

Thursday December 3, 2020

**EnPointe Public Affairs weighs in:**  
***Environmental Defence November 21, 2020***  
***Responses to form letters being sent to Ontario citizens by government***  
***MPPs with regard to the budget bill attack on Conservation Authorities***

LONDON, ON: EnPointe Public Affairs, a London-based advocacy and public policy analysis firm today released a response to comments circulated publicly by Environmental Defence Canada (“EDC”) on November 21, 2020 for media and public information purposes:

Environmental Defence provided responses to Ontario government explanations of Schedule 6 of Bill 229 that propose to amend the *Conservation Authorities Act*, 1990 R.S.O., c. 5 (the “Act”).

EnPointe Public Affairs provides this examination of Environmental Defence’s positions for educational and information purposes and for public review and comment.

We would underscore that our five-year advocacy on conservation authority (“CA or CAs”) reform in Ontario is an unfunded, pro-bono public interest campaign. EnPointe has not been retained nor is it under contract by or to any third party or unrelated interest in respect of these matters. The views and opinions offered herein are those of EnPointe Public Affairs and should not be interpreted or understood to be representative of any other interest(s) or individuals.

**EXAMINATION**

1. Original Government of Ontario comment:

*Over the past year and a half, the government has consulted on the core role of CAs in preparing and protecting against the impacts of natural hazards, maintaining and managing conservation lands, and their role in drinking water source protection. Through the consultations we have heard concerns that conservation authorities have expanded their programs and services beyond their core mandate.*

Environmental Defence Canada reply:

Many ENGO<sup>1</sup> and Conservation Authority staff attended these sessions and the Ontario government has never revealed a summary of these consultations. As a result the public has no way of knowing what the consultation summary actually says. The only groups present at the consultations that expressed the view that Conservation Authorities have “moved beyond their core mandate” were developers and extreme landowner rights groups who do not want the CAs to question or modify their plans to pave over wetlands, forests and river valleys or to be concerned about the community-wide impacts and costs of development.

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<sup>1</sup> ENGO is an abbreviation for “Environmental Non-Governmental Organization”

EnPointe Public Affairs examination:

- (a) Disclosure of consultation submissions. EDC can review submissions to Ontario's Environmental Registry to access public and sectoral stakeholder submissions as they are publicly posted. Further, EDC and the public at large have had access to both CA and ENGO submissions on CA reform in public formats since at least 2016. The positions of each respective stakeholder cannot be characterized as inaccessible to public review.

EnPointe Public Affairs was similarly present at most of the multi-stakeholder sessions conducted in January and February 2020. EnPointe would note the Conservation Ontario ("CO") has not released its representations made during the multi-stakeholder sessions to the public; noteworthy, as CO was the only publicly-funded stakeholder. We would also note that CO does not permit the public to attend its board meetings or scrutinize their internal work despite their funding originating from taxpayers via CAs.

The Ministry of Environment, Conservation, and Parks ("MECP") is also constrained from releasing non-redacted volumes of complaints to the Ministry about CAs due to its obligations under privacy legislation. This prevents additional volume added to positions opposite the CAs, CO, and EDC.

- (b) Only groups present opposing CAs. EDC fails to enumerate what groups or interests constitute "developers," and "extreme landowner rights groups," that expressed views in the manner EDC characterizes. During the session presentations, of which EnPointe Public Affairs was a part, not one stakeholder expressed either bluntly or by inference motives or support for wetland destruction, deforestation or harmful intervention in river valleys. EDC also chose not to qualify what it understands to be "community-wide impacts," or "costs of development," that are threatened by those encouraging CA reform.

