

Collage by Frederica Jacks, showing species listed as Endangered under Nova Scotia's Endangered Species Act. Photo: Karen McKendry



Underprotected

GOING TO COURT FOR NOVA SCOTIA'S MOST VULNERABLE WILDLIFE

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“So, wait, how does the government get away with not doing what it’s legally required to do?” asked my student, her brow furrowed.

I had just given a lecture to my environmental law class on species at risk. I had highlighted the Department of Lands and Forestry’s alleged failures to fulfill their legal obligations under Nova Scotia’s Endangered Species Act. We also covered “rule of law,” fundamental to Canada’s Constitution and by which government is explicitly not above the law.

“Well,” I stalled, fumbling for a response. Had I seen the province fail our forests and wildlife so many times that I was jaded? Did I simply accept this as the status quo?

“Well,” I finally answered, “no one has bothered to go to court over this, so the Department doesn’t bother to meet all of its legal obligations.”

I felt my students’ frustration. Why doesn’t the government abide by the law? What kind of governance is that? Citizens are expected to abide by the law, but the government can pick and choose which laws to follow?

I decided I couldn’t deliver the lecture again next semester without at least trying to launch legal action against the Department of Lands and Forestry.

First, I needed a client. I emailed my legal action proposal to a couple of Nova Scotia’s naturalist organizations—naturalists know first-hand the loss of species and the decline of wildlife habitat in Nova Scotia. Not unexpectedly, some organizations were hesitant: “Lawsuits are expensive.” “What if we lose and have to pay the government’s legal costs?” “We’re not activist organizations.”

I explained that when a law requires a government to do a certain thing, the courts are generally willing to step in and tell the government to do that thing. Courts, after all, are serious about the rule of law.

Dr. Soren Bondrup-Nielsen, president of the Blomidon Naturalists Society, and Mr. Bob Bancroft, president of Nature Nova Scotia, were immediately supportive. Funds for the lawsuit were quickly raised—Bob secured donation pledges and Soren set up a crowd-sourcing website. We launched the case at the end of January 2019 on behalf of Bob Bancroft (as an individual), Nature Nova Scotia, the Blomidon Naturalists’ Society and the Halifax Field Naturalists.

“Every one of the millions of species on Earth is unique—a natural work of art that cannot be recreated once lost. Humans are now causing the sixth major extinction in the planet’s history, but many of us aren’t noticing that. By dissociating from nature, people lose interest in protecting it. The three-piece collage highlights the urgency of conservation, with emphasis on the threat of habitat fragmentation and human-nature disconnection. We need to stop looking at endangered species as individual bullet points in our conservation to-do list. The Endangered Species Act (ESA) is not just a list of names, and protecting individual species is not just a matter of their own existence, but of their contribution to the surrounding environment, and as part of a beautiful, sustainable world for us all to live in.”

- Frederica Jacks

We chose six species at risk to represent the alleged failures by the Department of Lands and Forestry to meet legal obligations under the Act: Mainland Moose, Ram’s-head Ladyslipper, Black Ash, Wood Turtle, Canada Warbler, and Eastern Wood-pewee.

The Act requires the Minister of Lands and Forestry to both appoint a recovery team and ensure a recovery plan is created, within one year of an endangered species’ listed under the Act (two years for threatened species). Ram’s-head Ladyslipper was designated as endangered in 2008. It still lacks a recovery team and plan. The Act also requires recovery plans to identify “core habitat” for threatened and endangered species. Mainland Moose was listed as endangered in 2003. A recovery plan was prepared in 2007, but it does not identify core habitat, as required by the Act. In fact, the Department has yet to identify a single hectare of core habitat for any species at risk.

The lawsuit isn’t the first time these legal failures have been pointed out. In 2015, East Coast Environmental Law Association (ECELAW) published a report entitled Protected on Paper Only, which details the Department’s various alleged violations of the Act. Soon after, the Auditor General’s Office of Nova Scotia released its assessment of the Department’s track-record on species at risk

and recommended the Department to meet its legal obligations under the Act. After the lawsuit was launched, ECELAW published a follow-up to their 2015 report. It found that not only that the Department had none of the shortcomings identified in 2015 been addressed, but that the list of alleged violations had grown. The Auditor General’s Office also released its follow-up report earlier this year. It noted that the Department had failed to follow any of the Office’s 2016 recommendations.

Shortly after the lawsuit was launched, ECELAW, represented by Ecojustice, requested to join the case as an intervenor, and the Department agreed. The applicants and ECELAW submitted a motion for costs immunity – that is, no costs would be awarded for or against the applicants and the intervenor no matter the outcome of the case. Again, the Department agreed.

At present, we are waiting for the Department to provide us with the “record,”—the collection of documents on which the case will be argued and decided. Once we receive and review the record, and assuming there are no disputes about what the record should contain, we will finally be able to set a date for the actual hearing of the case. Stay tuned! With any luck, I’ll have a more positive lecture on species at risk for my students next term.