A14/SEM/97005/01/SUB
DISTRIBUTION: General
ORIGINAL: English

SUBMISSION TO THE COMMISSION ON ENVIRONMENTAL COOPERATION PURSUANT TO ARTICLE 14 OF THE *NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION*

Submitted by:

ANIMAL ALLIANCE OF CANADA
COUNCIL OF CANADIANS
GREENPEACE CANADA

Represented by:

Clayton Ruby
Ruby & Edwardh
Barristers
11 Prince Arthur Ave.
Toronto, Ontario
M5R 1B2

July, 1997

THE PETITIONERS

Animal Alliance of Canada
221 Broadview Avenue, Suite 101
Toronto, Ont., Canada M4M 2G3
ph.: (416) 462-9541, fax: (416) 462-9647

Animal Alliance of Canada is a Canadian not-for-profit, public interest, non-governmental organization with over 20,000 supporters. Animal Alliance has a long history of involvement in endangered species protection issues. For example, Elizabeth White, a Director of Animal Alliance, was appointed by the Federal Government to sit as a member of the Endangered Species Task Force. Animal Alliance also testified as a witness before Parliament's Standing Committee on Environment in 1996 concerning the need for endangered species legislation to fulfill Canada's commitments under the *Convention on Biological Diversity*.

The Council of Canadians
904-251 Laurier West
Ottawa, Ont., Canada K1P 5J6
ph.: (613) 233-2773, fax: (613) 233-6776

The Council of Canadians is a Canadian not-for-profit, public interest, non-governmental organization with over 100,000 members across Canada. Its mandate is to protect sovereignty and promote democratic development while protecting the environment, including endangered species. Through its involvement in the Canadian Endangered Species Coalition, the Council has communicated its concerns about the need for strong legal protection for endangered species to the Federal Government on numerous occasions.

Greenpeace Canada
250 Dundas Street West, Suite 605
Toronto, Ont., Canada M5T 2Z5
ph.: (416) 597-8408, fax: (416) 597-8422

Greenpeace Canada is a Canadian not-for-profit, public interest, non-governmental organization with over 150,000 supporters. Greenpeace seeks to promote the protection of Canada's environment, including all wild species and their habitat. For several years, Greenpeace has been actively involved in educating the public about the need for endangered species legislation. Greenpeace has met with a number of Federal Government officials, including Canada's Environment Minister, and has testified before Parliament's Standing Committee on Environment to urge Canada to pass endangered species legislation and comply with its obligations under *the Convention on Biological Diversity*.

TABLE OF CONTENTS

Page

THE PETITIONERS……...……..i

EXECUTIVE SUMMARY OF COMPLAINT…...…..……..……..……...…….1

THE COMPLAINT……..…..……3

.

1. Canada's Growing Endangered Species Problem……..…..…..……..…3

2. Canada's Lack of Endangered Species Legislation……..…...……4

3. Canada's Failure to Enforce its Regulation Ratifying the *Convention on Biological Diversity*……..……..……5

3.1 The Regulation Ratifying the *Biodiversity Convention* is an Environmental Law of Canada……...…..……5

3.2 Canada's Failure to Enforce the Ratification Regulation…..…...……6

3.2.1 The legal effect of the Ratification Regulation……7

3.2.2 Article 8(k) of the *Biodiversity Convention* requires endangered species legislation or regulations…….…..……7

3.2.3 Canada is contravening the *Biodiversity Convention* and the Ratification Regulation by its failure to pass endangered species legislation…….…….…..…9

3.2.4 Canada's failure to comply with Article 8(k) is a failure to enforce the Ratification Regulation……...…….11

4. The Petitioners have Communicated their Concerns to the Canadian Government……..……..…..……13

5. This Complaint Merits a Response from the Canadian Government……..……14

APPENDICES

Document	Appendix #
1997/98 Canadian Endangered Species & Other Wildlife at Risk (June 1997)	1
Canadian Wildlife Service, *The Benefits of Wildlife* (1995)	2
Angus Reid Group, *Public Support for Endangered Species Legislation* (June 1995); and Canadian Facts, *Endangered Species Legislation Multifacts* (December 1996)	3
World Wildlife Fund Canada, *1996-97 Endangered Spaces Progress Report* (1997)	4
Order-in-Council, No. P.C. 1992-1204 (June 4, 1992)	5
The Canadian Yearbook of International Law, Vol. XXXII (1994)	6
Instrument of Ratification (December 4, 1992)	7
Interpretation Act, R.S.C. 1985, c.I-21	8
Friends of the Oldman River Society v. Canada (Minister of Transport) (1992), 88 D.L.R. (4th) 1 (S.C.C)	9
Vienna Convention on the Law of Treaties (1969)	10
Convention on Biological Diversity (1992)	11
IUCN - The World Conservation Union, *A Guide to the Convention on Biological Diversity* (1994)	12
Commonwealth v. Tasmania (1983), 158 C.L.R. 1 (H.C. of Aust.)	13
Standing Committee on Environment, *A Global Partnership: Canada and the Conventions of the United Nations Conference on Environment and Development* (April 1993)	14
Convention on Biological Diversity Secretariat, *1995 Conference of the Parties to the Convention: Approaches and Experiences Related to the Implementation of Articles 6 and 8 of the Convention on Biological Diversity* (November 1995)	15
Canadian Bar Association, *Letter to Canada's Justice and Environment Ministers* (June 4, 1996)	16
Black's Law Dictionary, 6th edition (1991)	17
Sample Communications from Petitioners to Government of Canada	18
Animal Alliance of Canada Correspondence to Prime Minister and Response (April-May 1997)	19

