biodiversity education and I think that the events that have taken place around the proposed Biodiversity Act demonstrate that clearly.

I took a look at the 1998 Hansard for the debate during the introduction and passage of the Endangered Species Act. This Bill was passed unanimously during the liberal minority government of Premier Russell MacLellan. Interestingly, on the same day, the Wilderness Areas Protection Act was also passed. I would like to close with a quote from progressive conservative James DeWolfe, MLA for Pictou East speaking to the passage of the Bill:

Mr. Speaker, I am delighted to stand in support of moving this piece of important legislation forward. It certainly was democracy at its best, the cooperation of the three Parties that helped to get this thing through, and I certainly want to thank all involved for their hard work and diligence and for making our world a better place to live.

	Biodiversity Act, 2021	Endangered Species Act, 1998
Example of key prohibitions	38 Prohibits consuming, using, taking, killing of prescribed species; prohibits the introduction, release etc. of prescribed species, prohibits activities that result in the loss of an at-risk habitat or ecosystem prescribed by the regulations, without a permit.	13 Prohibits killing, injuring, etc. an endangered or threatened species; destroying, disturbing or interfering with a dwelling including the nest or den; contravening any regulation made with respect to a core habitat, without a permit.
Do prohibitions apply to private land?	Yes, but the prohibitions are not operational until regulations are passed.	Yes, the prohibitions apply to designated species regardless of location.
Can private land be designated under the Act?	16 Only with agreement of the landowner - Biodiversity Management Zone.	16 Yes, the Minister can designate core habitat on private land without landowner consent if the Minister is satisfied that the core habitat of the endangered or threatened species on public lands is not sufficient to meet the recovery needs of the species.
Example of order-making power	23 The Minister may issue a Biodiversity Emergency Orders when there are reasonable and probable grounds that a violation of section 38 will occur, and specific criteria are met.	18 The Minister may issue an order where the Minister believes it is necessary to control, restrict or prohibit activities that may adversely affect the endangered or threatened species or the core habitat of the species.
Fines	44 Individual, to a fine of not more than \$500,000; Corporation, to a fine of not more than \$1,000,000.	22 Corporation, to a fine not exceeding one million dollars; individual, to a fine not exceeding five hundred thousand dollars.
Do regulations require public review?	53, 54 Yes.	No

Example of key prohibitions

Environment Act, 1995

67 Prohibits the release of any substance into the environment that causes or may cause and adverse effect, without an approval.

Wilderness Areas Protection Act, 1998

17 Prohibits specified activities in a Wilderness Area without a license or permit, including industrial activities, farming, camping, etc. unless permitted.

Do prohibitions apply to private land?

Yes, the prohibitions apply to the environment, regardless of location

No, prohibitions only apply in a designated Wilderness Area.

Can private land be designated under the Act?

87 Yes, where the Minister is of the opinion that a substance that may cause, is causing or has caused an adverse effect is present in an area of the environment, the Minister may designate that area of the environment as a contaminated site.

Only with agreement of the landowner. 14 The Minister shall promote the voluntary establishment of privately owned lands as new wilderness areas or as parts of designated wilderness areas.

Example of order-making power

125 The Minister can issue orders where there are reasonable and probable grounds to believe that the Act is being violated including an order requiring the owner of a site to remediate it, an order to stop an activity, shut down an operation, etc. Specific criteria must be met.

22 The Minister may issue an order temporarily restricting or prohibiting activities in a wilderness area to protect property, the environment or the health or safety of humans.

Fines

159 Person to a fine of not less than one thousand dollars and not more than one million dollars.

30 Corporation, to a fine not exceeding one million dollars; individual, to a fine not exceeding five hundred thousand dollars

Do regulations require public review?

26 Yes

39(4) Yes