Comments on Bill 139
The *Fish and Wildlife Conservation Act, 1997*

Presented to the
Standing Committee on General Government

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PRESENTATION TO THE STANDING COMMITTEE ON GENERAL GOVERNMENT

COMMENT ON BILL 139, THE *FISH AND WILDLIFE CONSERVATION ACT, 1997*

David McLaren for the Canadian Environmental Law Association

Thank you for hearing our concerns today, even if it is for only 10 minutes. I understand this meeting was hastily called after second reading on Monday night and before third reading on Friday. I hope that is enough time for this committee to address our comments about Bill 139. The concerns that we present to you today are ours alone; we may disagree with those of the other groups presenting today.

The word "authorization" turns up a total of 71 times in Bill 139, usually in the company of "of the Minster." This signals our chief concern: that the *Fish and Wildlife Conservation Act, 1997* gives far too much latitude to the Minster of Natural Resources to authorize actions and people, even if they contravene the legislation.

Look first at s. 62(6): "The Minister may, in an authorization given under this Act, permit for the purpose of the authorization any act or omission that would otherwise contravene this Act or the regulations."

It's clear and self-explanatory and begs the question, why bother with the legislation? There is a great danger here that the Minister (not the legislature, not even Cabinet) can authorize anything that would contravene the Act. We are especially worried about the ramifications for "specially protected" species, the management of fish and wildlife, and the potential of delegating Ministerial management authority and responsibilities to non-MNR staff. There is only one section that prevents him from delegating his job to non-MNR staff when the Act is passed.

It is s.7(1) of the *Ministry of Natural Resources Act* which, so far at least, allows the Minister to delegate responsibility to MNR staff only. There were apparently earlier draft amendments that would have allowed the Minister to delegate his authority to persons and organizations outside the MNR which is evidence that the willingness is there in the MNR.

Nevertheless, the effect of Bill 139, as it is written, may well be a delegation of MNR management responsibilities to groups outside the MNR. However, before we ask who these groups might be and why we should be worried, let us look at some specifics.

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Particular Sections

What appears to be a bias in favour of the recreational use of fish and wildlife emerges in s. 26 which states:

> A person shall not use a dog to chase game mammals or game birds during the closed season for the purpose of teaching the dog hunting skills or testing the dog's hunting skills unless the person has the authorization of the Minister.

S. 35(1) prohibits the owning or operating of an area in which wildlife is enclosed for the purpose of teaching dogs hunting skills. But s. 35(2) allows this in "circumstances prescribed by the regulations."

S. 31(2) allows a property owner to "use agent to harass, capture or kill" wildlife the land owner believes is about to damage his property. However, section 62(6) may mean the agent authorized by the Minister may contravene s. 31(1) and any other section of the act, including the prohibition against harassing, killing or capturing the animals listed in s. 31(3), including, it would appear, specially protected wildlife.

S. 40 allows a person with a Ministerial authorization to hunt or trap game wildlife or specially protected wildlife for the purpose of keeping it in captivity.

S. 61(1) allows the Minister to "authorize a person to issue licences on the Minister's behalf." Now the CELA is not against allowing local marinas, tackle shops and hardware stores issuing fishing licences. (Although we wish there were a better way of controlling the large *number* of anglers who pressure a fishery.) However, will this section also allow the Minster to delegate to anyone one of his primary tools for conserving Ontario's Natural Resources? If so, it appears to fly in the face of s. 7 of the *Ministry of Natural Resources Act* which restricts such delegation to the Deputy Minister or any other employee of the MNR. It may be one thing to have the Trapper's Association licencing its members, but it is another to have members of rod and gun clubs doing it. If such persons can, under s. 61(1), would their delegated authority extend to issuing Aboriginal Communal Fishing Licences?

S. 62 provides no comfort to this concern, for, it is in this section that s. 62(6) permits the Minster, by means of authorizations, to do virtually what he wants, including, it must be assumed, to authorize anyone to do it; even, for example, to hunt, trap and fish without a licence (s. 66).

S. 68(3) would, for example, allow rod and gun club members to assume the *management* of fishing and hunting licences, and tags.

S. 87(1). The whole appointment, training and policing of Conservation Officers has always been problematical in light of the police powers to detain, arrest, and search and seizure granted to them in s. 88-93. Other than some post-secondary training as Sir Sanford Fleming and some post-appointment training at the police college, there is little to guide the Ministry in who should become a Conservation Officer and how they should conduct themselves once they are appointed. If the broad powers of the Minister under 62(6) prompt him to "authorize" other than MNR employees to carry out some of these functions, there is great potential for chaos in the field. I understand that, in the days of "deputy Conservation Officers" some individuals abused their power to harass those they disliked.