Recovery of Nationally Endangered Wildlife (RENEW) Report #6 (1996) 20

Capital Cities Communications et al v. *Canadian Radio-Television Commission et al* (1977), 81 D.L.R. (3d) 609 (S.C.C.) 21

S.A. Williams and A.L.C. de Mestral, *An Introduction to International Law*, 2nd edition (1987) 22

EXECUTIVE SUMMARY OF COMPLAINT

(i) The Endangered Species Problem

Canada has a serious and growing endangered species problem. At least 23 species already have gone extinct in Canada, and 268 more are at risk (according to the Committee on the Status of Endangered Wildlife in Canada). In April, 1997, fifteen more species were added to the list. The main cause of species extinction is destruction of their *habitats* – the fields, forests, wetlands and other areas on which species depend for their survival.

At present, Canada has no federal legislation designed to protect endangered species. And only four of Canada's twelve provinces and territories have endangered species legislation. Thus, in most parts of Canada, there is no legislation in place to protect endangered species.

There are many compelling reasons why Canada should protect its endangered species: (i) wild species play a vital role in maintaining the planet's ecological functions, which sustain human life; (ii) nearly half of all medicine prescribed in North America is derived from wild species; (iii) wildlife species are an important part of our national identity as Canadians; (iv) Canadians spend over $8 billion/year on wildlife-related activities, generating $4.6 billion in tax revenue and over 180,000 jobs; and (v) 94% of Canadians support federal legislation to protect endangered species legislation.

Canada's lack of legal protection for endangered species is not just a Canadian problem. Over half of the species at risk in Canada migrate or range into the U.S., and many go as far south as Mexico. Cross-border endangered species such as the grizzly bear, spotted owl and eastern cougar are protected by strong federal legislation in the U.S., but lose that legal protection when they wander back into Canada.

Moreover, Canada's lack of endangered species legislation constitutes an economic subsidy to Canadian corporations since, unlike companies in the U.S. and Mexico, they are not required to bear the costs of protecting endangered species.

(ii) Canada's Failure to Enforce its Regulation Ratifying the Biodiversity Convention Warrants a Review by the CEC under Article 14

Article 14 of the *North American Agreement on Environmental Cooperation* ("*NAAEC*") allows citizens to file a complaint with the Commission on Environmental Cooperation ("CEC") that a member country is "failing to effectively enforce its environmental law". The petitioners submit that Canada is failing to enforce its regulation ratifying the *Convention on Biological Diversity*.

Canada signed the *Biodiversity Convention* at the Rio Earth Summit on June 11, 1992. It subsequently ratified the *Convention* pursuant to an Order-in-Council on December 4, 1992. Under Canadian law, that Ratification Instrument is a legally binding "regulation".

Under international law, the legal effect of "ratifying" a treaty which subsequently comes into force is that a country agrees to be bound by that treaty and to perform the requirements of the treaty in good faith. Thus, in ratifying the *Biodiversity Convention*, Canada passed a regulation committing it to fulfill the requirements of the *Convention*.

Canada has failed to fulfill the requirements of Article 8(k) of the *Biodiversity Convention*, which stipulates that each country must "*develop* or maintain *necessary legislation* and/or other regulatory provisions *for the protection of threatened species and populations*." The Canadian Parliament's Standing Committee on Environment, in a unanimous report dated April 1993, acknowledged that Article 8(k) of the Convention required Canada to develop endangered species legislation, and recommended that it take "immediate steps" to do so.

It has now been nearly five years since Canada ratified the *Biodiversity Convention*, and yet Canada still has not passed endangered species legislation. The Federal Government committed in the 1996 Throne Speech that it would pass endangered species legislation, but did not do so. The government introduced an endangered species bill (Bill C-65) in October 1996. However, the government made little effort to have the Bill debated, and it died when a federal election was called on April 27, 1997 without even receiving second reading. Even if passed, Bill C-65 would not have fulfilled the requirements of the *Biodiversity Convention* because of several critical weaknesses (although that is not the subject of this complaint).

In ratifying the *Biodiversity Convention* by regulation, Canada made a legal commitment to be bound by and to perform the requirements of the *Convention*. By failing to fulfill the requirements of Article 8(k) of the *Convention*, which requires legislation to protect endangered species, Canada is failing to enforce the regulation ratifying the *Convention*; i.e. it is 'failing to enforce an environmental law'.

Canada's failure to enforce its regulation ratifying the *Biodiversity Convention* has resulted in, and will result in, significant harm to Canada's public and its endangered species.

The petitioners are not-for-profit organizations. They have pursued all available means to compel Canada to implement the requirements of Article 8(k) of the *Convention*, including communicating with government officials, testifying before Parliamentary committees, and participating in the federal Endangered Species Task Force. The petitioners have specifically asked Canada's Prime Minister and Environment Minister for a commitment that Canada will promptly comply with its regulation ratifying the *Convention* by passing endangered species legislation, and were told that no such commitment would be made.

By further investigating the matters raised in this complaint, the CEC would advance the goals of the *NAAEC*, and in particular Article 1(g), which promotes enhanced compliance with environmental laws, Articles 1(c) and 10(2)(i), which promote the protection of wild flora and fauna and their habitat, and Article 10(2)(j), which specifically promotes the protection of threatened and endangered species.

