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ENDANGERED SPECIES AND SPACES: THE NEED FOR FEDERAL LEGISLATION

SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION AND CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY TO ENVIRONMENT CANADA RESPECTING ENDANGERED SPECIES CONSERVATION

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ENDANGERED SPECIES AND SPACES: THE NEED FOR FEDERAL LEGISLATION

by
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PART I - INTRODUCTION

(a) General

The Canadian Environmental Law Association (CELA) is a public interest law group founded in 1970 for the purposes of using and improving Canada's laws to protect the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to casework, CELA undertakes public education, community organization, and law reform activities at both the federal and provincial level.

The Canadian Institute for Environmental Law and Policy (CIELAP) was also established in 1970. CIELAP operates as an independent, not-for-profit professional research and educational institute providing environmental law and policy analysis. CIELAP participates in the development of environmental law and policy which promotes the public interest and the principles of sustainability, including protection of the health and well-being of present and future generations, and of the natural environment.

Both CELA and CIELAP have identified biodiversity conservation as a major challenge of the 1990's and a priority issue for both organizations. Accordingly, CELA and CIELAP have undertaken, sponsored or endorsed projects and programs aimed at conserving biological diversity. A key component of ensuring conservation of biological diversity is a comprehensive, legislatively based regime for protecting species at risk and their habitat. CELA and CIELAP therefore recommend the expeditious development and implementation of an integrated national approach to endangered species conservation in Canada. For the reasons outlined below, the centrepiece of this national approach must be federal endangered species legislation.

The purpose of this brief is to describe the need for, and proposed content of, federal endangered species legislation. The brief is divided into three parts: Part I sets out the rationale, context and constitutional basis for federal endangered species legislation; Part II contains a concise summary of the essential components of effective and enforceable endangered species legislation; and Part

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III provides a summary of conclusions and recommendations. In addition, Appendix A includes succinct answers to the eight questions posed by Environment Canada in "A National Approach to Endangered Species Conservation in Canada: Discussion Document".

(b) Rationale for Action

At the global level, the staggering loss of biological diversity due to human activity has been well-established and does not have to reviewed here in detail. Scientists have estimated that two to three species become extinct **every hour** -- this translates into the loss of approximately 27,000 species each year. If this trend continues unabated, up to 20% of the Earth's existing species could become extinct within the next thirty years.[2]

The problem of decreasing biodiversity is not geographically restricted to areas where tropical rainforests have been cleared or burned. Canada, too, has experienced alarming losses of species, particularly since the arrival of European settlers. For example,
twenty species in Canada -- such as the passenger pigeon, Dawson's caribou, and sea mink -- have become extinct or extirpated, while hundreds of other species have been identified by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) as being endangered, threatened or vulnerable. Currently, COSEWIC has listed 243 species at risk, a total which has increased threefold over the past decade.

It should be noted that the actual number of species at risk in Canada is likely higher than the 243 mammals, plants, birds, fish and reptiles identified through the COSEWIC program. Because countless species in Canada have not yet been discovered or scientifically described, the status of such species has not been documented or assessed. Accordingly, the number of species at risk in Canada may number in the thousands.[3]

While there is uncertainty over the number of species at risk, there is little doubt about the cause of the risk -- human activity. It has been estimated that over 99% of modern species extinctions have been caused by humans. The major threats to biodiversity include:

- habitat destruction and degradation (i.e. loss of wetlands, grasslands, old growth forests and other critical habitats);

- incompatible land use and development (i.e. urban expansion or hydro-electric development);

- resource exploitation (i.e. clearcutting, overhunting or overfishing);

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[2] "Biodiversity Facts", in Western Canada Wilderness Committee, Protect Canada's Biodiversity (Vol. 14, No. 5, Spring 1995).

[3] Ibid.

- unsustainable agricultural practices (i.e. overreliance on chemical fertilizers or pesticides);
- introduction of exotic or non-native species (i.e. zebra mussels or purple loosestrife)
- climate change (i.e. excessive carbon emissions); and
- toxic pollution (i.e. discharge and bioaccumulation of persistent toxics).

Individually and cumulatively, these activities threaten the long-term sustainability of Canada's wildlife species, particularly those already at risk.

The continuing loss of biodiversity in Canada is significant from ecological, utilitarian and ethical perspectives. For example, many wild species play crucial roles in various ecological processes and functions. Losing species can therefore adversely affect air, water and soil quality and can result in ecosystem instability. The loss of species also adversely affects the social, economic and cultural benefits -- such as food, clothing, shelter, medicine, and recreation -- that Canadians derive from wild species. The loss of species also raises important ethical considerations: humans do not, as a species, have the right to condemn other species to extinction. In short, protecting species at risk is important for their sake, and for our own sake.

(c) Inadequacy of Existing Laws and Programs

The federal, provincial, and territorial governments within Canada have developed policies, programs, regulations and laws that are intended to protect wildlife, habitat and natural heritage. However, the efficacy of these various initiatives in protecting endangered species is questionable at best, given that some 243 species are now at risk in Canada notwithstanding the existing regulatory framework.