It is also difficult to follow EDC rationale that the participants in these sessions can be labelled into effectively the four categories EDC specifies: CAs, ENGOs, 'developers,' and 'extreme landowner rights groups.' Municipalities were represented, realtors, and agricultural interests as well. These diverse parties also having uniformity of view and identical priorities is unsupported by comments made session-wide. EnPointe Public Affairs observed the Ontario Federation of Agriculture supporting modernization of CA operations that CAs are best equipped to lead conservation efforts. The Ontario Farmers Network, also present, articulated their view that CAs have strayed from their core mandate and supported substantial reform. Both the Ontario Federation of Agriculture and the Ontario Farmers Network diverge significantly on the subject and approaches and may find EDC's conflation due to sectoral origin problematic and unfair.

In a similar vein, there was not unanimity observed among municipalities (whether staff or public office holders). There was a wide spectrum of views.

This included municipalities who have long argued that their watershed CAs are not responsive to their municipalities' concerns or objections..<sup>2 3 4</sup>

EnPointe Public Affairs would conclude that EDC's representations about the 2020 consultative process are broad and oversimplify participants and their views.

2. Original Government of Ontario comment: We are moving forward with a proposal to further define their core mandate, which will improve the governance, oversight and accountability of conservation authorities, while respecting taxpayer dollars by giving municipalities more say over the conservation authority services that they pay for. For example the proposed amendment includes the requirement of CAs to publish information such as audited financial statements and meeting minutes. This change will increase the consistency and transparency of the operations and decisions made, holding them accountable to municipalities and to property taxpayers.

Environmental Defence Canada reply: There is nothing that is not transparent about CAs now and they have been providing value for money for 60 years. Municipalities already have a huge say over the CA's budgets and many CAs get most or all of their money from programs that they run for the public or services that they provide to Municipalities that the Municipalities would otherwise have to pay for on their own, or do without. Conservation Authorities have changed with the times and in addition to flood control they have become key protectors of the small remaining amount of natural lands in southern and central Ontario. Conservation Authorities now collectively own and manage approximately 500 conservation areas across the province with approximately 300 of them available to the general public. Through the conservation areas, they provide a wide variety of year round outdoor recreation opportunities, nature-based events and environmental education programs. If protecting these lands is stripped away who will look after these lands and provide these programs?

EnPointe Public Affairs examination:

- (a) 60 years of value for money. EDC's statement is unqualified and lacks citations. Ontario's thirty-six CAs have only been audited on professional tests of value for money and programme performance once. In 2018, Ontario Auditor-General Bonnie Lysyk conducted a review of the Niagara Peninsula Conservation Authority<sup>5</sup> - a singular review and the first in the sixty-plus years of CAs. Neither the current legislation permits nor did any preceding acts require

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<sup>2</sup> "Ramara missing out on key conservation work, authority says," dated Jan 5, 2020. *Aware Simcoe* [online] <http://aware-simcoe.ca/2020/01/ramara-missing-out-on-key-conservation-work-authority-says/> Accessed Dec 2, 2020

<sup>3</sup> St. Marys, Perth East, Perth South object to conservation authority's budget request," dated Feb 26, 2020. *London Free Press* [online] <https://lfp.com/news/local-news/st-marys-perth-east-perth-south-object-to-conservation-authority-budget-request> Accessed Dec 2, 2020

<sup>4</sup> "Bluewater gives thumbs down to ABCA budget," dated Dec 9, 2019. *Shoreline Today* [online] <https://shorelinetoday.ca/2019/12/09/11925/> Accessed Dec 2, 2020

<sup>5</sup> Special Audit of the Niagara Peninsula Conservation Authority," dated Sep 2018. *Office of the Auditor General of Ontario* [online] [https://www.auditor.on.ca/en/content/specialreports/specialreports/NPCA\\_en.pdf](https://www.auditor.on.ca/en/content/specialreports/specialreports/NPCA_en.pdf) Accessed Nov 30, 2020

mandatory, objective, third-party assessments of CA operations. Ms. Lysyk wrote that consistent and deeper oversight over CAs generally is needed.<sup>6</sup>