THE COMPLAINT

1. Canada's Growing Endangered Species Problem

Canada has a serious endangered species problem. Already 23 species have gone extinct or become extirpated in Canada, according to the list prepared by the Committee on the Status of Wildlife in Canada (COSEWIC).1 Another 268 Canadian species are either endangered, threatened or vulnerable – meaning they face a risk of becoming extinct unless something is done to halt their decline.2 Canada's endangered species list grows longer every year; in April, 1997, 15 more species were added to the list.

These numbers are particularly alarming when one considers the fact that Canada, because of its northern latitude, has a far lower diversity of species than is found in areas closer to the equator. Thus, the loss of a single species in Canada is likely to have a far greater ecological impact than would be the case in a more tropical region.

The main cause of species' extinction is destruction of their *habitats* – the fields, forests, wetlands and other areas on which species depend to live, feed, or raise their young. In Canada, at least 240 acres of habitat are lost every hour. Habitat loss is a primary threat to almost 90% of Canada's species at risk.3

Protecting endangered species is important for their sake, and for ours. Humans are dependent on the earth's diversity of species for our own survival. Here are a few of the reasons for protecting endangered species:

- *Ecosystem benefits*. Wild species play a vital role in maintaining the planet's ecological functions; they help clean the air and water, renourish the soil, and maintain the atmosphere's carbon balance. In short, all of life is a complex, interdependent web.
- *Medicine and research*. Nearly 50% of the medicine prescribed in North America is derived from wild species (mainly plants), including Aspirin and many other cancer fighting drugs (some of which have been derived from Canadian species).4
- *National identity*. Wildlife species are an integral part of our identity as Canadians. Wild species adorn our flags, our art, and our currency. Our abundant wildlife is a tremendous source of inspiration, recreation and pride for all Canadians.
- *Economic benefits*. In 1991, Canadians spent $8.3 billion on wildlife-related activities, generating $4.6 billion in tax revenue and 187,000 jobs.5
- *Moral obligations.* Many believe that it is morally wrong for humans to cause other species to go extinct simply to meet the insatiable demands of human society.
- *Importance to Canadians.* Protecting endangered species is tremendously important to Canadians. Two national polls have found that 94% of Canadians support federal legislation to protect endangered species legislation.6

---

1 COSEWIC is a committee of wildlife experts drawn mainly from federal and provincial governments, which has been assessing the status of species at risk in Canada since 1978.
2 The actual number of species at risk in Canada is much higher. COSEWIC does not have the resources to assess all species suspected of being at risk.
3 A list of Canada's Species at Risk thus far identified by COSEWIC and the threats they face is attached as Appendix 1 to this complaint.
4 For example, British Columbia's Pacific Yew tree, long treated as a 'weed' species and cut indiscriminately, has recently been discovered to contain taxol, a leading cancer-fighting drug.
5 See, Canadian Wildlife Service, *The Benefits of Wildlife* (1995) (based on a comprehensive survey by Statistics Canada) [Attached as Appendix 2 to this complaint].
6 See, Angus Reid Group, *Public Support for Endangered Species Legislation* (June 1995), and Canadian Facts, *Endangered Species Legislation Multifacts* (December 1996) [Attached as Appendix 3 to this complaint].

2. Canada's Lack of Endangered Species Legislation

At present, Canada has no federal legislation designed to protect endangered species. There is general federal legislation governing the management of fish and certain migratory birds.7 However, even those laws do not provide any special protection for endangered species – in fact they do not even address the problem (as is clearly evidenced by the large number of fish and migratory bird species on Canada's List of Species at Risk).

Species that live in a national park or wildlife area do receive fairly strong legal protection under the *National Parks Act* or *Canada Wildlife Act* (although even in those areas some species are at risk due to human activity). However, those lands account for less than 3% of Canada, and thus are able to protect very few endangered species.8

Moreover, only four Canadian provinces currently have endangered species legislation: New Brunswick, Quebec, Ontario and Manitoba. The other eight provinces and territories have no endangered species legislation, only general laws governing wildlife management. Those laws, which are mainly designed to regulate hunting of game species, may include some incidental reference to endangered species, but do not require their protection.

Thus, in most parts of Canada, there is no legislation in place to protect endangered species.

Canada's lack of legal protection for endangered species is not just a Canadian problem; it also affects other countries. Over half of the species on Canada's List of Species at Risk either migrate or range across the Canada-U.S. border (including many species of fish and migratory birds). Within the U.S., endangered species and their habitats receive strong legal protection under the U.S. *Endangered Species Act*, yet when those same species range into most parts of Canada, they lose their protection. For example, grizzly bears in northern Montana and Idaho are legally protected as a threatened species, yet when they wander into Canada they can be legally shot, due to Canada's lack of endangered species legislation.

Similarly, approximately 25 of the bird species and at least one butterfly species (the monarch butterfly) on Canada's List of Species at Risk either migrate or have a range extending into Mexico. Unlike Canada, Mexico has passed legislation giving special protection to endangered species and their habitats.9

Thus, Canada's failure to protect endangered species will affect the survival of many species that are shared with the U.S or Mexico, and are legally protected in those countries.

