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**A LEGAL AND POLICY RESPONSE
TO THE DRAFT
CANADIAN BIODIVERSITY STRATEGY**

BY

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SEPTEMBER 1994

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CANADIAN INSTITUTE FOR
ENVIRONMENTAL LAW AND POLICY.
A legal and policy response to
the draft Canadian Biod...RN14394

A. INTRODUCTION

The signing and ratification of the 1992 *Convention on Biological Diversity* was a milestone in global recognition and action towards protecting, sustainably using and sharing the Earth's natural wealth. The Canadian government's ratification of the *Convention on Biological Diversity* (the Convention) in December 1992, on behalf and with the support of all governments in the country, demonstrated strong leadership in this crucial field. It also demonstrated the federal government's commitments and responsibilities to the world community to ensure that biodiversity conservation is given serious attention in this country, and to coordinate and where necessary assert leadership for its various subordinate jurisdictions.

As individuals and organizations who are involved in environmental law and policy research and are practitioners in the field, we commend the government for its leadership role in signing and ratifying the Convention and preparing this Canadian Biodiversity Strategy (the Strategy or CBS). While the Strategy is a useful, general guide to the nature of the biodiversity issue, it fails to address the fundamental issue of threats to biodiversity conservation arising from the Canadian approach to resource use and the issue of legal protection of biodiversity, as required by the Convention.

Nevertheless, the CBS is a first step towards delivering on Canada's responsibilities under the Convention. It begins with reasonable principles, explains why biodiversity is important and under threat, and then proceeds to make 92 general recommendations within broadly scoped topics. Furthermore, the CBS is being followed by other countries as a model of how to move from the Convention to implementation of its principles. It is therefore essential that the Strategy contain sound and detailed proposals that can and will be implemented.

As the CBS recognizes, this is merely the first stage of implementing the Convention in the Canadian context. Consequently, we focus our comments on an analysis of the CBS, and follow with recommendations on how to move the Strategy from general principles to concrete and detailed implementation.

B. CONSULTATION

Given the significance of biodiversity conservation and the Convention, the sweeping implications for Canadian attitudes, actions, law, policy and programs, and the scope of the Strategy itself, we must begin by expressing concern for the manner in which consultation on the CBS is being conducted. Initial copies were received in mid-July, and quantities for circulation and comment were not available to government or non-government groups until the end of July. In a practical sense, this has left merely one month to develop comments on a very wide-ranging document. Further, this period occurred during the summer when people are much less available to participate in this type of exercise.

Of additional concern is the fact that no funding has been put in place to support the time, effort, research and coordinated discussion necessary to effectively review the Strategy. We are informed that some minor expense monies may be available from the Biodiversity Convention Office budget, but this is wholly inadequate to accomplish the tasks necessary and demonstrates that serious study and comment is not expected -- particularly given the short time frame demanded. While we recognize the roles played by the advisory committee and a few selected workshops, it is really the full document, the interplay between its parts, and the content and level of detail in these draft recommendations which determine the effectiveness of the final Strategy.

Unfortunately, the draft Strategy appears to be a rather hollow government-oriented document that is being fast-tracked to meet political agendas. While a Ministers' announcement of commitment to a final Canadian Biodiversity Strategy is laudable and necessary, it is essential that the Strategy be meaningful. The opportunity to build wider public support and essential input has been severely limited by this attenuated process.

We therefore expect that a more effective approach to public consultation will be pursued as the Biodiversity Convention Office and the Working Group move towards implementing the final Strategy. In order to support the Working Group's efforts, we recommend a consultation, research and development process below under the Implementation section.

C. SPECIFIC COMMENTS

1. Recommendations are too general.

While we appreciate the efforts made in assembling the Strategy and developing its format, we are concerned about the recommendations' level of detail. The recommendations are very general and do little to give a concrete sense of what must be done to meet Canada's responsibilities under the Convention. How will we know whether we have accomplished the directions set out in the Strategy? Without more specificity and language which commits to implementation, the CBS will be little more than a reorganization and reiteration of the

Convention itself. Expressions such as "if necessary", "maintain or develop", "as appropriate" in some sections contrast with "require", "support", "work towards", etc. in others. This weaker wording shows that there is little clear commitment on such items, and that further thought and elaboration are necessary.

