#245

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

THE CROWN FOREST SUSTAINABILITY ACT

brief to the
STANDING COMMITTEE ON GENERAL GOVERNMENT
from
Canadian Environmental Law Association

Publication #245
ISBN# 978-1-77189-486-9

Prepared by:

Michelle Swenarchuk
Canadian Environmental Law Association
August 31, 1994

TABLE OF CONTENTS

THE CROWN FOREST SUSTAINABILITY ACT

1. INTRODUCTION

The Canadian Environmental Law Association is an environmental law clinic funded by the Ontario Legal Aid Plan. The CELA mandate includes representation of environmental groups and low income individuals affected by environmental problems, and engaging in law reform and public education.

CELA represented the environmental coalition, Forests for Tomorrow, during the timber environmental assessment, and has been involved in numerous forest-related cases and law reform efforts.

CELA joined with other groups in the development of the brief to this committee entitled The Crown Forest Sustainability Act: Making it Reflect a Commitment to Sustainability. We believe that it outlines basic changes needed to give Bill 171 a semblance of usefulness to the forest environment.

Even with these changes, the Act would fall far short of what is needed in Ontario, and what modern forest management entails. However, the adoption of our proposed changes, drafted from stated government policy, would demonstrate an intention on the part of the government to make this bill more than the public relations exercise it now appears to be.

2. ESSENTIAL ELEMENTS OF FOREST SUSTAINABILITY

Any modern concept of sustainability of forests incorporates, as did the Forest Policy Panel report, the fundamental premise that all elements of the forest must be sustained.

There are many ways of saying this. We speak of timber and non-timber values; or of conservation of biodiversity; or of stewardship of the forest for all the values within it, including wildlife, aesthetics, tourism, spiritual values, non-consumptive and consumptive recreation (canoeing, fishing, hunting), conservation of air, water, and soil, and logging.

In brief, any modern concept of sustainability of forests recognizes two broad categories of forest values to humans: timber and non-timber values, or economic and ecological values.

This bill does not provide for sustainability of either category of forest value. It is skewed toward the status quo: short-term profits for industry through the depletion of commercial forest species.

3. SUSTAINABILITY OF THE TIMBER RESOURCE

With respect to timber extraction, sustainability legislation requires a frank recognition of the

fundamental issue: what level of logging can be sustained in perpetuity (ie. what level does not exceed the level of wood the forest can produce). The immediate corollary question then becomes: what methods of logging and regeneration should we use to sustain both the timber and non-timber values of our forests?

This Act clearly does not grapple with this question. It fails to include a definition of sustainability, and eliminates the definition of "sustained yield" which currently exists in Section 6(2) of the Crown Timber Act. Although flawed and inadequate, that definition did relate the permissible level of the annual cut to the biological capacity of the forest.

Studies for Forests for Tomorrow, based on MNR wood projections, as well as other MNR reports, point to impending wood supply problems in various parts of the province. These studies include the Independent Audit Committee's Report on the Status of Forest Regeneration, Central Ontario Wood Study (MNR 1990), Review of Wood Supply and Distribution in the Southern Portion of the Central Region of the Ministry of Natural Resources (1993), Ontario Forest Products and Timber Resource Analysis, Volumes I and II, (MNR 1992), the Timber Management Plan for the Superior Forest (MNR 1992) and a Treasury Board presentation by Mr. Bob Carman this year which referred to anticipated "wood shortages in the 2020-2040 period."

Section 26 of Bill 171, rather than requiring a sustainable level of cut, establishes that each "forest" management plan will specify the "the amount..available for harvesting.." This amounts to no requirement of sustainability whatever.

The Draft Regulations under the Act (dated August 1, 1994) and the draft Forest Operations and Silviculture Manual similarly contain no sustainability commitment. Section 1.1.3 of the Manual, entitled "Achieving Sustainability of Crown Forests in Ontario" is an excellent example of MNR bafflegab. Propagandistic in style, lacking in substance, and failing to even mention the issue of harvest levels, it provides no standards or benchmarks for the achievement of sustainability.

Instead, it indicates that Ontario forest management will be amended to comply with federal government initiatives to certify products for export. These efforts are irrelevant to the determination of sustainability in Ontario. After years of public consultation in Ontario on forest policy, it is unacceptable that the government is seeking another excuse for failing to face the real issue.