- (b) Municipalities' influence already significant. The Auditor General's findings in 2018 specifically contradicts EDC's argument.<sup>7</sup> In fully sixteen categories, NPCA was found to perform without operational or performance issues in just three categories - a mere nineteen percent (19%) effectiveness margin. Seven recommendations alone dealt with board governance and provincial and municipal oversight.<sup>8</sup> Ms. Lysyk noted that while her review was confined to NPCA, her office observed significant issues with legislation and clarity that affected all CAs and their abilities to fulfill their mandates.<sup>9</sup>
  - (c) Halo-effect argument: if CAs don't do it who will? There is no dispute that CAs in Ontario own and oversee hundreds of conservation areas. The province can determine at any time to reassign control and operation of some or all of them to Ontario Parks or municipalities where they are located. Sixty-two other jurisdictions in Canada and the United States administer conservation areas and refuges under different management frameworks. EDC adduces no evidence that confirms the current CA-management model of sensitive lands is more effective due to at the absence of objective analysis.
  - (d) Education and awareness do not require centralization. EDC should be aware that like them, the ENGO sector features a diverse range of conservation actors who already provide awareness, campaigns, and education without public funding. Entering collaborative models to amplify those with provincial education curriculum without operational overhead is prudent practice, normative in many other provinces and states, and adds an even greater degree of local integration of citizen input and understanding.
3. Original Government of Ontario comment: The proposal also includes new opportunities for local members of the community to participate in the CA process through community advisory boards.

Environmental Defence Canada reply: The draft legislation proposes to remove non politicians from the Boards of CA and remove the requirement that CA Board members act in the best interest of the Authority. Instead it is proposed that Board members be legally required to advocate for only the narrow views of their home municipality. This means they will be prohibited from thinking first of the watershed management focus of the CA and instead to think narrowly about the administrative boundary of their municipality. This legally undermines the function and purpose of the CA.

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<sup>6</sup> Ibid, pg 5.

<sup>7</sup> Ibid, pg 6.

<sup>8</sup> Ibid, pg 7.

<sup>9</sup> Ibid, pg 30.

EnPointe Public Affairs examination:

- (a) Directors' duties. EnPointe Public Affairs would submit that the Government of Ontario does need to pass an administrative delegation act separate from the *Conservation Authorities Act*. The purpose would be to direct instances where the province creates separate agencies (like CAs) enabled under their own legislation but deliver functions the province otherwise would. Such administrative legislation can define that directors must act according to aims and objects the province prioritizes. EnPointe agrees this item is unclear but can be remedied in a follow up bill in the Legislative Assembly.

The ostensible purpose of requiring directors to advance the perspective of their municipalities is correct. It could be understood to originate from the maxim of “acting in the best interests of the shareholders,”<sup>10</sup> that has a long history in jurisprudence in the United States. CAs have evolved to rely upon primary funding from municipalities (themselves a provincial construct to provide programs and services the province otherwise would). Municipalities could be considered to be ‘shareholders’ of CA given their financial stake exceeds that of the province.

Canadian jurisprudence holds that directors’ duty is foremost to the interests of the corporation.<sup>11</sup> However this principal applies specifically to companies incorporated for the purpose of generating profit. In 2008, following the Supreme Court of Canada’s ruling in *BCE Inc., v 1976 Debenture Holders* the federal government amended the Canada Business Corporations Act to reflect this; but emerging legal commentary has argued that the maxim is ‘permissive’ not mandatory.<sup>12</sup> Further the concept surrounds governance of corporate boards where the directors exercise greater operational oversight and involvement. Directors who exercise more of a policy role while delegating day-to-day management to officers, like CAs, manifestly different in purpose and scope as public interests. To enjoin two distinct concepts is convenient but unsupported in law.

