Submission on Bill C-33

Species at Risk Act

NATIONAL ENVIRONMENTAL LAW SECTION
CANADIAN BAR ASSOCIATION

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TABLE OF CONTENTS

Submission on Bill C-33
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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Environmental Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Environmental Law Section of the Canadian Bar Association.

Submission on Bill C-33
Species at Risk Act

I. INTRODUCTION AND HISTORY OF CBA INVOLVEMENT IN ENDANGERED SPECIES LEGISLATION AND RELATED ENVIRONMENTAL MATTERS

The National Environmental Law Section (NELS) of the Canadian Bar Association (CBA) appreciates the opportunity to comment on Bill C-33, the *Species at Risk Act* (SARA). NELS has been involved in the debate about federal endangered species legislation and related environmental matters for a number of years.

The 1990 publication of the NELS' Sustainable Development Committee, *Sustainable Development in Canada: Options for Law Reform*, contained a paper by Ronald Orenstein, entitled "The Federal Government's Role in the Protection of Endangered Species".[1]

In February 1991, the CBA adopted an omnibus resolution calling for federal action for environmental protection and sustainable development. This included a recommendation that the federal government "adopt legislation within the scope of federal jurisdiction to conserve efficaciously endangered species and their habitat".[2]

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1 Sustainable Development in Canada: Options for Law Reform, Canadian Bar Association 1990, pp. 231-241. See Appendix 1.

2 Resolution 91-05-M. See Appendix 2.

In a December 1992 submission to the House of Commons Standing Committee on the Environment, NELS strongly urged the federal government to "take a leading national and international role on the implementation of the *Rio Convention* [on biological diversity], and more particularly in the adoption of the federal legislation to protect endangered species".

An April 1993 letter from the President of the CBA praised the House Environment Committee's recommendation calling for federal endangered species legislation. The letter called the enactment of legislation concerning endangered species and habitat protection "a top priority".

In a June 1996 letter to the federal Ministers of Environment and Justice, NELS commented on a legislative proposal made in 1995. The June 1996 letter principally addressed the issue of the constitutional authority of the federal government to protect endangered species and their habitat. We concluded that the federal government has constitutional jurisdiction over endangered species, based on several heads of federal power. We urged that legislation should respect Aboriginal and treaty rights. We also expressed concern about the extensive discretion granted to the Executive under the proposal and about the limitations placed on protection of habitat. We encouraged the federal government "to adopt comprehensive, effective legislation, protecting endangered species and their habitats, and to cooperate with provincial and territorial governments which do the same".

In December 1996, NELS presented a submission to the House Environment Committee concerning proposed Bill C-65, *Canada Endangered Species Protection Act*. It reiterated the concerns expressed in our June 1996 letter and noted that the Bill:

- failed to provide comprehensive protection for species and habitat;

- inappropriately relied on discretion and political will to implement the legislation; and
- inadequately provided for public participation and remedies for governmental action.

Many of these concerns are still present for SARA.

Resolutions adopted by the CBA have addressed matters also dealt in this submission. These include:

- a 1986 resolution confirming its support for strong federal leadership on environmental issues;[3]
- the 1991 omnibus resolution, which urged the federal government
  - to take strong measures to protect the environment and promote sustainable development to the full extent of its constitutional authority;
  - to consult the public in environmental assessments and on written enforcement and compliance policies; and
  - to improve public access to environmental justice;[4]
- a 1995 resolution urging all levels of government to provide information to the public on a regular basis with respect to environmental prosecutions;[5]
- a 1997 resolution urging the federal government to increase enforcement activity in areas of federal jurisdiction;[6] and

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3 Resolution 86-21-A. See Appendix 3.

4 *Supra*, note 2.