Moreover, Canada's failure to enact endangered species legislation constitutes a subsidy to Canadian corporations. Corporations in the U.S. and Mexico must carry out their operations in a manner that protects endangered species, and incur the costs of doing so. In Canada, corporations are not required to bear the costs of protecting endangered species; rather, the costs associated with species loss are borne by the Canadian public. Simply put, corporations in Canada are allowed to 'consume' a public resource (endangered wildlife) without having to pay the costs of doing so, i.e. they are subsidized.

3. Canada's Failure to Enforce its Regulation Ratifying the *Convention on Biological Diversity*

---

7 See, the *Fisheries Act*, R.S.C. 1985, c.F-14, and the *Migratory Birds Convention Act*, S.C. 1994, c.22 (which does not cover birds of prey).

8 See, World Wildlife Fund Canada, *1996-97 Endangered Spaces Progress Report* (1997), pp. 50-51 [Attached as Appendix 4 to this compliant].

9 See, *Norma Oficial Mexicana NOM-ECOL-059-1994* (which identifies threatened and endangered species and provides for protection of those species and their habitats), and Articles 83 and 87 of *General Law of Ecological Equilibrium and Environmental Protection*, D.O., Jan. 28, 1988.

Canada's failure to legally protect its endangered species is not only poor policy; it contravenes the legal obligations undertaken by Canada in ratifying the *United Nations Convention on Biological Diversity* ("*Biodiversity Convention*"), and constitutes a clear failure by Canada to enforce its environmental law. It is therefore a proper subject for a complaint under Article 14 of the *North American Agreement on Environmental Cooperation* ("*NAAEC*"), which allows citizens to complain that a country is failing to effectively enforce its environmental laws.

3.1 The Regulation Ratifying the *Biodiversity Convention* is an Environmental Law of Canada

On June 4, 1992, the Governor in Council (Canada's Cabinet) passed an Order-in-Council authorizing the Prime Minister or Secretary of State for External Affairs to sign and ratify the *Biodiversity Convention* on behalf of Canada.10

On June 11, 1992, Canada's Prime Minister signed the *Biodiversity Convention* on behalf of Canada at the U.N. Earth Summit in Rio de Janeiro11 (in fact, Canada was the first western nation to sign and ratify the Convention). On December 4, 1992, pursuant to the authority granted under the Order-in-Council, Canada's Prime Minister ratified the *Convention* on behalf of Canada by issuing an Instrument of Ratification.12

The Instrument of Ratification is an "environmental law", as contemplated by Article 14 of the *NAAEC*. Article 45 of the *NAAEC* defines that term as follows:

> (a) "environmental law" means any statute *or regulation* of a Party, or provision thereof, the primary purpose of which is the protection of the environment … through …
>
> (iii) *the protection of wild flora or fauna, including endangered species*, their habitat, and specially protected natural areas [emphasis added]

The Instrument of Ratification is a "regulation" whose primary purpose is "the protection of wild flora or fauna, including endangered species". Canada's *Interpretation Act* defines "regulation" as follows:

> "regulation" includes an *order*, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or *other instrument* issued made or established …
>
> (b) by or under the authority of the Governor in Council.[emphasis added]13

Thus, both the *Interpretation Act*, and the case law applying it,14 make it clear that an Order-in-Council is a "regulation". It is equally clear that the Instrument of Ratification, which was made pursuant to authority granted in the Order-in-Council, is a regulation. It is, to use the words of the *Interpretation Act*, an "instrument … made … under the authority of the Governor in Council."

Thus, the Instrument of Ratification is a "regulation", and therefore falls within the definition of "environmental law" in Article 45 of the *NAAEC*.

3.2 Canada's Failure to Enforce the Ratification Regulation

---

10 A copy of that Order-in-Council, No. P.C. 1992-1204, is Appendix 5 to this complaint.

11 See, *The Canadian Yearbook of International Law*, Vol. XXXII (1994), p. 349 [Attached as Appendix 6 to this compliant].

12 The Instrument of Ratification is Appendix 7 to this complaint.

13 The relevant section of the *Interpretation Act*, R.S.C. 1985, c. I-23, is Appendix 8 to this complaint.

14 See, for example, *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 at p. 19 et seq. (S.C.C.) (holding that the EARP Guidelines Order, which is an Order-in-Council, is an enforceable regulation). Relevant portions of this case are Appendix 9 to this complaint.

In order to determine if Canada is enforcing the regulatory instrument ratifying the *Biodiversity Convention* (hereinafter called the "Ratification Regulation"), it is first necessary to determine what the legal effect of that regulation is.

3.2.1 The legal effect of the Ratification Regulation

The Ratification Regulation does only one thing: it ratifies the *Biodiversity Convention*. What is the legal effect of this "ratification"?

Ratification is a term of art under international law. The *Vienna Convention on the Law of Treaties* makes it clear that by ratifying a treaty (or convention), a country agrees to be bound by that treaty and to implement its requirements in good faith.15 Article 2 of the *Vienna Convention* provides that:

> "ratification" … means … the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

Once a State has ratified a treaty, and that treaty has come into force (as is the case with the *Biodiversity Convention*16), Article 26 of the *Vienna Convention* further provides that:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Thus, the legal effect of ratifying, by regulation, the *Biodiversity Convention* is to commit Canada to be bound by the *Convention* and fulfill its requirements in good faith.