Constitutional jurisdiction is always a challenge in Canada, and perhaps an identification of differing federal, provincial, territorial, Aboriginal and private roles under some topics could lead to more specific recommendations. Obviously, different governments will have varying laws and programs in place, and thus be closer or further away from implementing the Convention within each of their diverse mandates. It is crucial that the Strategy include a frank statement of the variability arising from the constitutional division of powers. However, the Strategy must identify the standards against which every jurisdiction can be measured for its progress along admittedly diverse and emerging paths.

For example, Article 8(k) of the Biodiversity Convention calls for legislation to protect threatened species, but this recommendation is very general, weak and non-committal in the Strategy. This is in spite of a specific reference in the Convention, and the recommendation by Parliament's Standing Committee on the Environment that "the Government of Canada, working with the provinces ... take immediate steps to develop an integrated legislative approach to the protection of endangered species". A similar recommendation to pass strong endangered species legislation in each Canadian jurisdiction was made by the Law and Policy Working Group, convened specifically to advise the Biodiversity Convention Office and comprised of diverse stakeholders including governments and industry. This elaboration of what legislation and policy is needed, and the priority placed on issues such as endangered species legislation, needs to be reflected in the final Strategy.

Related to our concerns about general recommendations, the CBS does not identify in any detail the process(es) for its implementation. What will follow the Strategy? Who will do what, and over what time period? How can the public and particular collections of interests participate? The proposed Ministerial "institutional linkages" and "take action ... in accordance with the priorities" (page 58) are phrases which are simply too general to be useful. Furthermore, terms such as "ecological approach", "cooperative decision-making" or "information sharing" are not supported or substantiated through meaningful definition or implementation directions which one would expect in a "strategy" document. By the time the final Strategy is released, clear implementation processes, subsequent documents, appropriate contacts and milestones must be identified, and commitments made, by each jurisdiction.

2. The CBS fails to identify and respond to the threats to biodiversity conservation arising from the Canadian approach to resource use.

The Canadian history of resource use demonstrates a pattern of exploitation of natural resources without regard for conservation. The destruction of ecosystems that has

accompanied this process is the root cause of loss of biodiversity in Canada. Any national strategy for implementation of the Biodiversity Convention must acknowledge this problem, and propose concrete alternatives to the current patterns of economic production and consumption. This focus is missing from the CBS.

The development of sustainable policies for resource use in Canada is long overdue. The collapse of the Atlantic fishery, accelerating forest depletion, wetland drainage, and water pollution, to name only a few resource management problems in Canada, all have implications for biodiversity depletion.

3. A complete and effective legal regime is not in place.

There appears to be an implicit assumption in the Strategy that Canada has an essentially sophisticated and complete legal and policy regime to conserve biodiversity. This begins on page 3 with "[i]n light of Canada's rich base of legislation, policies and programs contributing to the conservation of biodiversity and the sustainable use of biological resources ...", and continues on page 52 with a mere one-page section on legislation. The legislation section suggests that administrative rearrangements may be necessary, and implies that constitutional or legislative rearrangements are not.

In contrast, there is a growing wealth of analyses and literature on the need to reform Canada's biodiversity conservation laws and policies. This is complemented by an emerging expertise across the country that is often quite distinct from traditional pollution and waste management environmental law.

Below we highlight only a few of the issues which should be addressed in the legislation and other sections, and which demonstrate that indeed Canada and its jurisdictions have a substantial task before them on the legislative and policy front.

Goal 1A Wild Flora and Fauna

- There is no comprehensive federal endangered species legislation in Canada. Only four provinces have such legislation in place, despite which there are numerous weaknesses (discretionary language, broad exemptions, too few designations and recovery plans, weak enforcement and penalties) and few habitat provisions¹. As noted earlier, recommendations for reform have been made by Parliament's Standing Committee on the Environment, the Biodiversity Convention Office's advisory Law and Policy Working Group, and individual organizations, and these must be clearly and strongly reflected in the final Strategy in order to fulfill obligations under Article 8(k) of the Convention.
- Federal and provincial wildlife legislation have numerous gaps dealing with birds, other species and habitat².
- Except for commercial species and those in protected areas, Canadian plant conservation legislation is severely limited.