5 Resolution 95-03-A. See Appendix 4.

6 Resolution 97-02-A. See Appendix 5.

- a 1999 resolution urging the federal, provincial and territorial governments to provide adequate notice of all proposed legislation to enable full and proper public comment.[7]

II. CONSTITUTIONAL BASIS FOR FEDERAL LEGISLATION AND ACTION

NELS has long held the view that, within the scope of federal jurisdiction, Parliament should adopt legislation to provide effective protection for endangered species and their habitats. Legislation should cover a broad range of species, habitat and territory, and can do so while still remaining well within federal jurisdiction. It can and should also explicitly bind the federal and provincial Crowns, as does other federal environmental legislation. In addition, the legislation should explicitly bind Crown corporations and agencies.

In our view, the federal government has the general authority to enact broad endangered species legislation. Alternatively, it has jurisdiction to address particular aspects of the endangered species problem.

A. Broad Federal Legislation

NELS views concerning federal jurisdiction over the environment is found in its 1994 submission on the five-year review of the *Canadian Environmental Protection Act*, the 1998 submission on the Bill to replace the *Canadian Environmental Protection Act*, and its 1996 submission on the proposed *Canadian Endangered Species Protection Act* legislation.

These views are supported by legal authority, as follows:

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7 Resolution 99-06-A. See Appendix 6. Adequate notice and consultation should also be required for regulations, delegations and agreements under SARA.

- The weight of judicial authority supports a strong federal role and jurisdiction with respect to environmental matters.
- *Friends of the Oldman River Society v. Canada*[8] and *R. v. Crown Zellerbach Ltd*[9] support the view that shared jurisdiction over environmental matters is the rule and not the exception.
- In *Canada v. Hydro-Québec*,[10] a majority of the Supreme Court of Canada found that protection of the environment, through prohibitions against toxic substances, constitutes a legitimate public objective in the exercise of the federal government's jurisdiction over the criminal law.
- If there is any outstanding concern, federal legislation should allow for administrative and equivalency agreements to address jurisdictional concerns and eliminate overlap with provincial law.

These principles apply to endangered species legislation. General federal legislation concerning protection of all endangered species in Canada would be found constitutional as being part of the rule, and not constitute an exception. We believe the principal constitutional authority for such legislation is found under the federal government's "peace, order, and good government" power, particularly the power to address matters of "national concern", and under the criminal law power.

Preventing the extinction of species within Canada is a matter of national significance. The fact that the nations of the world have signed treaties on the subject of wildlife is further evidence that protecting endangered species is a matter of international, as well as national concern. The enactment of SARA is one measure by which Canada would fulfill its

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8 [1992] 1 S.C.R. 3.

9 [1988] 1 S.C.R. 401.

10 [1997] 3 S.C.R. 213.

international obligations. The preamble to SARA states that wildlife has international value and that providing legal protection of species would in part meet Canada's obligations under the *United Nations Convention on Biological Diversity* (frequently referred to as the *Rio Convention*), which Canada ratified in 1992. Canada is also a party to other agreements in relation to wildlife and endangered species, including the *United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora*, which Canada ratified in 1975.

One issue is whether endangered species legislation meets the requirement set out in the case law for "singleness, distinctiveness and indivisibility". In our view, it would most likely satisfy this test. Endangered species protection is recognized as a distinct, self-contained subject matter by virtually all jurisdictions. The *U.N. Convention on Biological Diversity* also treats it as a distinct subject matter. We acknowledge that legislation protecting endangered species would, in some cases, affect the management of lands under provincial jurisdiction. However, the impact would not be so significant, in our view, as to disqualify it under the "national concern" test.