3.2.2 Article 8(k) of the *Biodiversity Convention* requires endangered species legislation or regulations

The *Biodiversity Convention* requires signatory nations to take a range of different actions in order to ensure the conservation of the planet's diverse array of species and the ecosystems upon which they depend. The requirement to develop endangered species legislation or regulations is found in Article 8(k), which provides:

> 8. Each contracting Party *shall*, as far as possible and as appropriate …
>
> (k) develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations. [emphasis added]17

The International Union for the Conservation of Nature – the international body integrally involved in the development and implementation of the *Biodiversity Convention* – has emphasized that Paragraph 8(k) "is *a particularly important aspect of the Convention* since legislation is *essential* to prevent the loss of threatened species."18 As noted above, Canada currently has no federal legislation or regulations to protect threatened species and populations.19

---

15 The relevant portions of the *Vienna Convention* are found in Appendix 10 to this complaint.

16 The *Biodiversity Convention* came into force on December 29, 1993, the ninetieth day after the thirtieth country ratified the *Convention*. See, Article 36 of the *Biodiversity Convention* [attached as Appendix 11 to this complaint], and *The Canadian Yearbook of International Law*, Vol. XXXII (1994), p. 349 [Attached as appendix 6 to this complaint].

17 The *Biodiversity Convention* is Appendix 11 to this complaint.

18 See, the IUCN's publication, *A Guide to the Convention on Biological Diversity* (1994), p. 49 [Attached as Appendix 12 to this complaint].

19 Canada does have a network of protected areas, covering less than 6% of its land mass, which offers some legal protection for threatened species (See, WWF Canada, *1996-97 Endangered Spaces Progress Report* (1997), p. 51, attached as Appendix 4 to this compliant.). However it is clear that article 8(k) requires more than

The opening words of Article 8 of the *Biodiversity Convention* – "each Party *shall*, as far as possible and as appropriate" – impose a *positive duty* on the Government of Canada to pass legislation. Virtually identical language in the *World Heritage Convention* has been interpreted by Australia's highest court as imposing "a clear obligation on Australia to act."20 (There do not appear to be any Canadian court decisions interpreting similar treaty language, largely because Canadian courts rarely interpret treaties.)

The Government of Canada has acknowledged that Article 8(k) obliges Canada to pass specific legislation protecting endangered species. Parliament's Standing Committee on Environment, following the 1992 Rio Earth Summit, held hearings to determine what steps Canada should take to implement the treaties it had signed at that summit. The all-party Committee's final report, released in April 1993, contained a number of specific recommendations. In regard to Article 8(k) of the *Biodiversity Convention*, the Committee 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]21

Similarly, Bill C-65 – the ill-fated endangered species bill introduced by the Federal Government in 1996 – specifically acknowledged that the *Biodiversity Convention* requires passage of endangered species legislation. The preamble to Bill C-65 stated:

> Recognizing that …

---

just the establishment of protected areas, since that is already specifically required by Article 8(a). Article 8(k) requires legislation to protect endangered species *outside* protected areas.

20 In 1982, the Australian State of Tasmania began to build a dam on the Gordon River, which threatened a downstream World Heritage Site. The Australian Federal Government, acting on what it believed to be its obligation under the *World Heritage Convention*, took legal steps to prevent construction of the dam. Tasmania challenged the legality of the federal action in court. The court was called upon to determine whether the Convention imposed a *mandatory obligation* on a signatory party to protect designated World Heritage sites. The applicable provision was Article 5 of the *World Heritage Convention*, which reads:

> To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention *shall endeavour, in so far as possible, and as appropriate for each country* ...
>
> (d) to take the appropriate legal ... measures necessary for the ... protection ... of this heritage

The introductory words, "shall endeavour, in so far as possible and as appropriate for each country", are virtually identical to those found in Article 8 of the *Biodiversity Convention*. Tasmania argued that these words allowed a signatory party broad *flexibility* as to how, and whether or not, to comply with Article 5. This argument was rejected, soundly, by the Australian High Court. Justice Mason found that:

> Article 5 cannot be read as a mere statement of intention. It is expressed in the form of a command ... *Indeed, there would be little point in adding the qualifications "in so far as possible" and "as appropriate for each country" unless the Article imposed an obligation*. The first qualification means "in so far as is practicable" and the second takes account of the difference in legal systems.

Another judge voting in the majority, Justice Brennan, echoed these sentiments; "There is a clear obligation upon Australia to act under Articles 4 and 5." (*Commonwealth v. Tasmania* (1983), 158 C.L.R. 1 (H.C. of Aust.) at 133 and 226) [The relevant parts of this case are attached as Appendix 13 to this complaint].

21 Standing Committee on Environment, *A Global Partnership: Canada and the Conventions of the United Nations Conference on Environment and Development* (April 1993), p. 30 [The relevant portions of this report are attached as Appendix 14 to this complaint].

> providing legal protection for wildlife species at risk will in part meet Canada's commitments under [the Biodiversity] Convention.

In sum, the Ratification Regulation obligates Canada's Federal Government to fulfill the requirements of the *Biodiversity Convention*, including the requirement in Article 8(k) to develop endangered species legislation or regulations.

3.2.3 Canada is contravening the *Biodiversity Convention* and the Ratification Regulation by its failure to pass endangered species legislation

It has now been $4^1/_2$ years since Canada ratified, by regulation, the *Biodiversity Convention*, yet the Federal Government still has not complied with the fundamental requirement to pass endangered species legislation or regulations. Other nations, such as Mexico, Australia and Japan, passed endangered species legislation shortly after signing the *Convention*.22 In the time since Canada ratified the *Convention*, more than 70 species have been added to Canada's List of Species at Risk. There is no excuse for Canada's continuing failure to fulfill the legal commitments it made in ratifying the *Convention*.