Goal 1B Protected Areas

- There is no integrated and comprehensive legislation for protected areas in aquatic environments but only a fragmented array of sectoral legal references³.
- Only 5 of 13 Canadian jurisdictions mention, let alone require and comply with, park management and system plans for protected areas⁴.
- The National Parks Act of 1988 adopted the "maintenance of ecological integrity" as a first priority management goal for National Parks⁵, yet this important concept is not mentioned in the CBS. In this respect, the CBS should incorporate ecological integrity into those recommendations pertaining to "ecological approaches/management".
- Protected areas legislation in Canada has very few provisions for ensuring ecological integrity around such areas, in contrast to the direction in Article 8(e) of the Convention⁶.
- In accordance with the principles of landscape ecology and conservation biology, a significant contribution that can be made by protected areas is through the protection of large roadless wilderness areas⁷. This concept remains essentially unaddressed in Canadian legislation and policy since there are no minimum size criteria for protected areas or road prohibitions for parks.

Goal 1C Ecosystem Restoration

- Policies and law for ecosystem restoration are in their infancy in Canada. Ecosystem restoration has usually been addressed peripherally through legislation for other purposes.

Goal 1D Sustainable Use of Biological Resources

Agricultural Areas

- The Canadian government has been unwilling to adopt policies promoting alternative and organic farming methods and protecting agro-biodiversity.
- Federal and provincial laws, subsidies and programs for agriculture, encourage wetland habitat loss⁸.
- Farming practices have generally been exempted from environmental regulations while the use of fertilizers is virtually unregulated and registration of pesticides is obtained through unsatisfactory processes.
- There is an urgent need to eliminate government policies which preclude the effective conservation of biodiversity and to create more support for alternative and organic farming through research, agricultural education and economic incentives⁹.

Aquatic Areas

- The failure of the Atlantic fishery is attributable in part to inadequate legal and policy controls, and the federal government is pursuing a new international convention to address stocks within international waters;
- The constitutional division of responsibilities for fish leads to complicated delegation, administrative, and enforcement arrangements.

- Provincial water laws need reform to promote increased conservation, in-stream conservation and groundwater protection.

Forested Areas

- Forestry practice codes, policies and legislation throughout Canada have serious deficiencies in the context of biodiversity conservation, often lacking explicit goals and directions to maintain biodiversity and native species. The plethora of recent conflicts surrounding forestry issues, from Clayoquot Sound to Temagami, is evidence enough that the Strategy will require very strong and detailed implementation directions.
- To be effective in the context of the Convention, the implementation directions will have to include explicit action plans for both research in forest ecology, updated training of forestry professionals and educators, and changes to forest practices.

Goal 2B Environmental Assessment

- To be effective in conserving biodiversity, environmental assessment processes must be amended to include the assessment of cumulative environmental effects of programs, policies and plans¹⁰.

OTHER ISSUES:

Biotechnology

- Canada's myriad policies and laws regarding biotechnology still do not provide for adequate assessment of their environmental impacts¹¹.

Private Lands

- Canada's income and property tax laws discourage conservation on private lands¹².
- The use of conservation easements for private land conservation across Canada is limited and fraught with legal difficulties¹³.
- Municipal plans must contribute to regional objectives on private lands, such as biodiversity conservation, groundwater protection, public transportation and clean air.

Public Involvement

- Public involvement in decision making and in the legal review of discretionary decisions affecting biodiversity needs to be enhanced and ensured.

In summary, Canada's biodiversity conservation laws are often dated, very general, and elaborated through unenforceable policy. There are many gaps in this legal regime, and it has generally not responded to an increasing loss and degradation of species and habitat, nor to new scientific knowledge, conservation principles (such as precaution, community based management and integration), or public awareness and support.

4. Impacts of Intellectual property rights are missing from the CBS.

Amongst our colleagues in environmental and development non-government organizations in the South, a pressing issue arising from the Biodiversity Convention is the potential conflict between its provisions and the widening reach of intellectual property regimes. The implementation of the *Intellectual Property Rights* chapters of the NAFTA and GATT are seen as potential threats to indigenous and national rights of control over biodiversity. They are also seen as threats to conservation of biodiversity.