The existing approach suffers from a number of deficiencies and shortcomings, which may be summarized as follows:

(i) Federal Laws

Incredibly, Canada still lacks an endangered species statute. There is no comprehensive federal legislation that specifically addresses endangered species. At the present time, then, protection of species at risk can only be indirectly pursued in a piecemeal fashion through other existing federal statutes, such as the Canada Wildlife Act, Fisheries Act, Migratory Birds Convention Act, National Parks Act, or regulations thereunder. However, this limited protection is more theoretical than real, and the existence of these other statutes does not negate the clear need for special endangered species legislation.

Canada's legislative inertia stands in stark contrast to the experience in the United States, which has had strong federal endangered species since 1973. While the American model is not problem-free, the U.S. experience clearly demonstrates that it is possible to protect species and their habitat while still providing land or resource use opportunities. CELA and CIELAP do not advocate the wholesale adoption of the U.S. statute in Canada. However, in developing an appropriate Canadian law, it is important to have regard for, and learn from, the American model.

(ii) Provincial Laws

The majority of Canada's provinces and territories do not have any specific endangered species legislation. Instead, these provinces have wildlife and parks laws that are simply not designed to adequately address the protection of endangered species.

Only four jurisdictions -- New Brunswick, Quebec, Ontario and Manitoba -- have endangered species laws, and these provincial regimes cannot be viewed as uniform or comprehensive. Ontario's Endangered Species Act, for example, suffers from a number of deficiencies, including the following:

- **The listing of endangered species is entirely discretionary.** Only a small number of species has been designated as "endangered" in Ontario, including two species that have already been extirpated from Ontario.[4] There are no formal opportunities for public input into the listing process, and there has been considerable delay in expanding the list to include COSEWIC-listed species at risk in Ontario. Similarly, Ontario's legislation does not impose a mandatory duty on the government to identify or evaluate all species at risk in the province. At best, then, Ontario's current list is purely bureaucratic in nature, and it is not a credible or accurate assessment of the current status of species at risk in the province.

- **Recovery plans are not required by law.** Even for the few species recognized as "endangered" in Ontario, the legislation fails to require the development and implementation of plans to assist the recovery of such species. This is a major shortcoming of the legislation, and the lack of an action-oriented response for endangered species will undoubtedly perpetuate the precarious status of such species until they are extirpated or extinct.

- **Preventative measures are not required by law.** The Ontario legislation permits the listing of "threatened" and "rare" species as well as "species of concern". However, the statute provides no legal protection for these species or their habitat. This is an unfortunate omission since it is important to undertake protection and recovery efforts before species reach "endangered" status.

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[4] Patricia Mohr, "Wildlife", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993), p.360.

- **There is no requirement to assess projects or undertakings which may impact upon endangered species or their habitat.** The Ontario law does not require prior assessment of projects, developments, or undertakings that may adversely affect endangered species or their habitat. Where applicable, the Environmental Assessment Act would require such an evaluation; however, this Act has largely been applied to a small number of provincial proponents, and private sector development (other than waste management facilities) has remained largely untouched by the Act.

- **Enforcement has been sporadic and ineffective.** Although the Ontario law has been in existence since 1971, only four prosecutions have been undertaken in approximately twenty-five years.[5] It is noteworthy that these four cases involved "takings" of endangered species; thus, the habitat protection provisions of the Ontario law have never been enforced. This abysmal enforcement track record, combined with the government's apparent unwillingness to designate additional species as "endangered", does not provide sufficient deterrence to offenders or adequate protection to species at risk.

Some of the above-noted deficiencies in the Ontario legislation were targeted by a private member's bill that was recently introduced in the Ontario Legislature. However, the bill has not proceeded, and Ontario's endangered species law remains as outdated and ineffective as ever.

(iii) COSEWIC and RENEW

COSEWIC currently comprises of wildlife specialists from the federal and provincial governments as well as conservation organizations. COSEWIC commissions wildlife status reports and uses the results to develop updated lists of species at risk. While COSEWIC's work is generally well-regarded, no legal protection is provided to species found on the COSEWIC lists. Thus, each Canadian jurisdiction still possesses considerable discretion as to which measures, if any, will be undertaken to respond to COSEWIC's findings.

In some instances, COSEWIC listings have prompted the development of voluntary recovery plans under the auspices of RENEW (Recovery of Nationally Endangered Wildlife). By 1994, thirteen recovery plans have been developed under the RENEW program. The RENEW mandate is well-intentioned but suffers from the lack of legal authority and the limited focus upon terrestrial vertebrate species. There are limits on how far voluntary efforts can go in protecting species at risk, and CELA and CIELAP submit that these important non-regulatory initiatives -- COSEWIC and RENEW -- must be supplemented by effective, efficient, and enforceable legal standards at both the federal and provincial level.

In conclusion, the problems with Canada's existing endangered species regime may be summarized as follows:

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[5] Ibid.

- lack of federal endangered species statute or minimum national standards;

- lack of provincial endangered species laws in most provinces and territories;

- lack of consistency, clarity and certainty in the few provincial endangered species statutes; and

- lack of legal status in COSEWIC listings and RENEW recovery plans.

Accordingly, CELA and CIELAP submit that it is erroneous to believe that the existing regime can adequately deal with the endangered species challenge. Similarly, CELA and CIELAP submit that attempts to merely "finetune" or "tinker with" the existing regime would prove to be wholly inadequate, inefficient and unproductive, particularly in light of the fundamental deficiencies described above. The Canadian approach to endangered species protection must be substantially restructured, and it must include effective and enforceable federal endangered species legislation.