B. Other Bases of Federal Jurisdiction

Federal authority to enact endangered species legislation may also be found under the different heads of jurisdiction in section 91 of the *Constitution Act, 1867*.

i) Aquatic species and habitat

Under its fisheries power, the federal government has jurisdiction over virtually all freshwater and marine fish and marine animals. This includes the power to protect the habitat upon which the fish and marine animals depend.

ii) Migratory birds

Federal legislative authority over migratory birds is well established. The *Migratory Birds Convention Act* and Regulations were enacted to fulfill Canada's obligations under an international treaty. The *Act* and Regulations implement the treaty and regulate hunting of migratory birds, disturbance of their nests, and harmful alteration of their habitats, regardless of where such activities occur. Provided it addresses a valid federal objective, this power can affect activities occurring on non-federal lands.

iii) Trans-boundary species

Only the federal government has the constitutional ability to address trans-boundary environmental or endangered species problems. In many cases, endangered species require protection across different boundaries and jurisdictions in order to survive. Federal legislation should apply to species that migrate or range across provincial, territorial or national borders. The legislation also should address activities in another province, territory or country which threaten an endangered species.

iv) Criminal law power

The federal criminal law power supports legislation aimed at achieving a number of public purposes, including public security, health, and morality. In *Canada v. Hydro Québec*,[11] the Supreme Court of Canada found that the federal government has plenary power to make criminal law in the widest sense. The Court in *Hydro Québec* found that the protection of the environment in the context of prohibitions against toxic substances constitutes a legitimate public objective in the exercise of the criminal law power. It in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit. In our view, preventing extinction of a species would likely qualify as a valid exercise of criminal law power. Under the criminal law

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11 *Ibid.*

power, legislation could prohibit harm to endangered species or destruction of critical habitat.

v) Federal lands

SARA would apply to species on federal lands. This is a constitutionally valid exercise of the federal government's power.

vi) Other federal powers

Several other federal heads of power could also be relied on to support aspects of federal endangered species legislation. These include federal power over trade and commerce, navigation and shipping, Indians and Indian lands and agriculture. In addition, the federal government has authority over the construction and operation of railways, dams, pipelines, and other activities which affect endangered species.

III. FEDERAL GOVERNMENT AND ABORIGINAL AND TREATY RIGHTS

Aboriginal and treaty rights are constitutionally protected under section 35(3) of the *Constitution Act, 1982*. Aboriginal and treaty rights concerning wildlife and wildlife management boards are recognized or established under historic treaties, land claim agreements and other agreements that apply throughout Canada's territories and in most Canadian provinces. Federal legislation under all heads of federal power must carefully respect those rights. There may also be federal power stemming from positive federal constitutional and fiduciary obligations to uphold and protect the exercise of Aboriginal and treaty rights.

Section 3 of SARA recognizes aboriginal and treaty rights. SARA would also require consultation with Aboriginal peoples and co-operation with wildlife management boards.

Federal endangered species and habitat legislation will also be subject to Aboriginal rights, which include the recognition of the traditional and preeminent use of wildlife by Aboriginal people, subject to measures necessary for conservation.

IV. INTER-GOVERNMENTAL COOPERATION

Environmental issues, including endangered species protection, call for firm measures from all levels of government and government agencies. The preferred approach is for provinces and territories to adopt effective endangered species legislation of their own that complements federal endangered species legislation. SARA is described as one part of a three-pronged federal strategy to protect species at risk. The other two components are stewardship and incentive programs and the 1996 Accord for the Protection of Species at Risk agreed to by the federal, provincial and territorial governments.

SARA would provide a framework for federal, provincial and territorial cooperation consistent with commitments made in the 1996 Accord for the Protection of Species at Risk. Section 7 provides that the Canadian Endangered Species Conservation Council would be comprised of the federal Ministers of the Environment, Fisheries and Oceans, Canadian Heritage and the federal, provincial and territorial ministers responsible for wildlife. Participation in the Council was agreed to by the federal, provincial and territorial ministers in the 1996 Accord. The Council is responsible for providing general direction on the activities of the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) and on recovery strategies and actions plans.

The Council is also responsible for co-ordinating the activities of various governments and agencies to conserve species. This clause was added to the proposed *Canadian Endangered Species Protection Act* legislation at the Committee stage, and we commend its retention in SARA. NELS has always supported cooperation between the federal, provincial and territorial governments and agencies, provided that cooperation does not

result in the removal of environmental protection or the non-enforcement of environmental laws.