Within Canada, there has been no real examination of the potential for conflict between the policies needed for conservation of biodiversity and our intellectual property regime. A national strategy for implementation of the Convention must include research into these potential conflicts, and the development of proposals for any changes necessary to our intellectual property laws.

5. The recommendations for research do not reflect current developments in science.

Throughout the CBS, the need for increased research is recognized as critical to effective implementation. Specifically, the CBS emphasizes research and development of ecological management approaches referring to the need for increased knowledge of ecosystem structure and function (page 37). While the idea of ecosystem and landscape level research is timely and commendable, the recommendations are too general and restrictive in scope to facilitate meaningful implementation.

The recommendations reflect traditional compartmentalized science without recognizing the need for input from the newer, large scale ecosystem science. Ecosystem science accepts the realities of ecosystem complexity and limited predictability, focusing its efforts on management options based on anticipation and adaptation rather than prediction and control¹⁴. Accordingly, the CBS should include explicit recommendations for research in ecosystem science, focusing on ecosystem integrity, complexity and adaptive management.

6. The Strategy fails to acknowledge the lack of integration in government and private sector structures responsible for biodiversity management in Canada.

The CBS is based on a set of normative principles (page 1) as the foundation for its recommendations, and presumably, eventual implementation. The principles and recommendations are similarly visionary in their use of proactive terminology such as: "cooperative", "ecological approach/management", "integrated decision making", "landscape level planning" and "partnerships". The ideals suggested by these terms are in keeping with the ecological, economic and socio-political interdependence and complexity that characterizes the biodiversity issue.

However, such terms are not reflective of the characteristics of current Canadian institutional arrangements or their practices. For example:

- the Constitutional division of powers does not contemplate biodiversity conservation and often contributes to expensive, convoluted delivery where conservation does occur;
- government administration and programs have largely failed to integrate biodiversity conservation across the mandates of its various agencies; and,
- the economic institutions and the private sector have not developed the means to internalize environmental costs.

These realities of our institutional arrangements and their practices render many institutions fundamentally incapable of implementing and delivering effective biodiversity conservation according to the general recommendations of the current CBS. Thus, the CBS should recognize explicitly the basic need to reform institutions, both in structure and function, as necessary to implement the Strategy's recommendations. This would require proactive and precautionary decision making and management options involving an ecological approach, integrated decision making and other cooperative responsibilities.

D. IMPLEMENTATION

Very few indications of the next steps in the process were given in the draft Strategy. The Invitation's second page is typical, and summarizes the Implementation section on page 58:

"... a final version of the Canadian Biodiversity Strategy will be drafted for the approval of all governments, with a view to publicly releasing the Strategy in late 1994. Following this, each jurisdiction will determine its priorities for action."

The federal government should not shy from its leadership role in implementation, nor from its commitment to the international community. It has the constitutional authority (through its treaty making power) and the legal and moral responsibility (by signing the Convention) to coordinate, assist, prod, and if need be, supersede the efforts of all Canadian jurisdictions to bring the Strategy into reality. Similarly, the federal government should not let other public and private institutions and individuals "off the hook".

As members of the environmental law and policy community in Canada, we feel that there has been too little emphasis on the legal and policy decision making responsibilities and practical implications of the Convention and now the Strategy. A "catalogue of existing biodiversity-related legislation, policies and programs" has been assembled, and workshops have touched on a few legal issues. However, in large part, the analyses necessary to translate the Convention and a final Strategy into appropriate policy and legal tools remain

to be done. The task is incomplete, and has hardly begun.

Despite the emerging expertise and literature on biodiversity policy and law, Canada still has limited capacity to identify the constraints and opportunities in this field, with essentially no courses or publications and few practitioners. Thus to deliver on the important legal and policy component of the Strategy, implementation must provide for the means to share and develop this expertise. A coordinated Canada-wide approach should be adopted in order to reduce duplication and cost, and to tap into the limited expertise available. Literature reviews, coordinated research and interactive opportunities to discuss the appropriate policy and legal regimes at both the national and sub-national levels are therefore necessary.