This is not to say there there is no need to enhance or expand provincial or territorial laws and programs aimed at the conservation or recovery of endangered species. Indeed, comprehensive and coordinated action at the provincial and territorial level is critically important to the overall success of Canada's endangered species regime. First Nations exercising self-government resource management authority also have an important role to play in the conservation of endangered species.

However, it is clear that the federal government can no longer evade its endangered species responsibilities by resorting to unpersuasive constitutional arguments or unproductive jurisdictional wrangling. This is particularly true in light of Canada's obligations under the 1992 Convention on Biological Diversity, and the applicable heads of federal power under the Canadian Constitution, as described below. There is a compelling need for federal leadership in endangered species conservation, and there is a strong constitutional basis for such action.

(d) Canada's International Obligations: The Rio Convention

Before and during the 1992 Rio Earth Summit, Canada played a key role in the development of the Convention on Biological Diversity, which Canada subsequently ratified. Among other things, Article 8(k) of the Convention obligates Canada to "...as far as possible and as appropriate, develop or maintain necessary legislation... for the protection of threatened species and populations" (emphasis added). In 1993, Parliament's Standing Committee on Environment considered Canada's obligations under the Convention, and concluded that the lack of a federal endangered species statute was a "legislative gap". The Standing Committee also unanimously recommended:

> ... that the Government of Canada, working with the provinces and territories... take immediate steps to develop an integrated legislative approach to the protection of

endangered species, habitat, ecosystems and biodiversity in Canada (emphasis added).[6]

CELA and CIELAP endorse the Standing Committee's call for federal legislative action, and further submit that the mere existence of endangered species laws in some provinces does not satisfy Canada's obligations under the Biodiversity Convention. As a signatory to the Convention, the Government of Canada is obliged to enact comprehensive endangered species legislation that may be supplemented, but not supplanted, by provincial laws.

(e) Constitutional Basis for Federal Endangered Species Law

Legislative authority over the "environment" was not expressly allocated to the provinces or the federal government under the 1867 Constitution Act. However, it is now well-settled law that both the federal and provincial governments enjoy concurrent jurisdiction over the "environment".[7] For example, the courts have held that both levels of government can enact and enforce legislation in relation to water pollution[8] and air pollution,[9] although at first blush these matters appear to be in the provincial domain by reason of their local and private nature. Where there is operative conflict between federal and provincial laws, the federal law prevails under the constitutional doctrine of paramountcy.

Similarly, there is concurrent jurisdiction in relation to certain aspects of "wildlife". On the federal side, there are a number of heads of power which provide authority for federal endangered species legislation, including: regulation of trade and commerce; sea coast and inland fisheries; and criminal law. Moreover, the "national concern" branch of the residual federal power to make laws for "peace, order and good government" (POGG) undoubtedly provides a strong constitutional basis for federal endangered species legislation. It must be noted that over 80% of Canada's endangered species move beyond provincial and international boundaries. Since provincial laws cannot have extraprovincial effect, these species are beyond the effective control and authority of individual provinces, and a comprehensive federal response is undoubtedly required to tackle this matter of national concern. This is particularly true in light of the continuing provincial failure to deal effectively with the intraprovincial aspects of the endangered

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[6] Standing Committee on Environment, A Global Partnership: Canada and the Conventions of the United Nations Conference on Environment and Development (April 1993), p.30.

[7] See, for example, Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), 7 C.E.L.R. (N.S.) 1 (S.C.C.).

[8] See, for example, R. v. Crown Zellarbach Ltd., [1988] 1 S.C.R. 401 (S.C.C.); Northwest Falling Contractors Ltd. v. R., [1980] 2 S.C.R. 292 (S.C.C.); R. v. Nitrochem Inc. (1993), 14 C.E.L.R. (N.S.) 151 (Ont. Ct. (Prov. Div.)).

[9] See, for example, Re The Canada Metal Company Limited and R. (1982), 12 C.E.L.R. 1 (Man. Q.B.).

species problem, as described above.

In construing the nature and extent of the POGG power, the courts have held that for a matter to qualify as a matter of national concern, it must have, among other things, a "singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern".[10] Thus, in R. v. Crown Zellarbach, the Supreme Court of Canada held that "marine pollution" was a sufficiently distinct form of environmental degradation that could be legitimately addressed by the federal government under the POGG power.[11] It is clear that "endangered species" represents a similarly distinct matter that has attained a national dimension over the years since 1867. Thus, the issue of "endangered species", because of its predominantly extraprovincial nature and international character, is clearly a matter of concern to Canada as a whole.

In light of the foregoing analysis, CELA and CIELAP submit that the regulatory framework proposed in Environment Canada's "Discussion Document" is unacceptable from a constitutional perspective. In particular, the "Discussion Document" attempts to limit federal authority to fish and migratory birds -- matters that have been traditionally acknowledged as federal responsibilities. CELA and CIELAP view this excessively conservative approach as an unprecedented and unsupportable power grab by provincial jurisdictions. While there is an undeniable need for enhanced provincial legislation, there is an equally compelling need for a national "safety net" -- federal regulatory standards that apply from coast to coast to coast. As described below, there is room for federal-provincial cooperation and inter-jurisdictional agreements respecting the administration and enforcement of the federal law. However, there is no constitutional need for the federal government to abdicate or significantly limit its endangered species responsibilities, as suggested by the "Discussion Document".