Impact of Bill 139 on Specially Protected Species

S. 2 of the *Fish and Wildlife Conservation Act, 1997* seems to be a way of protecting the "specially protected species" listed in the schedules of Bill 139: where there is conflict between Bill 139 and the *Endangered Species Act* (ESA), the "provision that gives the animal, invertebrate or fish the most protection prevails." The trouble is, there are very few species designated as "specially protected" under Bill 139 that are also designated as endangered under the ESA. And there are no fauna and no fish designated as "specially protected" under Bill 139. So, there is virtually no conflict between the two acts.

That leaves most of the species listed as "specially protected" under Bill 139 at the mercy of the Minister (by virtue of s. 62(6). And, in s. 31(6), for the sake of defence of private property:

> Sections 5 and 6, clauses (1)(a) to (d), section 27 and such other provisions of this Act and the regulations as are prescribed by the regulations do not apply to a person who harasses, captures or kills wildlife under this section.

S. 5 prohibits the hunting or trapping of "specially protected" species and s. 6 requires a licence to hunt or trap. Both sections are waived for someone who is protecting their property.

It is curious why the MNR would not move to list some fish species in some areas of Ontario as "specially protected". For example, the sturgeon of Lake Huron and Georgian Bay were driven to near extinction by the late 1800s by over fishing, yet there are reports of the odd catch by anglers even today. Perhaps it is too difficult to guarantee sportsmen and commercial fishermen will not accidentally reel in the last of this species. It is a different case with the last remaining populations of lake trout indigenous to Lake Huron however. There are only two populations left — one in Iroquois Bay on the North Shore and the other in Big Bay at Parry Sound. And yet the MNR allows recreational fishing of the Big Bay population and, in fact, just in time for the 1997 angling season, the MNR expanded the angling season on the Big Bay population from one week to two.

But to return to s.2 ... It will be difficult to interpret this paramouncy clause given the highly subjective nature of determining which act provides the "most protection." Indeed, what are the criteria or benchmarks for evaluating the respective levels of protection: the size of potential fines? The nature of the listing process? The nature of the investigation and enforcement tools? In fact, the ESA seems to me somewhat more protective of endangered species because the ESA's general prohibition includes habitat protection, while Bill 139 simply prohibits the hunting or trapping of "specially protected" wildlife, unless, of course, you are defending your property or are an agent authorized by the Minister.

CELA considers Ministerial stop orders and the ability of the Minister to seek injunctive relief in the civil courts useful methods to ensure compliance with the *Fish and Wildlife Conservation Act,* and the ESA and their regulations. Unfortunately, neither act contains such measures.

In addition, although the Lieutenant Governor in Council can list, de-list or not list "specially protected" wildlife species, there are no statutory criteria to guide the process. And there are no formal opportunities for public involvement in the listing process under Bill 139. This flaw is shared by the ESA.

Neither Bill 139 nor the ESA makes mandatory the development and implementation of recovery plans for listed species.

In short, when it comes to the protection of endangered or "specially protected" species, Bill 139 does not improve on the *Endangered Species Act*. In our opinion, Ontario's endangered species remain in danger.

Whom does the Act Benefit?

The values that emerge from Bill 139 favour the protection of private property (as opposed to the protection of wildlife while ensuring reasonable protection of property) and the recreational use of fish and wildlife to the exclusion of other users, including First Nations who, as it happens, have constitutional aboriginal and treaty rights to Ontario's fish and wildlife. We notice, in the list of who was consulted, in the drafting of this Bill, and how, the recreational industry was well consulted but First Nations were simply sent information. I am told by the Chiefs of Ontario office that they did not even receive notice. This, we find exclusionary, given the priority nature of aboriginal rights under the 1982 Constitution Act.

In an internal memo dated June 7, 1997, the Management Committee of MNR received this advice:

> "If Ontario is genuinely interested in conservation of wildlife and fish or in facilitating hunting and fishing for sports purposes by the public generally, and if the exercise of control over the taking of wildlife and fish by persons who have an aboriginal and treaty right to do so is an element in the attainment of effective conservation or facilitation of hunting and fishing for sports purposes, Ontario must amend its laws in the manner suggested by the Supreme Court cases or in another manner which will reduce the likelihood of findings of infringement and will enhance the likelihood of findings of justifiability."

Apparently, the MNR feels Native rights to fish and wildlife are an impediment to hunting and fishing for sport purposes.

We have serious concerns that the broad powers given to the Minister under Bill 139 will eventually lead, without further consultation with other users, to the devolution of Ministerial management authority to the recreational industry. We do not believe this will forward the public interest in conservation of fish and wildlife and we believe it will be prejudicial to the constitutionally protected priority interests of First Nations who have found themselves, to put it kindly, at odds with many sportsmen's organizations.

We offer the following as evidence of our concerns.

The Fish and Wildlife Advisory Board appointed the Minister to make recommendations on how the MNR should spend funds from the Special Purpose Account is made up almost entirely of representatives from the recreational industry.

