Submission to the Law Amendments Committee on Bill 4 for a Biodiversity Act

I am making this submission as a private resident of Nova Scotia.

1.0 General

1.1 I do not know what Bill 4 says, only what it said before the government announced it would be gutted. I do not know if there is any point making specific comments on a clause-by-clause basis in light of the Bill's highly fluid state following second reading. If only the legislative drafters know what the legislation says until a few short hours before a clause-by-clause examination, legislators are similarly working in the dark. All around, this is a worrying development in democratic governance. It should not be tolerated, much less dignified.

1.2 If, as the Premier says, the Biodiversity Act will not apply to private land it will not apply to 71% of Nova Scotia. Proceeding with an Act on this basis will give the lie to statements, such as that found in the Preamble, that Nova Scotia is committed to a complete, holistic, integrated legislative framework that provides for all aspects of the conservation and sustainable use of biodiversity. Beyond the lie, this equates to a fundamental policy decision to deliver the protection and use of Nova Scotia's biodiversity into the hands of private property owners. This is not an approach that was given approval in principle by the Legislature on first and second reading. Nor is it a wise and responsible approach to protecting and sustainably using Nova Scotia's biodiversity. Unless intelligently regulated, our freedom to profit from privately owned property poses a threat to biodiversity. The sight of our government abandoning protection of biodiversity in response to a virulent private property rights lobby is appalling.

1.3 My more specific comments, which follow, are offered on the basis of Bill 4 as tabled on March 11, 2021.

2.0 Specifics

2.1 In order for Bill 4 to be meaningful and effective as a Biodiversity Act, it should be grounded in a view about the reasons for loss of biodiversity. The recitals in the Bill approach pure aspiration. They do not identify any sort of mischief to be remedied, whether through discretionary executive orders, voluntary engagement or otherwise. I request that the Law Amendments Committee amend Bill 4 to include the following as the first recital in the Act

in order to be clear about the nature of the problems to be addressed through the Act:

- Whereas biodiversity in Nova Scotia is under threat due to actions and processes, such as changes in land use, exploitation of natural resources, pollution, invasive alien species and climate change, which threaten or may threaten the survival or natural development of organisms or ecosystems;

2.2 I believe that responsibility for the Act should be conferred on the Minister of Environment, not the Minister of Lands and Forestry. The Minister of Lands and Forestry is mandated to increase the productivity of forests in Nova Scotia and that is a mandate which inherently conflicts with the protection of their biodiversity.

2.3 I believe that the Act should establish an independent advisory body to make recommendations to the Minister based on scientific evidence and Mi'kmaq ecological knowledge about threats to biodiversity, the establishment of biodiversity management zones and the appropriate measures to mitigate or remediate risks to biodiversity in the those zones. The Minister should be required to take all steps reasonably necessary to implement the recommendations unless the Governor in Council varies or rejects the recommendations with published, written reasons. This approach will give those impacted by the creation and operation of Biodiversity Management Zones assurance that the zones and measures are scientifically necessary and not based on political opinion or the arbitrary exercise of power.

2.4 I find it hard to support this Bill, even though I think it is needed and is overdue, because it kicks the actual regulatory regime down the road by placing power and responsibility in the hands of the Executive. If the Legislature is going to approach this difficult and complex issue by empowering the executive to make discretionary subordinate legislation I would feel a lot happier if I could see some efforts to establish checks and balances. In this context I refer to section 23 which gives rise to three problems.

> (1) It should be amended to eliminate the power to delegate exercise of this important, order issuing, function to employees. All subsequent related references to employees should also be deleted, including section 28 in its entirety. This power is too important and potentially invasive to be wielded by the bureaucracy.

(2) The kind of time frames resulting from the interplay between sections 23, 26, 27 and 28, particularly the 30-day appeal period and ensuing judicial process, suggest that the need for immediate action of the kind usually associated with stop work orders is not being contemplated. In this context subsection 27(2) does not relate in any way to the right of appeal in subsection 28(1). Does 27(2) operate notwithstanding the right of appeal in 28(1) or is it subject to exhaustion of the appeal period and the appeal process? Clarification is essential.

(3) Crucially important, section 23 operates entirely in relation to contraventions of section 38. Section 38 does not, however, specify any offenses. Rather it serves to establish categories of offence for which the Minister may make regulations under section 54. It does so without referring to section 54. This kind of opaque sectional cascade makes the legislation difficult to read and understand and gives rise to suspicions about the government's agenda – as you may have noticed. Citizens are entitled to know what the offences are for which they may be penalized and the offences should be spelled out in the legislation. If the Legislature intends to delegate the power to create offences, the delegation should be to the Lieutenant Governor in Council rather than to the Minister and, contrary to section 55, the Act should be specified to come into effect 30 days after the proposed regulations have been tabled in the Legislature. This would ameliorate concerns about arbitrary and opaque laws which arise when offences are created beyond the reach of accountability to the Legislature.

2.5 There is mention in the Bill's Preamble of biodiversity being "a shared responsibility of all levels of government". In the body of the Bill there is reference to the Minister coordinating implementation of biodiversity policies and programs with municipal government (section 7(e)) and of the Minister entering into agreements with municipalities for purposes of the act (section 8). What the Bill fails to do, however, is <u>empower</u> municipal governments for purposes of protecting bio-diversity and its sustainable use. Municipal governments have to deal with the fact that they are implicated and involved in protecting biodiversity and regulating its sustainable use without receiving any guidance or clarification of their roles, responsibilities and powers. Why is there no consequential amendment to the *Municipal Government Act*, particularly the provisions respecting land use planning? I would like to see the Biodiversity Act take a robust approach to the role of our municipal governments in the protection of biodiversity and its use. In

that regard I have three suggestions developed in consultation with my daughter who is a municipal councillor.

> *First,* section 14 (which empowers the Minister to authorize a person to engage in a prohibited activity if, in the Minister's opinion, the activity is not likely to cause an adverse effect and is necessary to satisfy a compelling public interest) trenches on an essential municipal government function. Provincial legislation gives land use planning, zoning and regulation to the municipalities as their responsibility and it is therefore essential that they play an informed and meaningful role in land use regulation and the permitting of land uses. Section 14 should be amended to require that before the Ministers issues a permit s/he must consult the municipal government having land use planning responsibilities for the area where the prohibited activity will be carried out after first providing
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> - written public information to support the conclusion that negative effects are unlikely,
> - written identification of the public interest to be served, and
> - an explanatory statement as to why it is of compelling interest.
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> *Second,* the Minister should be required to consult the municipal government before establishing a biodiversity zone under section 15 or 16 within the municipality.
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> *Third,* municipal governments should be specifically referenced in section 53(2) and (if my recommendation at paragraph 2.3(3) is not adopted) section 54(2), which deal with consultation requirements prior to the enactment of regulations. To be clear on this point, municipal governments are not simply “stakeholders” or members of the public, but are charged with the responsibility of local government with particular emphasis on land use regulation and the Minister should have a specific obligation to consult them before recommending or making regulations under the Act.

Respectfully submitted on 29 March 2021.

Veryan Haysom