PART II - ESSENTIAL ELEMENTS OF ENDANGERED SPECIES LAW

This section summarizes the essential elements that must be included within the new federal endangered species law.

(a) Preamble

The new bill would benefit considerably from a succinct preamble that contains recitals outlining the rationale for the legislation. CELA and CIELAP would respectfully propose a preamble based upon the Canadian Environmental Protection Act (CEPA) preamble, which also sets out the constitutional basis for the law:

> It is hereby declared that the protection of species at risk is essential to the well-being of Canada.

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[10] R. v. Crown Zellarbach, [1988] 1 S.C.R. 401 (S.C.C.).

[11] Ibid.

WHEREAS the existence of species at risk is a matter of national concern;

WHEREAS species at risk are not always contained within geographic boundaries;

WHEREAS human activities have resulted in the extinction or extirpation of some species in Canada;

WHEREAS the Government of Canada, in demonstrating federal leadership, must establish national standards, regulations, guidelines and objectives regarding the protection of species at risk;

AND WHEREAS Canada must be able to fulfill its international obligations respecting species at risk and biological diversity;

NOW THEREFORE Her Majesty, by and with the consent of the Senate and House of Commons of Canada, enacts as follows:

(b) Short Title

The bill should be cited as the Canadian Endangered, Threatened and Vulnerable Species Act to properly describe its scope and purpose:

> This Act may be cited as the Canadian Endangered, Threatened and Vulnerable Species Act.

(c) Administrative Duties

Like s.2 of CEPA, the bill should set out a list of administrative duties upon the federal government:

> In the administration of this Act, the Government of Canada shall, having regard for the Constitution and laws of Canada,
>
> (a) take both preventative and remedial measures to protect species at risk;
>
> (b) endeavour to act in cooperation with the provinces and territories to protect species at risk;
>
> (c) encourage the participation of the people of Canada in the making of decisions that affect species at risk;
>
> (d) facilitate the protection of species at risk by the people of Canada;
>
> (e) establish nationally consistent standards and regulations respecting species at risk;

(f) provide information to the people of Canada on the status of species at risk;

(g) apply science, technology and traditional ecological knowledge to protect species at risk; and

(h) identify and protect endangered ecological communities and significant habitat for species at risk.

(d) Act Binds the Crown

The bill must expressly provide that it binds the Crown:

This Act is binding on Her Majesty the Queen in right of Canada or a province.

(e) Statement of Purpose

The bill must set out a broad statement of purpose in order to provide guidance in interpreting the intent of the legislation:

(1) The purposes of this Act are,

(a) to ensure that no species native to Canada become extinct as a result of human activities; and

(b) to ensure that species at risk recover to healthy, self-sustaining population levels.

(2) The purposes set out in subsection (1) include the following:

(a) to ensure that decisions to list or de-list species at risk are made on the basis of sound science;

(b) to provide a preventative and precautionary approach to protecting species at risk;

(c) to prohibit any harm to species at risk or their habitat;

(d) to ensure that the needs of species at risk are considered and incorporated into the early stages of planning land use or development that could impact upon such species; and

(e) to provide for timely decision-making and public participation opportunities respecting species at risk.

(f) Definitions

Clear and concise definitions are critically important to the success of the new bill. While CELA and CIELAP have not attempted to provide definitions for all terms likely to be used in the bill, the following definitions should be included:

> "ecological community" means an integral assemblage of native species that inhabitats a particular area in the wild.
>
> "endangered" means risk of imminent extinction or extirpation throughout all or a significant portion of a species' Canadian range.
>
> "extinct" means formerly native to Canada but no longer exists anywhere.
>
> "extirpated" means no longer existing in Canada but occurring elsewhere.
>
> "Minister" means Minister of Environment.
>
> "species" means all wild flora and fauna, including sub-species and distinct populations, that are native to Canada, which, for the purposes of greater certainty, includes mammals, birds, reptiles, amphibians, fish, vascular and non-vascular plants, fungi, algae, lichen, insects, mollusks, crustaceans, and other invertebrates, as well as the eggs, larvae and other developmental stages and body parts thereof.
>
> "species at risk" means a species that is endangered, threatened or vulnerable.
>
> "threatened" means risk of becoming endangered in Canada if factors affecting species vulnerability are not reversed.
>
> "vulnerable" means a risk of becoming threatened due to low or declining numbers, small range or other reasons.

(g) Scientific Committee and Listing Species

It will be necessary to establish an independent and credible scientific committee to assist in the implementation of the bill, particularly with respect to the decision to list (or de-list) a species at risk. The listing exercise is too important to be left to the whims of bureaucrats or the vagaries of Cabinet politics. Listing decisions should be left in the hands of qualified wildlife experts, such as the COSEWIC members, and findings by the committee that a particular species is endangered, threatened or vulnerable must trigger certain mandatory consequences, as described below. Various schedules (Schedule A - endangered species; Schedule B - threatened species; and Schedule C - vulnerable species) should be appended to the bill. There should be opportunities for members of the public to request that species be added to these schedules.

(1) The Minister shall establish and fund a scientific committee which shall,

(a) create and maintain lists of Canadian species that are extinct, extirpated, endangered, threatened and vulnerable;

(b) prepare status reports for species at risk;

(c) identify endangered ecological communities and significant habitat for species at risk;

(d) approve recovery plans for species at risk;

(e) provide advice to the Minister on priorities for recovery plans; and

(f) advise the Minister on matters relating to species at risk.