As representatives of environmental law and policy non-government organizations across Canada, we would be pleased to work with the federal and provincial governments on the next phase of the proposed Strategy. We cannot over-emphasize that the implementation phase is critical to realizing an effective Strategy. Most importantly, the next step is to develop explicit implementation directions or action plans with specific time-lines and deliverables for each of the recommendations.

To assist in realizing the major task of developing detailed action plans, we recommend:

- inclusion of a statement of detailed federal, provincial, and territorial processes, dates, contacts and milestones for the implementation phase within the final Strategy;
- organization of a series of workshops to research and develop the known policy and legal agenda across the country, and to shape a path for further investigation;
- determination of baseline standards for existing or proposed policy frameworks and legal programs; and
- development of a means of ongoing communication and profile for biodiversity conservation planning, policy and law in Canada.

We look forward to participating in and assisting with the effective and timely implementation of this most important Strategy. We would be pleased to discuss with you any of the recommendations and comments we have provided in this submission.

E. ORGANIZATIONS

Canadian Bar Association, National Environmental Law Section

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers, students and judges across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The National Environmental Law Section was formed to pursue law reform and legal education in matters relating to the environment.

Canadian Environmental Law Association

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. It is also a free legal advisory clinic for the public, and acts at hearings and in the courts on behalf of citizens or citizens' groups who are otherwise unable to afford legal assistance.

Canadian Institute for Environmental Law and Policy

The Canadian Institute for Environmental Law and Policy (CIELAP) is a nationally-directed organization which provides leadership in the development of environmental law and policy that promotes the public interest and sustainability. CIELAP's work includes identifying emerging strategic environmental law and policy issues facing Canada and the world; analyzing current environmental law and policy issues; researching and evaluation policy options for public and private sector responses; and communicating the conclusions of its research results to lay and professional audiences in a clear and non-partisan manner. CIELAP's financial support comes from governments, foundations, corporations, and individuals, from fees for services, and from the sale of publications (including the recent third edition of Environment on Trial, one of the most comprehensive treatments of environmental law and policy in Canada).

East Coast Environmental Law Association

The East Coast Environmental Law Association (ECELA) is an incorporated association dedicated to promoting environmental law education and reform in the Atlantic provinces of Canada. Its Board of Directors consists of environmental law and policy specialists from New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland.

Environmental Law Centre

The Environmental Law Centre (ELC) was founded in December 1981 in response to the need for legal services expressed by the many individuals and groups in Alberta with pollution, resource management and other environmental concerns. The Centre is operated by a registered charitable organization with the following objectives: to conduct research on environmental law and policy; to monitor relevant

law, policy and practices; and to provide the public with information and referral assistance in the area of environmental and natural resources law. The Centre publishes reports on environmental law and policy related to Alberta and western Canada. It also maintains a public resource library. The Centre receives its funding from the Alberta Law Foundation, federal and provincial governments, and private and corporate donors.

Sierra Legal Defence Fund

The Sierra Legal Defence Fund (SLDF) is a charitable organization specializing in environmental law and litigation. SLDF's staff lawyers provide free legal advice and representation to environmental groups and concerned citizens across Canada on a variety of environmental issues. Our recent court cases have included two victories in the Supreme Court of Canada to force federal environmental assessments of the Oldman River dam and of energy exports from Hydro-Québec's Great Whale dam, and a Federal Court decision halting commercial logging in Wood Buffalo National Park. SLDF also has been active in advocating biodiversity law reform. SLDF appeared as a witness before Parliament's Standing Committee on the Environment in its hearings on the Biodiversity Convention, and is a member of the Law and Policy Working Group advising the Biodiversity Convention Office.

West Coast Environmental Law Association

The West Coast Environmental Law Association (WCELA) has been operating an environmental law centre in Vancouver since 1974. It is a nonprofit public interest organization, providing free legal advice to anyone in the province with environmental legal questions and advocating legislative reforms to protect the environment and ensure public participation in environmental decision making. Recent significant law reform initiatives include work on topics such as the Pulp Mill Regulations, the Canadian Environmental Assessment Act, the BC Environmental Assessment Act and the proposed BC Environmental Protection Act. WCELA also manages the Environmental Dispute Resolution Fund, whose purpose is to improve the rational resolution of environmental disputes in B.C. by providing financial assistance to concerned citizens.

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