SARA includes other provisions for consultation with governments, First Nations, land owners and other interested parties. These would authorize a variety of agreements on matters ranging from conservation agreements for species at risk, to agreements to authorize activities affecting the critical habitats of listed species. Co-operative efforts would also be demanded by several provisions, including co-operation on recovery strategies and recovery plans. As a fallback, the Bill would provide a discretionary "safety net". The federal Cabinet may order that SARA apply to the territories or to species which are not fish or migratory birds on those lands within a province that are not federal lands.

V. CANADA'S OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY

SARA can be seen as one of the federal government's attempts to fulfil its international obligations with respect to endangered species and biodiversity. As noted earlier, Canada signed the *U.N. Convention on Biological Diversity* in 1992. The Convention sets out the obligations of each contracting party, including Canada.

The preamble to the Convention, recognizes, among other things, that:

- there is intrinsic value in biological diversity;
- conservation of biological diversity is a common concern of humankind;
- it is vital to prevent the loss of biological diversity; and
- conservation of habitats is vital for the recovery of viable populations.

Article 8 of the Convention is particularly relevant from the perspective of SARA. It describes the following obligations:

> (c) Regulate or manage biological resources important for the conservation for the biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
> (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;...
> (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;...
> (k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

VI. ASSESSMENT OF SARA

An examination of SARA must consider whether it is comprehensive, effective and fulfils Canada's constitutional responsibilities and international obligations. When tested under these criteria, it is our view that the Bill, like previous proposals, continues to fall short in many respects. Overall, as a result of the changes, SARA functions more as a framework for endangered species protection but does not describe all aspects of that protection.

The primary concerns fall into three categories:

- failure to provide comprehensive protection for endangered species and their habitat;
- inappropriate reliance on discretion and political will for the implementation of the legislation; and
- inadequate provision for public participation, and remedies for governmental action.

A. Failure to Provide Comprehensive Protection for Species and Habitat

Considering the scope of federal authority to protect endangered species and their habitat, SARA is needlessly and dangerously narrow. In some ways, it would be more restrictive than the *Canadian Endangered Species Protection Act*, the government's previously

proposed endangered species legislation. SARA would apply to aquatic and migratory species across the country, but application to other species can be restricted to federal lands, unless the federal Cabinet orders otherwise. Unlike the previous draft legislation, there would be no automatic extension of the Bill to species that cross international borders. Trans-boundary species would also be excluded. More extensive powers may also be delegated under SARA.

SARA ignores areas of clear federal responsibility and jurisdiction. A balance between federal, provincial and territorial interests can be achieved by adopting federal legislation with comprehensive protection for endangered species and their habitat, supported by provincial and territorial legislation and administrative and equivalency agreements. This would be more appropriate than relying solely on provincial and territorial legislation which cannot effectively respond to issues and species extending across their borders.

The treatment of habitat issues in the Bill is particularly worrisome. Habitat protection, and thus protection of the species is limited to the "residence" of the species. As indicated in NELS' June 1996 letter to the Ministers of Environment and Justice:

> Not only is protection of habitat crucial for the endangered species, it is within federal constitutional powers a part of jurisdiction over the protection of the species. This is illustrated by federal fisheries and migratory bird legislation which provides for the regulation of habitat.

Orenstein's 1990 paper provides helpful guidance in this regard by placing protection of endangered species in the context of crisis management:

> By the time a species becomes endangered we will have already failed to sustain it or its habitat... We must begin by assuming if the species is endangered, it cannot sustain further stress or even the present level of stress. An endangered species, once designated, ought to become a 'flagship' for its habitat. Its presence can and should focus its attention on a threatened ecosystem for legislatures and the public.[12]

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12 *Supra*, note 1 at 231-32.