(2) The scientific committee shall consist of members who,

(a) are unbiased and free from any conflict of interest relative to the committee's mandate; and

(b) who have knowledge or experience relevant to the committee's mandate.

(3) In addition to carrying out its duties set out in subsection (1), the scientific committee may perform such other duties and functions as may be specified by the Minister.

(4) Where the scientific committee proposes to list a species as being endangered, threatened or vulnerable,

(a) the committee shall provide public notice of the proposed listing, and shall provide a minimum of thirty days for public comment on the proposed listing; and

(b) the Minister shall, within 120 days of the committee's final determination, by regulation add the species to Schedule A, B, or C to this Act.

(5) Where the scientific committee proposes to find that a species is no longer endangered, threatened or vulnerable,

(a) the committee shall provide public notice of the proposed finding, and shall provide a minimum of thirty days for public comment on the proposed finding; and

(b) the Minister shall, within 120 days of the committee's final determination, by regulation amend Schedules A, B, or C accordingly.

(6) The determination of whether a species is endangered, threatened or vulnerable shall be made on the basis of the best available scientific information and traditional ecological knowledge.

(7) Where a species is not listed in Schedules A, B and C in this Act, and where the Minister is satisfied that measures are necessary to protect or conserve the species, the Minister may issue an interim conservation order,

(a) identifying the species requiring protection; and

(b) prohibiting harm to the species or its habitat.

(8) No order under subsection (7) shall remain in effect for more than two years.

(9) Any person who contravenes an order under subsection (7) is guilty of an offence.[12]

(10) Any person may make a representation in writing, together with any relevant information, to request that the scientific committee determine whether a species is endangered, threatened or vulnerable, and the committee, within 120 days of receipt of the request, shall advise the person in writing, with reasons, on what course of action the committee will take respecting the request.

(h) Annual Reports

The Minister should be required to file annual reports summarizing the status of species added to, or deleted from, Schedules A, B and C:

(1) The Minister shall table in the House of Commons, no later than June 1 of each year, a report consisting of,

(a) a list of every species added to, or removed from, Schedules A, B, and C to this Act during the previous year;

(b) a summary of the information upon which the determination to add or remove species from Schedules A, B and C was made;

(c) a discussion of the factors threatening species at risk in Canada;

(d) a summary of enforcement activity under this Act; and

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[12] Such offences should be subject to the penalties set out below respecting the general prohibition against harming endangered or threatened species or their habitat.

(e) a discussion of the number, status, and implementation of recovery plans under this Act.

(2) The reports, evidence, and other information relied upon to make a determination to add or remove a species from Schedules A, B and C to this Act are public records and the Minister shall make them available for public inspection during normal business hours and provide copies thereof upon request.

(i) Administrative Agreements

The Minister should be empowered to enter into various agreements and undertake other activities that are necessary or ancillary to the duties imposed by the bill. However, provinces must not be able to "opt out" of the federal bill through use of an "equivalency clause" such as the one found in CEPA.

In order to fulfill the duties required under this Act, the Minister may,

(a) make agreements or arrangements for carrying out research or assessing information respecting species at risk or their habitat;

(b) make agreements with any government of a province or with a First Nation, Indian band, Metis settlement, or Inuit settlement or municipality;

(c) hold public hearings, meetings, workshops or other forms of consultation to solicit information and opinions respecting species at risk or their habitat;

(d) acquire or expropriate land or any interest in land, or enter into agreements for land management, for the purpose of protecting, conserving or restoring species at risk or their habitat;

(e) provide loans, grants, guarantees, subsidies or other financial assistance to any person, government, First Nation, Indian band, Metis settlement or municipality respecting the implementation of recovery plans; or

(f) use the services of any officer or employee of any department, board, commission or agency of the Crown, with the consent of the Minister or officer responsible for that department, board, commission or agency.

(j) Recovery Plans

As noted above, one of the purposes of the bill is to facilitate the recovery of species at risk to viable, self-sustaining population levels. CELA and CIELAP therefore submit that the bill should require the preparation and implementation of recovery plans for all species listed in Schedules A, B and C of the bill:

(1) Where a species at risk has been listed on Schedules A, B or C to this Act, the Minister[13] shall prepare and implement a recovery plan,

(a) within two years of the listing for endangered species in Schedule A;

(b) within three years of the listing for threatened species in Schedule B; and

(c) within five years of the listing for vulnerable species in Schedule C.

(2) The purpose of each recovery plan under subsection (1) shall be to stop the decline of the species at risk and to support its recovery in the wild in order to remove the species from Schedules A, B or C to this Act.

(3) Each recovery plan under subsection (1) shall include,

(a) a statement of the plan's objective;

(b) a description of the actions necessary to achieve the plan's objective;

(c) an estimate of the duration and cost of implementing the plan;

(d) a description of the likely impacts that implementing the plan will have on affected ecosystems; and

(e) a description of the monitoring program to assess and report upon progress in implementing the plan.

(4) Each recovery plan prepared under subsection (1) shall be submitted to the scientific committee for review and approval, and reasonable public notice and comment opportunities shall be provided by the Minister during the preparation, approval, and implementation of the plan.