In October of 1996, the federal Environment Minister did introduce an endangered species bill (Bill C-65). However, the government made little effort to have the legislation passed by Parliament. After going through committee hearings, Bill C-65 sat on the Parliamentary order paper for nearly two months without ever being scheduled for debate. The Bill was given just a few token hours of debate on April 24, 1997 – three days before the Federal Government called an election (thus proroguing Parliament). Bill C-65 died on the order paper when the election was called, without even receiving second reading.

There was more than ample time for Bill C-65 to be passed, had the government wished for this to happen. At least 12 other Bills that were introduced in Parliament *after* Bill C-65 were passed before the April 27, 1997 election call.23 However, the government chose to let Bill C-65 lie dormant, and die when the election was called.

Even if passed, Bill C-65 would not have fulfilled the requirements of the *Biodiversity Convention*, due to a number of critical shortcomings, including:

> (i) The Bill establishes a scientific committee to determine which species are endangered, but then leaves it up to Cabinet to decide whether or not to add those species to the list under the Act. Thus, the Bill does not require "the *protection* of endangered species", as required by Article 8(k), since it does not even require the *listing* of species that are scientifically determined to be endangered (and listing is a prerequisite to protection).
>
> (ii) Outside of federal lands and waters, the Bill provides *no habitat protection* for endangered species; it merely prohibits direct harm to a species or its 'residence' (e.g. its nest or den). Yet habitat loss is the main cause of species extinction. The parties to the *Biodiversity Convention* themselves have acknowledged that "habitat protection" is a "*crucial aspect* of legislation promulgated pursuant to 8(k) … since the requirement is to protect populations."24 It is clear that

---

22 See, Government of Mexico, *Norma Oficial Mexicana NOM-ECOL-059-1994*; Government of Japan, *Law for the Conservation of Endangered Species of Wild Fauna and Flora*, No. 75/1992; and, Government of Australia, *Endangered Species Protection Act*, No. 194/1992.

23 For example, Bill C-95 (the anti-gang bill) was introduced for first reading on April 17, 1997, was passed on April 21, 1997, and received Royal Assent on April 25, 1997.

24 See, Minutes of the 1995 Conference of the Parties to the Convention, p. 19, paras 77 and 81, attached as Appendix 15 to this complaint. Similarly, the IUCN has concluded that, "Habitat protection should be one aspect of any legislation promulgated pursuant to paragraph 8(k), since the requirement is to protect populations." See, *A Guide to the Convention on Biological Diversity* (IUCN, 1994), pp. 49-50 [Attached as Appendix 12 to this complaint].

the Federal Government has the constitutional authority to protect species' habitat outside federal lands;[25] it simply has chosen not to exercise that authority – contrary to Articles 8(d) and (k).

(iii) Even on federal lands, Bill C-65 would not require protection of species' habitat. Sections 38(5) and 42(1) of the Bill grant responsible ministers the discretion to determine whether or not regulations to protect a species' critical habitat are needed – when in reality they are needed in all cases (as noted above in sub-paragraph (ii)). Again, this contravenes Articles 8(d) and (k) of the *Convention*.

(iv) Bill C-65 only applies to about 40% of Canada's species at risk; it does not cover all species within federal jurisdiction.[26] This contravenes the opening words of Article 8 of the *Convention* which requires the Canadian government to go "as far as possible" in developing legislation to protect threatened species and populations.

The fact that Bill C-65, even if it had been passed, would not have met the requirements of the *Biodiversity Convention* is <u>not</u> the immediate subject of this complaint[27]. That issue could arise only *after* Canada has passed endangered species legislation. The present complaint concerns the fact that Canada has not passed endangered species legislation *at all* – which is a clear contravention of the Article 8(k) and the Ratification Regulation.

3.2.4 Canada's failure to comply with Article 8(k) is a failure to enforce the Ratification Regulation

As explained above, the Ratification Regulation obligates Canada to fulfill the requirements of the *Biodiversity Convention*, including the requirement in Article 8(k) to develop endangered species legislation. Canada's failure to fulfill the requirements of the *Convention* thus constitutes a "failure to enforce" the Ratification Regulation.

The NAAEC does not define the term "enforce". However, *Black's Law Dictionary* provides the customary definition of "enforce" and "enforcement":

> "enforce". To put into execution; to cause to take effect; to make effective; as, to enforce a particular law, a writ, a judgment, or the collection of a debt or fine; to compel obedience to.
>
> "enforcement". The act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command.[28]

---

25 The Canadian Bar Association (CBA), in a 1996 letter from its national president, has advised the Federal Government that it clearly has the constitutional authority to protect the habitat of any endangered species that fall within its jurisdiction, regardless of whether that habitat is on federal, provincial or private land. See, June 4, 1996, letter from CBA to Canada's Justice and Environment Ministers, at p. 6 [Attached as Appendix 16 to this complaint].