It is difficult to reconcile the failure to extend protection to the habitat of endangered species with any notion of effective legislation. Species not endangered within the scope of the *Fisheries Act*, within national parks, and considered under environmental assessment legislation would have better habitat protection than endangered species within the scope of SARA. Further, given the narrow scope of SARA in regard to the habitat of protected species, it is doubtful that SARA would extend federal protection of habitat in any meaningful way, as that protection may already be found in other legislation.

Limiting habitat protection to the damage or destruction of a "residence" of those species protected by the Bill is a recipe for abuse. Harassment or cutting all the trees except the one in which the nest is found could have the same or potentially more dangerous effect than the destruction of a home. This mischief should not be permitted.

RECOMMENDATION:

1. **The National Environmental Law Section of the Canadian Bar Association recommends that SARA be extended to have obligatory application to all species and species habitat within federal jurisdiction, including all species ranging across international, provincial and territorial boundaries.**

B. Inappropriate Reliance on Discretion and Political Will for Implementation

SARA is characterized by a high degree of discretion vested in the federal government and, through delegation, the provinces and other parties. NELS June 1996 comment to the Ministers of Environment and Justice on the 1995 legislative proposal remains entirely applicable with respect to Bill C-33:

> [C]oncrete regulatory and administrative action to protect habitat and endangered species would have essentially been rendered optional. Failure to appropriately exercise that discretion would deprive the legislation of all but symbolic effect. At best, such discretion would create regulatory uncertainty and insulation from legal accountability. Such uncertainty is not favoured by the NELS, nor for that matter, by industry or environmentalists. As with Bill C-78 and C-13 (which became the *Canadian Environmental Assessment Act*), and in accord with the Rule of Law, we are of the view that any legislative proposal should avoid unstructured discretion in favour of objective and reviewable standards and language.

Frequently, SARA would leave action to ministerial direction, without stipulating the criteria which must guide the exercise of that discretion. Examples of this can be found in the broad powers of delegation, the absence of any legal obligation to implement recovery plans, the treatment of international and trans-boundary species, and the discretion regarding emergency orders.

RECOMMENDATION:

2. **The National Environmental Law Section of the Canadian Bar Association recommends that SARA be amended to require governmental action, eliminate discretion and provide for objective reviewable standards. Without limiting the generality of the foregoing:**
   - **COSEWIC designation of a species as endangered should lead automatically to regulation;**
   - **recovery plans should be legally binding and enforceable;**
   - **endangered international and inter-provincial species should have automatic protection;**
   - **when emergency conditions exist, the Minister should be obliged to act; and**
   - **wherever possible, "may" should be replaced by "shall".**

C. Inadequate Public Participation and Remedies

As with other environmental legislation such as the *Canadian Environmental Protection Act*, the *Fisheries Act* and the *Canadian Environmental Assessment Act*, public access to information, participation and decision making, accountability mechanisms and public remedies are essential to effective legislation for the protection of endangered species and their habitat. This is all the more so in view of the public interest in the protection of endangered species reflected in the preamble to SARA.

SARA demonstrates a serious effort to ensure public access and remedies. However, the Bill would expand the scope of delegation, would employ narrow definitions to identify interested public parties, would not ensure easy and meaningful public involvement in decision-making, would provide inadequate accountability, and would place too many barriers in the way of remedies.

Important provisions or restrictions in the previously proposed *Canadian Endangered Species Protection Act* have been removed. For instance, the previously proposed legislation provided for endangered species protection actions (section 60). The protection action was a new civil suit which could compel the Minister to act. While this protection action had internal limitations – for instance, requiring unreasonable ministerial conduct or decisions – its removal leaves a gap. Public remedies would now be even more restricted. Members of the public would be entitled to apply to have the status of a species assessed, to provide comments on a recovery strategy or for an investigation.