(5) In determining the order in which recovery plans will be prepared, the Minister shall consider,

(a) the degree and immediacy of threats to the species at risk or its habitat;

(b) the potential of the species at risk to benefit from recovery efforts;

(c) the importance of the species at risk to the ecosystems in which it inhabits;

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[13] It is likely that the Minister would delegate the preparation of the recovery plan to a team of wildlife experts, such as RENEW members.

(d) the genetic distinctiveness of the species at risk;

(e) the social, cultural, spiritual value or utility of the species at risk;

(f) the resources necessary to implement the recovery plan; and

(g) advice from the scientific committee respecting the matters listed in paragraphs (a) to (f).

(k) Assessment and Review

As described below, it is necessary for the bill to establish appropriate prohibitions and penalties for harming endangered or threatened species or their habitat. At the same time, however, the bill should also include preventative provisions which require advance assessment and review of projects, enterprises, activities or undertakings that may impact upon species at risk or their habitat:

(1) In this section, undertaking means any project, enterprise, development, or activity carried out by or for,

(a) Her Majesty the Queen in right of Canada or a province;

(b) agencies, boards, commissions or Crown corporations established under an Act of Parliament or a provincial legislature; and

(c) any person resident in Canada.

(2) Where an undertaking may affect a species at risk or its habitat, the undertaking shall not proceed unless,

(a) the Minister has conducted an environmental assessment of the undertaking; and

(b) the Minister has given approval to proceed with the undertaking.

(3) The environmental assessment under subsection (2) shall include,

(a) a description of the purpose of, and need for, the undertaking;

(b) a description of,

(i) the species at risk or its habitat that may be affected,

(ii) the effects that may caused to the species at risk or its habitat, and

harming individual members of endangered or threatened species ; and second, a general prohibition against destroying or degrading habitat of species at risk. The prohibition on killing or harming species may be worded as follows:

> (1) No person shall kill, injure, trap, capture, disturb, harass, hunt, pursue, collect, possess, sell, trade, transport, import or export any endangered or threatened species, or attempt to do so.
>
> (2) Any person other than a corporation who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than $10,000 and not more than $500,000 for each day on which the offence occurs or continues, or to imprisonment for a term of not more than three years, or to both.
>
> (3) A corporation that contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than $20,000 and not more than $1,000,000 for each day on which the offence occurs or continues.
>
> (4) An officer, director, or agent of a corporation who directs, authorizes, agrees to, acquiesces in, participates in, or fails to take reasonable steps to prevent, a contravention under subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than $10,000 and not more than $500,000, or to imprisonment for a term of not more than three years, or to both.

Similarly, the prohibition against habitat destruction could be worded as follows:

> (1) In this section, habitat means air, land or water, including the flora, natural resources, geological features and ecological functions thereof, where a species has naturally occurred or may be re-introduced.
>
> (2) No person shall destroy, disturb, degrade, alter, or interfere with the habitat of any endangered or threatened species.

Persons and corporations who contravene the habitat prohibition should be subject to the same penalties set out above for the prohibition against killing or harming species.

To enhance the deterrence value of these sections, and to ensure remediation of actual environmental harm, the court should also be empowered to impose orders requiring defendants to undertake various conservation-oriented activities:

> (1) Where a person or corporation has been convicted of an offence under this Act, the court, upon its own initiative or upon application by counsel for the prosecutor, may, in addition to any penalty prescribed by this Act, order the person or corporation to,
>
> (a) restore or rehabilitate the habitat of a species listed as endangered, threatened

or vulnerable, or to restore or reintroduce such species to specified sites or habitat;

(b) publish in the form and manner directed by the court, and at their own expense, the facts out of which the conviction arose;

(c) provide security or financial assurance to ensure performance of, or compliance with, an order made under this subsection;

(d) stop the acts or omissions giving rise to the conviction;

(e) compensate the Minister, in whole or in part, for the costs of investigating or prosecuting the offence, or for the costs of taking remedial or mitigative measures as a result of the offence;

(f) to perform community service on such terms as may be specified by the court;

(g) to make restitution for damages; or

(h) to pay an amount not greater than any fine imposed to any private or public body conducting research into species at risk and their habitat, or generally working toward greater protection for such species or their habitat.

(2) Where a person or corporation has been convicted of an offence under this Act, the court, upon its own initiative or upon application by counsel for the prosecutor, may, in addition to any other penalty imposed by the court, increase the fine imposed by an amount equal to the amount of the monetary benefit acquired by or that accrued to the person or corporation as a result of committing the offence, despite any maximum fine elsewhere provided.

To help defray the costs of any private prosecutions under the Act, a fine-sharing provision should be enacted. Such provisions already exist under the Fisheries Act and Migratory Birds Convention Act:

Where a fine or other monetary penalty is imposed upon conviction under this Act following an information or complaint laid by a person who is not an employee of Environment Canada or any provincial natural resources ministry or agency,

(a) one-half of the fine or monetary penalty shall be paid to that person; and

(b) one-half of the fine or monetary penalty shall be paid to the Minister.

(m) Powers of Minister

In addition to her ability to prosecute offences under the bill, the Minister should be equipped

with the power to issue binding administrative orders to quickly remedy serious occurrences. The Minister and the public at large should also be permitted to go to court to seek civil remedies to restrain and remediate threats to species at risk and their habitat.