The Chairman, Phil Morlok is VP of Marketing for a large tackle company and head of that company's, sports fishing initiative. At the annual meeting of the Ontario Federation of Anglers and Hunters (OFAH) in February, 1997, Mr. Morlok said, "The Harris government has kept its promise to the OFAH to redirect licence money and fines to hunting and fishing." In a personal correspondence, he explains that the mandate of the Advisory Board extends to: "commenting on the distribution of other funds from the Consolidated Revenue for the purpose of fish and wildlife management"; and "advising the Minister on other proposed policies or programs related to fish and wildlife." (Ref: Letter to D. McLaren from Phil Morlok as Chair, Fish and Wildlife Advisory Board, August 28, 1997)

At the same OFAH annual meeting in February 1997, the Minister of Natural Resources, Chris Hodgson listed the following promises the MNR has kept to the OFAH:

- to institute the Special Purpose Account — a $44 million account made up of revenue from sports licences, fines and commercial fishing royalties.

- to set up a Fish and Wildlife Advisory Board to advise the Minister on how to spend that $44 million.
- to update the Game and Fish Act (to include penalties for interfering with anglers & hunters, to increase commercial fishing offences to $100,000 and/or jail time, and to drop the licence fee for groups wanting to stock fish.).
- MNR supports the OFAH position on the spring bear hunt.
- to make it easier for sportsmen's clubs to access the MNR's Community Fisheries Involvement Program.
- to strengthen the MNR enforcement program (there will be no reduction in the number of Conservation Officers in Ontario).
- more partnership programs with OFAH clubs, especially in managing hatcheries.
- to review how MNR can improve "customer service" by meeting with dozens of sportsmen's groups.
- to meet with OFAH clubs about their concerns about fisheries in Lake Simcoe and Lake Huron.

The Minister then outlined the four goals of the MNR:
1. overcoming impediments to fishing and hunting;
2. increasing opportunities for sportsmen;
3. marketing Ontario's natural resources and;
4. improving communications between the MNR and the OFAH.

The MNR will achieve these goals alongside its partners from the OFAH, said the Minister, who also said the Ministry is in the midst of a transition to privatization, for example, hatchery management. In this vein, resource-based tourism will become a major component of land-use management.

You will notice that none of these goals speak of conservation. We believe the cozy relationship between the MNR and the recreational industry (especially the OFAH) will, if Bill 139 becomes law, swiftly progress to a legislatively blessed partnership. We believe that, in such a partnership, conservation will be very poorly served.

There is mounting criticism from the scientific community regarding the management practices of the MNR as they pertain to sports fishing. For example, in spite of studies by biologists such as Dr. Mart Gross of the Biology Department of the University of Toronto that show stocking with hatchery-raised fish can spell disaster for the native fish already there (by introducing diseases and weakening the gene pool), the MNR has persisted in the aggressive stocking of hatchery-raised trout in Lake Huron and Georgian Bay and of hatchery fish in lakes in central Ontario. (In fact, although the MNR had, in 1995, ceased stocking in lakes in Central Ontario that showed natural reproduction, the OFAH lobbied successfully to have that decision reversed.)

Perhaps the most dangerous stocking practice is with pacific salmon in Georgian Bay. Dr. Stephen Crawford of the Axelrod Institute of Ichthyology, University of Guelph has released a study done for the Chippewas of Nawash that sounds a warning for the future of natural fish stocks around Bruce Peninsula. In his report, Dr. Crawford concludes that non-native salmon species (e.g. chinook salmon, coho salmon, rainbow trout, brown trout) pose an ecologically significant threat to native species (especially lake trout and brook trout) in the Great Lakes and their tributaries. He calls for the formation of a politically- and administratively-independent panel of fisheries experts to conduct a public inquiry into Great Lakes salmon stocking programs. He states there are no good biological or conservation related reasons for stocking salmon in Georgian Bay or in any of the Great Lakes. (Ref: Crawford, S., "Ecological Effects of Salmon in the Great Lakes", August 1997)

There is also evidence (documented by MNR biologists) of pacific salmon attacks on the Iroquois Bay population, north of Manitoulin Island. Not only were captured lake trout showing the scars from such

attacks, but the MNR biologists brought up salmon eggs from lake trout spawning shoals, showing the salmon were moving into trout spawning territory.
(Ref: Powell, MJ & Miller, M (OMNR), "Shoal Spawning by Chinook Salmon in Lake Huron", North American Journal of Fisheries Management, 10:242-4, 1990.)

Summary

We see Bill 139 as the mechanism for the devolution of MNR's responsibility for managing the Province's fish and wildlife to the recreational industry. We do not believe the industry (or indeed the present MNR, under the legislation as drafted) has the ability to conserve the fish and wildlife of Ontario. To make us more nervous, there is no definition of "conservation" in Bill 139. Is it as the OFAH defines it: "Conservation includes the wise use of a resource to achieve optimum benefits to all society"*? or is it as we would prefer to define it: "the preservation of natural ecological processes"?

* Chris Brousseau, OFAH, at public meeting in Owen Sound, April 20, 1997.

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