26 Most experts, including the Canadian Bar Association, believe that the Federal Government has the constitutional jurisdiction to protect *all* endangered species in Canada (under its "criminal law" and/or "national concern" powers). At a minimum, it is beyond dispute that the following endangered species within federal jurisdiction were not covered by Bill C-65: (a) species that migrate across, or whose range extends across, a provincial border; (b) species of plants whose range extends across a national border (only animals are covered), and; (c) animal species living on federal lands in the Yukon or Northwest Territories. [See, CBA letter, attached as Appendix 16 to this complaint]

27 Although it negates any response by Canada that merely by reintroducing and passing Bill C-65 Canada would fulfill the requirements of the *Convention* and the Ratification Regulation.

28 *Black's Law Dictionary*, p. 365 [Attached as Appendix 17 to this complaint].

Clearly, the Canadian Government's failure to enforce, put into effect, and carry out the mandate of the Ratification Regulation constitutes a failure to enforce an environmental law for the purposes of Article 14 of the NAAEC.

Determining what constitutes 'enforcement' of a particular environmental law depends on the nature of the law in question. While many environmental laws impose requirements on corporations or the general public, it is not uncommon for an environmental law to impose obligations on a government official, a Minister, or the Cabinet.29 In this case, the law in question – the Ratification Regulation – obligates the Government of Canada to implement the requirements of the *Biodiversity Convention*. Therefore, 'enforcement' of that law means ensuring that the requirements of the Convention are in fact carried out by the Government of Canada – including the requirement to pass endangered species legislation or regulations.30 There is no other way in which the Regulation could be enforced.

The present complaint is quite different from two previous complaints to the CEC which dealt with situations where a new law was passed which had the effect of precluding the enforcement of a prior law. In those cases, the CEC determined that a Party may alter its domestic laws in a manner which supersedes previous environmental laws without that constituting a failure to enforce the earlier law (Secretariat determinations SEM-95-001 and SEM-95-002).31 In other words, a Party retains the authority to alter its environmental laws. By contrast, in the case at hand, Canada has not rescinded or altered the Ratification Regulation. The obligations created by that environmental law are still very much in force and, to the extent discussed in this submission, still unenforced. Of course, Canada does retain the right to repeal or modify that law, but so long as the law continues in force, Canada is required to enforce its obligations.

The petitioners in this case are not challenging the Canadian Government's policy decision about whether or not to pass endangered species legislation. In this case, the Government of Canada has already accepted the obligation to pass endangered species legislation or regulations, through its regulation ratifying the *Biodiversity Convention*. It is the failure to enforce this environmental law that the petitioners are challenging.

The present situation is not one that is likely to arise very often. There are only a limited number of environmental treaties which Canada has ratified, and, as far as the petitioners are aware, the Canadian Government typically has complied with any legislation-making requirements in such treaties. For example, Canada's obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* are implemented through the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*. Similarly, Canada's obligations under the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* are implemented through the *Canadian Environmental Protection Act*. Thus, Canada's failure to fulfill the obligations it undertook in ratifying the *Biodiversity Convention* appears to be an unusual situation – but a very serious one.

---

29 For example, the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c.52, section 21(2), provides that: "The Governor in Council *shall make regulations* specifying the animals and plants that are listed as 'fauna' and 'flora', respectively, in an appendix to the [CITES] Convention, and *shall*, not later than 90 days after any change to a list in an appendix to the Convention, *amend the regulations* to reflect that change."

30 It is significant to note that the Governor in Council (Canada's Cabinet) could comply with Article 8(k) simply through executive action – *legislative action is not necessarily required*. Article 8(k) calls for legislation *or regulations* to protect threatened species. Section 12 of the *Canada Wildlife Act*, R.S.C. 1985, c.W-9, specifically provides for the passage of such regulations by Cabinet.

31 See, SEM-95-001: In the CEC's determination under Article 14(2) it partially relied on the fact that, in that case "the alleged failure to enforce environmental law results from competing legislative mandates, and not from other action or inaction". By contrast, in the case at hand the failure to enforce the Ratification Regulation results solely from government inaction, and not from any competing legislative mandate.

In sum, Canada ratified the *Biodiversity Convention* by means of an Instrument of Ratification (made pursuant to an Order-in-Council) which is a "regulation" under Canadian law. The regulation "ratifying" the *Biodiversity Convention* constitutes a legal commitment by Canada to be bound by the *Convention* and to perform its requirements in good faith. Despite passing the Ratification Regulation nearly five years ago, Canada has yet to fulfill one of the main requirements of the Biodiversity Convention – the requirement in Article 8(k) to pass endangered species legislation or regulations. Canada's failure to carry out the mandate of the Ratification Regulation constitutes a "failure to enforce an environmental law" for purposes of Article 14 of the *NAAEC*.

4. The Petitioners have Communicated their Concerns to the Canadian Government

The petitioners have communicated with the Canadian Government on numerous occasions over the preceding three years and encouraged the Government to pass endangered species legislation as required by the *Biodiversity Convention*.32 Indeed, one of the petitioners, Animal Alliance of Canada, sat as a member of the Endangered Species Task Force – a body of industry and environmental representatives appointed by the Federal Government to advise it about the need for, and requisite elements of, endangered species legislation. The Federal Government has not followed the Task Force's consensus recommendation that it pass strong endangered species legislation.