With respect to ministerial powers, the Fisheries Act offers some useful guidance for crafting appropriate administrative remedies for use in emergency situations:

> (1) Where the Minister, or a person designated by the Minister, is satisfied that a contravention under this Act has occurred or is likely to occur, and that significant harm to a endangered or threatened species or its habitat has occurred or is likely to occur, the Minister or designate may issue an order or direction requiring,
>
> > (a) the immediate cessation of acts or omissions causing the contravention or likely contravention;
> >
> > (b) remedial measures to restore or rehabilitate the habitat harmed or likely harmed;
> >
> > (c) preventative measures to prevent harm to an endangered or threatened species or its habitat; or
> >
> > (d) studies, investigations, monitoring or reporting as may be appropriate.
>
> (2) An order or direction under subsection (1) may issued to,
>
> > (a) any person who has or had the charge, management or control of the undertaking that has contravened or may contravene this Act; or
> >
> > (b) any person who causes, permits or contributes to the contravention or likely contravention of this Act.
>
> (3) Every person who fails to comply with an order or direction made under subsection (1) is guilty of an offence.[15]

The broad powers of inspection, detention and search and seizure under the Fisheries Act should also be incorporated within the bill.

With respect to other civil remedies, the following provision (derived from s.135 of CEPA) should be included within the bill:

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[15] Such offences should be subject to the penalties outlined above in relation to the general prohibition.

(1) Where, on the application of the Minister or any other person, it appears to a court of competent jurisdiction that a person has committed, or is about to commit, an offence under this Act, the court may issue an injunction ordering any person named in the application,

(a) to refrain from doing any act or thing that it appears to the court may consitute or be directed toward the commission of an offence under this Act;

(b) to do any act or thing that it appears to the court may prevent the commission of an offence under this Act; or

(c) to take all necessary steps to restore or rehabilitate habitat that has been or may be harmed in contravention of this Act.

(2) No injunction shall issue under subsection (1) unless forty-eight hours notice has been given to the persons named in the application, except where the urgency of the situation is such that service of notice would not be in the public interest.

Similarly, CELA and CIELAP support the inclusion of "citizen suit" provisions that would allow members of the public to address contraventions of the statute in the civil courts through civil fines, injunctions, restoration orders or other relief.

The bill should also create a new civil cause of action analogous to s.136 of CEPA:

(1) Any person who has suffered loss or damage as a result of conduct that is contrary to this Act may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by the person, and an amount to compensate for the costs of undertaking investigations or proceedings under this section.

(2) No civil remedy for an act or omission is affected or suspended by reason only that the act or omission is an offence under this Act or gives rise to liability under subsection (1), and nothing in this Act shall be construed so as to repeal, remove or reduce any remedy available to any person at common law, under any Act of Parliament or of a provincial legislature.

(n) Duty respecting Vulnerable Species

To this point, the focus has been on protecting endangered or threatened species and their habitat. However, vulnerable species should also receive mention under the bill, although they may not necessarily require the full-blown protection accorded to endangered and threatened species. To raise the profile of such species, and to foster greater public understanding, it is suggested that the bill include a general duty regarding vulnerable species:

Every person shall take all reasonable precautions to protect and conserve vulnerable species and their habitat.

(o) Regulation-Making Authority

The Governor in Council will have to receive a broad grant of regulation-making authority under the bill:

(1) The Governor in Council may make regulations prescribing,

(a) persons who may be designated to exercise the duties of the Minister under this Act;

(b) the composition, duties and functions of the Scientific Committee;

(c) the content and implementation of recovery plans required under this Act, including public participation opportunities relating thereto;

(d) the content of environment assessments required under this Act, and public participation procedures relating thereto;

(e) the manner and circumstances in which the Minister, or a person designated by the Minister, may issue orders or directions under this Act, including terms and conditions thereof;

(f) the manner and circumstances in which orders or directions under this Act, including terms and conditions thereof, may be reviewed, rescinded or varied; and

(g) any other matters necessary for or incidental to carrying out the purposes and provisions of this Act.

(p) Coming into Force

The bill should come into force as soon as possible:

This Act shall come into force on a day fixed by proclamation within six months of receiving Royal Assent.

PART III - CONCLUSIONS

CELA and CIELAP submit that it is imperative that the Government of Canada quickly enact effective and enforceable endangered species legislation. As described above, there is a strong

constitutional basis for such legislation, and Canada has an international obligation to enact the legislation. At a minimum, the statute must provide for:

- national standards covering all species at risk throughout Canada;

- listing of species at risk on a sound scientific basis by a nonpartisan, expert, and independent scientific committee;

- advance assessment and review of undertakings that may affect species at risk;

- development and implementation of recovery plans for all species at risk;

- prohibitions against harming endangered or threatened species or their habitat;

- strong penalties for violations under the legislation;

- effective enforcement and compliance mechanisms, including administrative orders and recourse to the civil courts.

Enacting a federal law without these components is ethically, ecologically and politically unacceptable. CELA and CIELAP therefore urge the federal government to demonstrate leadership by enacting stringent legislation by the end of 1995.

APPENDIX A - RESPONSE TO ENVIRONMENT CANADA'S "DISCUSSION DOCUMENT"

The following is the response of CELA and CIELAP to the specific questions posed in Environment Canada's recent "Discussion Document".