We therefore strongly urge the Ontario government to amend the Act to require (as specified in our collective brief) that the level of harvest be set to provide a non-declining flow of volume of each harvested forest resource in perpetuity. This standard should apply to each species harvested with a permissable fluctuation in the amount of the flow of plus or minus ten percent.

Successive governments of Ontario have a long history of promoting an unsustainable level of logging in the province. By continuing this pattern, the Act fails to provide for sustainability of

the timber resource.

4. SUSTAINABILITY OF NON-TIMBER RESOURCES

In the past, and up to the 1980s, forest managers spoke of managing wildlife in the forest, and developed policies focussed on production of fish and game species, with little regard for other species. In Ontario, we continue to base wildlife management on production of moose and deer habitat with some attention to habitat for game fish. It has been estimated that Ontario's present approach ignores approximately 99% of the species of flora and fauna which exist in the province.

However, a modern approach to forest management, including that proposed by the Forest Policy panel, concentrates on conservation of biodiversity, using landscape management and concern for conservation of forest ecosystems overall.

This Act contains no such modern thinking, and does not even reflect current practice of requiring some attention to habitat for some species; it merely says that forest managers, in preparing plans, shall:

> have regard to the plant life, animal life, water, soil, air and social and economic values, including recreational values and heritage values, of the management unit. (Section 7(2)(b).

Similarly, a Minister may approve a plan, and find that it provides for sustainability (undefined) of the forest by merely "having regard to" the same issues. (Section 8(2).

It should be noted that similar language ("have regard for") is currently being removed by the Ontario government from the Planning Act because it is too vague and doesn't provide sufficient protection for environmental values. It therefore has no place in Bill 171.

Forest management requires that we plan the use of all the forest resources in an integrated fashion and not merely plan for timber extraction with some minor "regard" for other values. The scientific community and forward-looking forestry community (including some field people within MNR) are far beyond that in 1994. Non-timber values must be seen as worthy of protection and production in their own right, and not merely as "constraints" to timber production.

The US National Forest Management Act, passed in 1974, provides a precedent that could have been adapted to Ontario needs, together with the lessons learned in its implementation over 20 years.

Numerous prominent Canadian foresters, including Gordon Baskerville of the University of New Brunswick, have criticized MNR's backward approach and lack of integrated forest

management.

To have wording like this in legislation proposed in 1994 is shocking. The old Crown Timber Act had no pretensions; it only dealt with timber. The government should acknowledge that despite the years of consultation and environmental assessment, it is not about to move to forest management and that Bill 171 is about timber management in the old style.

Nor can we rely on the Manuals to correct this deficiency. The Forest Operations and Silviculture Manual includes a section on biodiversity and standards for forest management activities. The biodiversity section includes a reasonable definition of it, but no commitment to manage for conservation biodiversity and no measurable benchmarks or indicators.

Incredibly, the section entitled "Standards for Forest Management Activities" includes no standards. It merely recites that familiar list of MNR manuals and provides no standard that the public can actually enforce or rely upon.

That old style timber management plans will be deemed to be forest management plans under this Act (Section 69) will not make them so. However, it may well stop any progress being made by forward-looking MNR employees, working without the support of their senior management, to move in that direction.

5. SILVICULTURE FUNDING AND PRACTICES

CELA is among the groups in Ontario who support requiring the forest industry to assume more of the costs of silviculture. However, it is impossible to evaluate whether the move to create the Forest Renewal Trust and Forestry Futures Trust actually achieves that goal. The government has given the public no information about the structure and management of the trust funds.

If revenues that would otherwise accrue to the Crown (stumpage and area charges) are put into trust funds for silviculture, the public has still lost the use of those revenues from forest operations for the creation of public services and payment of the provincial debt, and the industry has not paid more.

Further, CELA and other groups have urged the government to impose and enforce silvicultural standards on the industry, even if regeneration costs are transferred to them. These would include more use of logging methods other than large area clearcutting. This Act and the regulations under it impose no regeneration standards.