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<sup>10</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) [online] <https://law.justia.com/cases/delaware/supreme-court/1986/506-a-2d-173-1.html> Accessed Dec 2, 2020

<sup>11</sup> *BCE Inc v. 1976 Debentureholders*. 2008 SCC 69 (CanLii), [2008] 3 SCR 560 [online] <https://www.canlii.org/en/ca/scc/doc/2008/2008scc69/2008scc69.html?searchUrlHash=AAAAAQAhQkNFIEluYy4gdiAxOTc2IERlYmVudHVyZSBib2xkZXJzAAAAAAE&resultIndex=5> Accessed Dec 2, 2020

<sup>12</sup> “Acting in the ‘best interests of the corporation’: CBCA amendment codifies director considerations,” dated Sep 17, 2019. *Charlie Kim and Nathan Halloway - Robins Appleby* [online] <https://www.robinsappleby.com/resources/blogs/details/taking-care-of-business-law/2019/09/17/clarifying-a-corporation%27s-best-interests-the-codification-of-director%27s-duties-under-the-cbca>

The *Municipal Act*, 2001 subjects municipal public office holders to its jurisdiction as long as they are acting the auspices of their elected office.<sup>13</sup> This includes serving on a CA board. Schedule 6 will aid in de-conflicting this jurisdictional dispute of hierarchies between the CA Act and the *Municipal Act* but the government will need to refine scope further to realize its intent.

- (b) Motives of municipal politicians and geographical myopia: EDC encounters another problematic argument with the sweeping generalization that municipalities cannot be relied upon to consider implications beyond their own municipal boundaries. This faulty assumption presumes that no contemporaneous examples exist where municipalities collaborate. Upper-tier governments, cross-jurisdictional roads and infrastructure, economic development, public health are but a few examples. In fact, a more recent example in Ontario where a municipality attempted development without advising or consulting the neighbouring municipality despite infrastructure, sewer, water, and water treatment implications, saw the current Minister of Municipal Affairs and Housing reject a Ministerial Zoning Order application.<sup>14</sup> In that very instance, the province demonstrated its willingness to intervene to protect the larger public interests on costs, environmental impact, and procedural fairness.

The position that municipalities act in a trend of behaviour that is uniquely in their short-term interests is contradicted by multiple extant operational frameworks and current practices.

4. Original Government of Ontario comment: These changes are about ensuring that CAs are able to focus, not only on protecting people and property against the impact of natural hazards like flooding, but also on conserving and managing conservation land. As landowners, CAs will continue to conserve and manage their lands, which includes natural heritage features as defined under the Provincial Policy Statement.

Environmental Defence Canada reply: Categorically false. The proposed legislation will allow developers to by-pass CAs and get permits to develop in wetlands, floodplains and forests directly from the provincial government. It also provides fast track by-pass for developers of C.A.'s science-based permitting process. This is being pushed through even though CAs almost always work with developers to make their projects successful. For example, Conservation Halton has denied only one permit in the last four years and 1000 have been issued. Province-wide 92% of all permit applications to Conservation Authorities were approved and only 28 appealed to the Mining and Lands Tribunal in 2018. This is a gift to developers at our expense. It will also remove the ability of CAs to buy land that should not be developed at fair market value in areas of extreme risk (like the valley lands flooded by Hurricane Hazel)..

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<sup>13</sup> *Municipal Act*, 2001, S.O. 2001, c. 25, sections 5, 8, 14, 22, 23.3, 27, 28, 95, 96, 135-147, 198, 223.1-223.24. *Government of Ontario* [online] <https://www.ontario.ca/laws/statute/01m25#BK36> Accessed Dec 2, 2020

<sup>14</sup> "Ontario won't fast-track 'necessary' 1,200-unit Mclean Park subdivision: Oro-Medonte," dated Oct 3, 2020. *Barrie Advance* [online] <https://www.simcoe.com/news-story/10215762-ontario-won-t-fast-track-necessary-1-200-unit-mclean-park-subdivision-oro-medonte/>



EnPointe Public Affairs examination:

