

# Sustainability and the Courts: A Snapshot of Canada in 2009

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# SUSTAINABILITY AND THE COURTS:

## A SNAPSHOT OF CANADA IN 2009

by Katia Opalka and Joanna Myszka\*

### INTRODUCTION

Canada is a country with a small population, a large resource base, and only one big neighbor. Canada's influence in the post-World War II period owed a lot to the role of External Affairs Minister Lester B. Pearson, who found a peaceful resolution to the Suez Canal Crisis.<sup>1</sup> The future Prime Minister helped shape the world's image of Canada as a big, green place populated by reasonable, peace-loving people. Likewise, the desire of Canada's governments and its people to solve problems amicably has limited the role of the courts in advancing sustainable development in Canada. While the government continues to view litigation as "un-Canadian," citizens and environmental groups are using litigation as a means to protect the environment. Meanwhile, Canada's green brand has lost value, mainly because the government has shied away from environmental regulation and enforcement.

### USE OF THE COURTS BY THE GOVERNMENT

We should begin by saying that sustainable development—that is, development that meets the needs of current generations without compromising the ability of future generations to meet their needs—is achieved through standard-setting and planning, not litigation. In other words, judicial action can enforce compliance with plans (like land use plans) and standards (like building codes), but it cannot fill the void when plans and standards are missing.

### LAND USE PLANNING

After Canada became the first industrialized country to ratify the *United Nations Convention on Biological Diversity* in 1992,<sup>2</sup> it developed, but ultimately failed to put into practice, an ecological land use planning framework<sup>3</sup> that would provide a degree of certainty to natural resource industries (for example, mining, oil and gas, and forestry). The framework was intended to help establish where development would be prohibited and where it might be allowed, subject to intense coordination across industry sectors. For example, such coordination could minimize the overall impacts associated with expansion of the road network into wild areas.<sup>4</sup>

The reason for Canada's relative failure to plan resource development in a sustainable fashion lies in the constitutional division of legislative powers between the provinces and the federal government.<sup>5</sup> The provinces own most of the land in Canada.<sup>6</sup> In that respect, the provinces still resemble the individual colonies that banded together to form a compact in 1867.<sup>7</sup> The provinces also have exclusive legislative authority, subject to rules of federal paramountcy, to legislate regarding natural

resource development on these "provincial Crown lands."<sup>8</sup> In principle, regardless of how poorly a province performs in conserving biodiversity on its land base, the federal government does not step in.

### TREATIES

In Canada, as in the United States, the federal government represents the country when it comes to reporting on the implementation of international treaties.<sup>9</sup> Because of their wide ranging legislative jurisdiction under the Constitution, the provinces play a key role in treaty implementation. Thus, in regard to the *Biodiversity Convention*, for example, while the federal government must report to the international community regarding Canada's progress on implementation, there is little the federal government can do to force the provinces to achieve such implementation. Similarly, the federal government cannot force the provinces to implement the *North American Agreement on Environmental Cooperation* ("NAAEC"),<sup>10</sup> under which each of Canada, the United States, and Mexico commit to effectively enforce their environmental laws. Only Alberta, Manitoba, and Quebec have ratified the NAAEC, and therefore, Canada is only accountable for those three provinces as regards enforcement of provincial environmental laws in Canada.<sup>11</sup>

For all rules, there are exceptions, and the *Migratory Birds Convention*<sup>12</sup> signed with the United States in 1916 is the exception here. Great Britain entered into the Convention on behalf of Canada, and therefore, because of a rule in the Canadian Constitution, the federal government has sole authority to implement that treaty.<sup>13</sup> Because birds are everywhere, the federal government has very broad power to use the courts to enforce migratory bird protection legislation on provincial Crown land (and by extension regulate natural resource extractive industries that operate there) but has hesitated to do so.

### *R. v. HYDRO-QUÉBEC*

The decision of the Supreme Court of Canada ("SCC") in *R. v. Hydro-Québec*<sup>14</sup> is a leading SCC ruling on the federal authority to legislate on environmental matters, but the decision

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is controversial. In *Hydro-Québec*, the SCC upheld the toxics provisions of the *Canadian Environmental Protection Act, 1988* on the basis that the provisions constituted a valid exercise of the federal government's constitutional authority to legislate criminal law.<sup>15</sup> That decision, though a victory for the federal government, also seemed to tie its hands. Because the criminal law power is the power to create prohibitions and impose sanctions, not the power to create elaborate regulatory schemes, some commentators argue that the SCC should have upheld the legislation as a valid exercise of the federal government's constitutional power to make laws for the "peace, order and good government" of Canada (the "POGG Power").<sup>16</sup> Had the legislation been upheld under the POGG Power, the federal government would not have been left feeling hampered in its ability to adopt federal environmental regulations, though here again, views differ.<sup>17</sup>