1. Have all the essential elements been identified in the proposed national approach?

No. The discussion document unnecessarily constrains the role of the federal government, and overlooks the need for advance assessment and review of undertakings that may affect species at risk. More alarmingly, the discussion document states that for nationally endangered or threatened species, the "range jurisdiction" will select which response "if any" that will be undertaken (p.20). Protection of endangered or threatened species cannot be optional. Instead, protection must be mandatory, not left to whims of Cabinet politicians or fish and wildlife bureaucrats.

2. (a) In your opinion, is the proposed assessment process satisfactory? How could it be improved?

The proposed assessment process for listing species is not satisfactory. CELA and CIELAP favor the retention of the COSEWIC listing process (and definitions), but recommend giving the process legal force (i.e. the lists should be compiled and updated by an expert scientific committee, not left to bureaucratic discretion or political pressures). There should be a single national list -- multiple lists or jurisdictional lists are potentially confusing and cumbersome. Citizens should also be provided with a formal opportunity to nominate species for listing. The national list should include sub-species and distinct populations, not just "species" as suggested by the discussion document. "Vulnerable" species, as defined by COSEWIC, should also be listed and receive protection under the national regime in accordance with the precautionary principle.

(b) Should the criteria be the same for all governments? Should the assessments be based on international standards?

The criteria should be the same for all governments across Canada. International standards are acceptable, provided that the "vulnerable" category is included. However, CELA and CIELAP have some difficulty with the rigid criteria proposed in pages 21-24 of the discussion document. Assessments of risk and population status are best left to the scientific committee. In addition, it is submitted that jurisdictions be required by law to list species, not just "have the capacity" to list species (p.18).

3. If a species is listed as critically endangered, endangered or vulnerable, what action should result? How can the proposed measures be improved?

CELA and CIELAP do not accept the terminology of "critically endangered", "endangered" or "vulnerable", as used in the discussion document. Instead, the current COSEWIC defintions should be used. There should be a broad prohibition on the killing or taking of endangered or threatened species. The habitat of endangered or threatened species should be similarly protected by a broad prohibition. Contraventions must be met with swift enforcement activity (i.e. inspection, detention, search and seizure, criminal prosecution, civil actions, and administrative orders). Vulnerable species should be protected through other means (i.e. advance assessment and review, or duty to take precautions to prevent harm to vulnerable species and their habitat). Once a species has been listed as endangered, threatened or vulnerable, a recovery plan should be prepared and implemented by the federal government in conjunction with the provinces, landowners, and others. The scientific committee can provide advice and information on critical habitat needs of listed species.

4. Listing of a species as critically endangered, endangered or vulnerable, often leads to the preparation of a recovery plan to restore the species to a healthy level. Under what circumstances should the recovery of a species be considered not feasible?

As described above, recovery plans should be prepared and implemented for all listed species. The Minister, together with the scientific committee, can prioritize recovery efforts in accordance with clear statutory criteria (i.e. nature of threat to species or habitat, ability of species to respond to recovery efforts, ecological significance of species, etc.). There should be an emphasis on ecosystem-based recovery efforts.

5. How should endangered species be managed on private lands? On Crown lands? On treaty lands? In Canadian waters?

Protection of endangered and threatened species should be mandatory throughout Canada and its coastal jurisdiction. This includes private lands. In addition to a firm regulatory approach, the federal government must undertake non-regulatory initiatives (i.e. public information, landowner contact, stewardship programs, technology transfer, financial assistance, etc.) and co-operate with provincial governments and First Nations. Administrative agreements or arrangements with these other levels of government will undoubtedly be necessary to achieve the purposes of the legislation. Federal acquisition or expropriation of lands, or interest in lands, may also be appropriate in certain circumstances.

6. Under what circumstances should a species be considered of national concern? Regional concern? Local concern?

The potential extinction of a species, sub-species, or distinct population is always a national

concern and it warrants a national response. This matter may also be a regional or local concern, and regional and local authorities should be free to supplement the federal standards with more stringent requirements, provided that they do not conflict with federal law. A consistent and cooperative approach is key to overall success in protecting species at risk.

7. In your opinion, what are the essential elements that every agency should have in place?

The model proposed in the discussion document is far too vague and permissive. Mandatory protection is necessary. As discussed in the CELA and CIELAP submission, the essential elements of the legislation include:

- clear, effective and enforceable standards;

- listing of species at risk on a sound scientific basis by a nonpartisan, expert and independant scientific committee;

- advance assessment and review of undertakings that may affect species at risk or their habitat;

- preparation and implementation of recovery plans for all species at risk;

- broad prohibitions on the killing or taking of endangered or threatened species or harming their habitat;

- strong penalties for contravening the legislation; and

- effective enforcement and compliance mechanisms, including administrative orders and recourse to the civil courts.

8. What other means would you suggest to improve endangered species conservation in Canada? For the federal government? For the provincial or territorial government? For industry? For the public?

Aside from the legislative response outlined above, the various governments can undertake a wide variety of other measures to protect species at risk, including:

- providing enhanced funding to protection, conservation and recovery efforts;

- undertaking public education, supporting research, contacting landowners, and undertaking similar non-regulatory initiatives;

- completing the network of parks and protected areas across Canada to protect all significant or representative ecosystems;

- reforming laws, regulations and policies relating to conservation easements, restrictive covenants, and property and income tax to facilitate private protection of habitat and to discourage unsustainable development; and

- ensuring that all government programs (i.e. Crown timber management) are consistent with the endangered species legislation described herein.

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