- (a) False characterizations. Schedule 6 permits applicants to request CA decisions to be reviewed using an appeals format . The existing process using the Mining and Lands Tribunal at the Ministry of Natural Resource and Forestry is cumbersome, expensive, and can take years to resolve. EnPointe Public Affairs can further attest that multiple applicants have been dissuaded from appeals as they cannot support the financial demands to pursue relief. This is illustrated by how few individual applications have been filed before the Mining and Lands Tribunal; the sparse case history is not wholly and exclusively indicative of the strength of CA decision making or rationales.
  - (b) Unsubstantiated figures. EDC proffers figures without citation(s) or data from Conservation Halton and therefore the arguments that rely on those figures cannot be confirmed or validated.
  - (c) Natural Heritage Features: this has been an especially troublesome aspect of conservation policy in Ontario for some years. The science surrounding them is disputable and the interpretation, ground-truth validation, and consistency have created substantial controversy across the province. Ignoring those limitations, municipalities have to adhere to them as well as the province and multiple levels of government have demonstrated abilities to manage conservation lands.
5. Original Government of Ontario comment: CAs are mandated to conserve and protect provincially significant conservation lands as defined under the Conservation Land Act and in provincial policy for significant wetlands, areas of scientific and natural interest (ANSIs), the Niagara Escarpment, habitat of endangered species, and management for invasive species control. In the coming weeks, the ministry will be consulting further on the regulatory proposals, including mandatory programs and services CAs must provide and the regulation outlining the agreements between CAs and municipalities..

Environmental Defence Canada reply: the budget legislation proposes to allow developers to sidestep the Conservation Authorities and get permits to destroy these areas directly from the Minister of Natural Resources and Forestry, therefore removing science review of potentially risky developments and politicizing the approval process.

EnPointe Public Affairs examination:

- (a) Contextual deficiencies. Many aspects of provincial data regarding food-plain mapping, other hazard lands, Areas of Scientific and Natural Interest (ANSI) are frequently out-of-date and in some cases no longer relevant.<sup>15</sup> When challenged, EDC and CAs interpret review as “threats to the environment,” much in the same manner EDC characterizes CA reform as unnecessary and an ‘attack’.

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<sup>15</sup> Special Audit of the Niagara Peninsula Conservation Authority,” pg 31 dated Sep 2018. *Office of the Auditor General of Ontario* [online] [https://www.auditor.on.ca/en/content/specialreports/specialreports/NPCA\\_en.pdf](https://www.auditor.on.ca/en/content/specialreports/specialreports/NPCA_en.pdf) Accessed Nov 30, 2020

- (b) Argument ignores regulatory process. EDC's last comment about developers by-passing process ignores the government's stated intention to develop regulations that will set under what circumstances applicants can seek review and/or relief from the Local Planning Appeal Tribunal ("LPAT") or from the applicable Ministers. EDC has presupposed that no substantive or defensible outcomes will arise from producing regulations.

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For further information, please contact

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This analysis was conducted in response to Environmental Defence Canada

Reference: Ontario citizens  
Tim Gray, Environmental Defence November 21, 2020  
*Wellington Water Watchers*  
[www.wellingtonwaterwatchers.ca](http://www.wellingtonwaterwatchers.ca)

Responses to form letters being sent to Ontario citizens by government MPPs with regard to the budget bill attack on Conservation Authorities

Hi All,

Many of you have written to your MPP expressing concern about the attacks on our wetlands, forests and safety included in Bill 229, schedule 6. Thank you for doing that.

You have likely received a form letter reply that contains misleading and false characterizations of the proposed changes. To help you understand better what is going on I have taken a sample of this letter and provided responses that you can use to follow up with your MPP and to use when speaking with friends and neighbours.

Please get in touch with us at [info@environmentaldefence.ca](mailto:info@environmentaldefence.ca) if you need more information. All the best and thanks for fighting for the future of Ontario.

Typical Ontario government response in regular font and our reply/explanation in italics.

Thank you for your email and sharing your concerns about the proposals in Bill 229, Schedule 6 with regards to conservation authorities (CA). I appreciate the opportunity to respond.