The following examples illustrate these comments:

i) Delegation agreements - section 8

Section 8 would permit delegation of powers or functions under the Bill provided there is an agreement including the requirement of annual reporting. Given the breadth of delegation permitted, it would be necessary to have more comprehensive federal, provincial and third party reporting on the administration and enforcement of these agreements. Sunset clauses and periodic review of all agreements should also be included.

ii) Committee on the Status of Endangered Wildlife in Canada (COSEWIC) - sections 21-26

COSEWIC should be required to provide notice of its reports or decisions in draft form and invite public comment, prior to any status reports and assessments being finalized.

COSEWIC assessments and reasons should be published and indexed in the *Canada Gazette*, in addition to the public registry created pursuant to section 9. Any underlying documentation should also be made available

iii) Emergency listings and orders - sections 29 and 80

Emergency listings and orders should be obligatory whenever emergency conditions arise, as timely reaction to threats may be required. Thus, sections 29 and 80 should be framed in obligatory language ("shall") and based on objective determinations. Emergency listings should be available at public request.

iv) Recovery plans - sections 37-48

The constituency to be consulted in the development of recovery strategies is too narrow and is left to Ministerial discretion to determine whether a person or organization may be "appropriate" (section 39).

v) Compensation - section 64

The Minister would be permitted to pay compensation in accordance with the regulations for losses suffered as a result of "extraordinary impact" of the application of sections 58, 60, 61 or an emergency order for habitat necessary for the survival or recovery of the species. Details are to be provided in regulations.

It would be useful for the *Act* or regulations to clarify the circumstances when compensation is likely to be available. However, the possible payment of compensation should not be a factor in determining whether species are endangered or habitat should be protected. This determination should be made on a scientific basis.

vi) Government reports - sections 101 and 103

These provisions should stipulate the content required in the reports.

RECOMMENDATION:

3. **The National Environmental Law Section of the Canadian Bar Association recommends that SARA be amended to**
   - **ensure public access to complete information and grant the public the right to comment and participate in all decisions other than emergency situations and agreements permitted by the *Act*;**
   - **require decision makers and administrators under the *Act* to respond to public comment and report in detail on the administration, operation and enforcement of the *Act*, its regulations and any order or agreement made under it.**

VII. ENVIRONMENTAL ASSESSMENT

Section 11 of the *Canadian Environmental Assessment Act* recognizes the principle that environmental assessment is to be conducted as early as practical in the planning stages of

the project and before irrevocable decisions are made. Section 136 of SARA amends section 2(1) of the *Canadian Environmental Assessment Act* to include the consideration of a listed wildlife species, its critical habitat or residence in accordance with SARA. However, the *Canadian Environmental Assessment Act*–only results in recommendations, and can not itself require that a project be halted.

VIII. CONCLUSIONS

The enactment of comprehensive, effective federal legislation to protect endangered species is a keystone to ensuring sustainable development in Canada. Major changes are needed for SARA to ensure comprehensive and consistent protection for endangered species and their habitat.

IX. SUMMARY OF RECOMMENDATIONS

The National Environmental Law Section of the Canadian Bar Association recommends:

1. **that SARA be extended to have obligatory application to all species and species habitat within federal jurisdiction, including all species ranging across international, provincial and territorial boundaries.**

2. **that SARA be amended to require governmental action, eliminate discretion and provide for objective reviewable standards. Without limiting the generality of the foregoing:**
   - **COSEWIC designation of a species as endangered should lead automatically to regulation;**
   - **recovery plans should be legally binding and enforceable;**
   - **endangered international and inter-provincial species should have automatic protection;**
   - **when emergency conditions exist, the Minister should be obliged to act; and**
   - **wherever possible, "may" should be replaced by "shall".**

3. **that SARA be amended to**
   - **ensure public access to complete information and grant the public the right to comment and participate in all decisions other than emergency situations and agreements permitted by the *Act*;**
   - **require decision makers and administrators under the *Act* to respond to public comment and report in detail on the administration, operation and enforcement of the *Act*, its regulations and any order or agreement made under it.**