At a minimum, the Act should provide for accountability of the trusts to the legislature, and not just to the Minister of Natural Resources. (Section 45 and 48)

6. ENFORCEMENT PROVISIONS

We are pleased to see that the MNR has been provided with the authority to issue "stop" orders or "remedial" orders. However, we remain concerned about the MNR's willingness to actually use this authority, particularly in light of the MNR's questionable enforcement track record in forestry-related contraventions. We therefore recommend that s.53(3) be amended to permit the Minister "or any resident of Ontario" to apply to court for remedial relief. Section 52 and 54 should be similarly amended to provide the Minister or Ontario residents with the ability to go to court to seek injunctive or mandatory relief. In fact, we are surprised to see that these sections, as drafted, fail to provide the ability to go to court to seek appropriate relief where a person fails to comply with MNR orders.

We note that s.78 of Bill 171 repeals the Crown Timber Act. Significantly the Crown Timber Act is scheduled as a statute to which the Environmental Bill of Rights applies; see Ontario Regulation 73/94. Therefore, if the Crown Timber Act is repealed, the Ontario government must concurrently amend the EBR regulation to list the Crown Forest Sustainability Act as a statute which is subject to the EBR. Otherwise, forestry operations may be beyond the reach of the EBR, which is contrary to the expectations of the public and the intentions of the drafters of the EBR.

We see s.56 of Bill 171 as a "paper tiger", since the MNR, to our knowledge, has never cancelled or revoked a Forest Management Agreement. Nevertheless, if the MNR actually takes the extraordinary step of revoking a licence, s.56(3) should be amended to give the public an opportunity to make submissions on revocation, suspension or cancellation. The Crown forests are a public resource, and the public should have the opportunity to make submissions on why the licence should be suspended or cancelled.

We have reviewed the provisions of s.61, and note that while the maximum fines look impressive on paper, in reality fines rarely approach the maximum even for serious contraventions. Accordingly, we propose that s.61(a) to (d) should be amended to provide minimum fines (i.e. $25,000) to enhance the deterrent effect of this section. In addition, we suggest that s.61 be further amended to empower the court, upon its own initiative or upon application by the prosecutor, to issue restraining orders, clean up orders, and other necessary relief: see sections 183, 189, 190, and 191 of the Environmental Protection Act.

7. PUBLIC PARTICIPATION IN FOREST MANAGEMENT

A hallmark of modern management of public resources is the creation of opportunities for public participation, and sharing of information with the public. Nothing defeats this approach as readily as unenforceable laws and retention of bureaucratic discretion. This Act exemplifies the latter approach in such provisions as:

- the absence of definitions of sustainability and absence of enforceable standards

for timber and non-timber management.

- the retention of the Minister's discretion to approve plans without legislated standards. (Section 9)

- the inclusion of an appeal structure regarding forest management plan approval, (Section 11) which will not in fact be put in place (according to commentary accompanying the draft Regulations.)

- a section enabling regulations pertaining to independent audits of industry compliance. (Section 67 (28) No such regulations will be drafted (according to commentary accompanying the draft Regulations.)

- the Remedies and Enforcement sections (Part VII) which permit enforcement actions for environmentally damaging practices only if the Minister considers that damage has been done. (Sections 52, 53 and 54.)

8. RELATIONSHIP TO THE ENVIRONMENTAL ASSESSMENT DECISION OF APRIL 20, 1994

The MNR maintained throughout the protracted environmental assessment hearings that it was seeking an approval for timber management planning. Despite the objections of environmental groups and others, and despite having previously written four draft environmental assessment documents for "forest management", the MNR abandoned forest management and proceeded to obtain an approval for an undertaking called "timber management."

If the MNR now wants to call its approach "forest management," we question whether the approval the Ministry obtained is sufficient to cover such a change, particularly given the narrow and conservative basis of the decision by the Environmental Assessment Board. This confusion is ironic, given that the Ministry in fact merely intends to continue its "timber management" approach, and merely change its name. However, the legal confusion is real.

9. CONCLUSION

Given all of these deficiencies and lack of substance in Bill 171, we do not support its passage. We are concerned that it may stop any useful initiatives currently being undertaken by MNR's more forward-looking staff, and will also make further forestry legislative reform more difficult in the future.

We urge the government to withdraw this Bill, make a commitment to real sustainable forestry, and present legislation that would mandate that necessary reform.