Over the past year and a half, the government has consulted on the core role of CAs in preparing and protecting against the impacts of natural hazards, maintaining and managing conservation lands, and their role in drinking water source protection. Through the consultations

we have heard concerns that conservation authorities have expanded their programs and services beyond their core mandate.

*Reply: Many ENGO and Conservation Authority staff attended these sessions and the Ontario government has never revealed a summary of these consultations. As a result the public has no way of knowing what the consultation summary actually says. The only groups present at the consultations that expressed the view that Conservation Authorities have “moved beyond their core mandate” were developers and extreme landowner rights groups who do not want the CAs to question or modify their plans to pave over wetlands, forests and river valleys or to be concerned about the community-wide impacts and costs of development.*

We are moving forward with a proposal to further define their core mandate, which will improve the governance, oversight and accountability of conservation authorities, while respecting taxpayer dollars by giving municipalities more say over the conservation authority services that they pay for. For example the proposed amendment includes the requirement of CAs to publish information such as audited financial statements and meeting minutes. This change will increase the consistency and transparency of the operations and decisions made, holding them accountable to municipalities and to property taxpayers.

*Reply: There is nothing that is not transparent about CAs now and they have been providing value for money for 60 years. Municipalities already have a huge say over the CA’s budgets and many CAs get most or all of their money from programs that they run for the public or services that they provide to Municipalities that the Municipalities would otherwise have to pay for on their own, or do without. Conservation Authorities have changed with the times and in addition to flood control they have become key protectors of the small remaining amount of natural lands in southern and central Ontario. Conservation Authorities now collectively own and manage approximately 500. conservation areas across the province with approximately 300 of them available to the general public. Through the conservation areas, they provide a wide variety of year round outdoor recreation opportunities, nature-based events and environmental education programs. If protecting these lands is stripped away who will look after these lands and provide these programs?*

The proposal also includes new opportunities for local members of the community to participate in the CA process through community advisory boards.

*Reply: The draft legislation proposes to remove non politicians from the Boards of CA and remove the requirement that CA Board members act in the best interest of the Authority. Instead it is proposed that Board members be legally required to advocate for only the narrow views of their home municipality. This means they will be prohibited from thinking first of the watershed management focus of the CA and instead to think narrowly about the administrative boundary of their municipality. This legally undermines the function and purpose of the CA.*

These changes are about ensuring that CAs are able to focus, not only on protecting people and property against the impact of natural hazards like flooding, but also on conserving and managing conservation land. As landowners, CAs will continue to conserve and manage their lands, which includes natural heritage features as defined under the Provincial Policy Statement.

*Reply: Categorically false. The proposed legislation will allow developers to by-pass CAs and get permits to develop in wetlands, floodplains and forests directly from the provincial government. It also provides fast track by-pass for developers of C.A.'s science-based permitting process. This is being pushed through even though CAs almost always work with developers to make their projects successful. For example, Conservation Halton has denied only one permit in the last four years and 1000 have been issued. Province-wide 92% of all permit applications to Conservation Authorities were approved and only 28 appealed to the Mining and Lands Tribunal in 2018. This is a gift to developers at our expense. It will also remove the ability of CAs to buy land that should not be developed at fair market value in areas of extreme risk (like the valley lands flooded by Hurricane Hazel).*

CAs are mandated to conserve and protect provincially significant conservation lands as defined under the Conservation Land Act and in provincial policy for significant wetlands, areas of scientific and natural interest (ANSIs), the Niagara Escarpment, habitat of endangered species, and management for invasive species control.

In the coming weeks, the ministry will be consulting further on the regulatory proposals, including mandatory programs and services CAs must provide and the regulation outlining the agreements between CAs and municipalities.

*Reply: the budget legislation proposes to allow developers to sidestep the Conservation Authorities and get permits to destroy these areas directly from the Minister of Natural Resources and Forestry, therefore removing science review of potentially risky developments and politicizing the approval process.*

Thank you again for sharing your views on this important matter. I would encourage you to participate in the public consultation process.