Furthermore, on April 17, 1997, Animal Alliance of specifically wrote to the Prime Minister of Canada to inform him of their concerns that Canada was violating Article 8(k) of the *Biodiversity Convention* by its failure to pass endangered species legislation. The letter requested a commitment from the Government that it would comply promptly with the requirements of Article 8(k), and advised that unless such a commitment was forthcoming, Animal Alliance and other organizations would take action against Canada for its non-compliance with the Convention. On April 25, 1997, a Director of Animal Alliance met with representatives of Canada's Prime Minister and Environment Minister, and was advised that the Canadian Government would not commit that it would promptly pass endangered species legislation, in compliance with the *Convention*. Following that meeting, on May 15, 1997, Animal Alliance wrote to the Prime Minister and Environment Minister and advised them again that Animal Alliance, along with other organizations, would take action against Canada for non-compliance with the *Biodiversity Convention* unless the Government committed to prompt passage of legislation in compliance with Article 8(k). Animal Alliance received no response to its letter of May 15, 1997, and received only a *pro forma* acknowledgment of its letter of April 17, 1997.33

32 Examples of these communications are attached as Appendix 18 to this complaint.

33 Copies of these letters are attached as Appendix 19 to this complaint.

5. This Complaint Merits a Response from the Canadian Government

The petitioners submit that this complaint satisfies the criteria set out in Article 14(2), and that a response from the Canadian Government is warranted.

The Federal Government's failure to enforce the Ratification Regulation will cause harm to the Applicant organizations and their members, and to an important public resource – Canada's endangered species.34 The Applicants are all non-profit organizations concerned with the protection of Canada's endangered species. The harm to the Canadian public from the Government's failure to protect endangered species is manifest. Since the Ratification Regulation was passed in 1992, five of the species on Canada's List of Species at Risk have been "up-listed" (meaning their status has gotten significantly worse) and more than 70 other species have been added to the list. Worse still, there are no recovery plans in place for over 90% of the species on that list.35

The public benefits of conserving endangered species are discussed above, in part 1. The petitioners are concerned that many more Canadian species will become endangered or extinct unless the Government promptly carries out the mandate of the Ratification Regulation, by passing effective endangered species legislation or regulations.

The preparation of a factual record would advance the goals of the Agreement by:

- ensuring that activities in Canada do not harm endangered species that are shared with the U.S. or Mexico (preamble, para. 2)
- promoting compliance with international environmental agreements (preamble, para. 9)
- increasing cooperation between the parties to better protect wild flora and fauna and their habitat (Articles 1(c) and 10(2)(i))
- protecting threatened and endangered species (Article 10(2)(j))
- avoiding trade distortions created by Canada's failure to require protection of endangered species (Article 1(e))
- enhancing compliance with Canada's environmental regulations (Article 1(g))

The Applicants have exhausted all remedies available to them under Canadian law. They have written to and met with the responsible authorities in the Canadian Government, and they have appeared as witnesses before the Canadian Parliament's Standing Committee on Environment in order to encourage the Government to fulfill its obligations under the Ratification Regulation and the *Biodiversity Convention*.

The option of pursuing this matter in the Canadian courts is not available to the applicants. Despite the fact that treaty ratification does create legal obligations (as discussed above in part 3.2.1), those obligations are not ones that traditionally are considered enforceable in a Canadian court, at least not by private citizens or organizations.36

---

34 See, SEM-96-001 (Notification of the Secretariat to Council under Article 15(1)) where the Secretariat found that the public nature of the resources in question in that case, a coral reef, brought the submission "within the spirit and intent of Article 14" even where "the submitters may not have alleged the particularized, individual harm required to achieve legal standing to bring suit in some civil proceedings in North America."

35 *Recovery of Nationally Endangered Wildlife (RENEW) Report #6* (1996), p. 30 [Attached as Appendix 20 to this complaint].

36 See, for example, *Capital Cities Communications et al* v. *Canadian Radio-Television Commission et al* (1977), 81 D.L.R. (3d) 609 at p. 631 (S.C.C.) ("if the contention of the Appellants [that Canada was bound by the terms of the Convention] has any force … it can only relate to the obligations of Canada under the Convention towards other ratifying signatories. There would be no domestic, internal consequences unless they arose from implementing legislation giving the Convention a legal effect within Canada.") [Attached as appendix 21 to this compliant]; and, S.A. Williams and A.L.C. de Mestral, *An Introduction to International Law*, 2nd edition (1987), p. 36 ("a treaty can only create rights enforceable by the courts or change the laws of Canada where appropriate legislation has been adopted") [Attached as Appendix 22 to this complaint].

The fact that the Ratification Regulation creates legal obligations which cannot be enforced by Canadian citizens in a domestic court makes this a particularly appropriate case for CEC review under Article 15. The Article 15 review process was not intended merely to allow the CEC to duplicate, or second guess, a country's domestic courts. Rather, it was designed, at least in part, to provide a review mechanism when no adequate private remedy was available through domestic courts[37] (this is the clear intent behind sections 2(c) and 3(b)(ii) of Article 14). In this case, there is no domestic law route available for citizens to review Canada's non-enforcement of the legal obligations created by the Ratification Regulation. Review by the CEC under Article 15 will provide a much needed mechanism to ensure Canada's accountability for the enforcement of this regulation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

_____	_____
Clayton Ruby, Counsel for the petitioners Animal Alliance of Canada, Council of Canadians and Greenpeace Canada	Date

37 As noted by the Secretariat in its determination under Article 14(2) in SEM-95-001, endnote 4: "There may be circumstances where no [domestic] legal remedy exists to redress a matter that falls squarely within the ambit of Article 14 submissions."