#### THE COMMON LAW

There is no common law requirement that governments enforce the law—environmental or otherwise.<sup>18</sup> There is only potential civil liability if the government adopts an enforcement policy and then acts contrary to that policy, causing harm.<sup>19</sup> Enforcement policies for federal environmental laws in Canada are fraught with provisions that make prosecution highly unlikely. The policies identify enforcement responses to instances of suspected non-compliance, reserving prosecution for cases where the intent to commit the offense can be established, and where harm to the environment is significant.<sup>20</sup> Because most violations of environmental laws are unintended, and because most violations do not have major environmental impacts (though thousands of little violations by hapless violators probably do), prosecution normally does not occur.

#### THE DEPARTMENT OF JUSTICE

While a department such as Environment Canada may recommend prosecution in certain cases, the decision to press charges is made by the Attorney General (the Department of Justice).<sup>21</sup> That department has its own rules for deciding which cases will go forward.

#### BUDGETS AND POLITICS

Finally, budgetary and political concerns affect the Government's use of the courts to enforce environmental legislation. Politicians decide whether to allocate human and financial resources to environmental law enforcement. In Canada, environmental budgets have been cut in successive rounds of program review every couple of years since the early 1990s.<sup>22</sup> With

most of the senior personnel at Environment Canada, Fisheries and Oceans, and all provincial environmental departments retired or preparing to retire, many posts have been eliminated or left vacant.<sup>23</sup> Because prosecution sometimes results in constitutional challenges to the underlying legislation<sup>24</sup> and cross-demands against the Government, private firms must be hired and costs can quickly spiral out of control.<sup>25</sup> Those costs are absorbed by departments with environmental protection responsibilities. Those departments normally choose to use their scant resources to focus on programs that are assured to deliver some benefits for the environment, rather than take a risk with protracted litigation.<sup>26</sup> However, Canada does have one notable prosecution success story. In 1993, Tioxide Canada Inc. was fined four million Canadian dollars for consistently failing to heed Government demands that it install a system to treat its toxic effluent before discharging it into the Saint Lawrence River.<sup>27</sup>

### USE OF THE COURTS BY CITIZENS AND ENVIRONMENTAL GROUPS

As explained above, governments in Canada have generally not relied on the courts to achieve sustainable development. This is in part owed to a failure to adopt a planning framework and regulations that courts would help enforce compliance with. That said, citizens and environmental groups have turned to the courts with some success, using the very limited regulatory tools at their disposal. These citizens and environmental groups have succeeded when they have used the publicity that comes with litigation as a high profile means of forcing the government's hand. Litigants have been less successful in their attempts to get around carefully worded provisions in environmental laws that essentially allow the government to do nothing. Examples are provided below.

#### PRIVATE PROSECUTIONS (*FISHERIES ACT*)

Under the federal *Fisheries Act*, it is an offense to disturb or destroy fish habitat and to discharge deleterious substances into waters frequented by fish.<sup>28</sup> Individuals can bring charges against violators, though the provincial or federal attorneys general can stay those charges or take over the prosecution.<sup>29</sup> Private prosecutions are often stayed. When they have not been stayed, however, private prosecutions have led to high profile guilty verdicts, notably against municipalities.<sup>30</sup> Environmental scientists who were laid off by governments have helped environmental groups, such as the Environmental Bureau of Investigation, gather evidence of *Fisheries Act* violations. EcoJustice, a non-governmental organization, has provided legal representation for environmental groups seeking judicial redress for

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*Enforcement policies for federal environmental laws in Canada are fraught with provisions that make prosecution highly unlikely*

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environmental wrongs.<sup>31</sup> These groups document government and industry failures regarding compliance with the *Fisheries Act* by tracking municipal effluent quality across the country,<sup>32</sup> discharges from pulp and paper mills, etc. The groups also publish publicly-available guides on how to launch a private prosecution.<sup>33</sup>

## CIVIL SUITS

Two interesting decisions of the SCC involving civil suits on environmental matters are summarized below.<sup>34</sup> Here, we will only mention a civil suit provision in a Canadian environmental statute.

Under the NAAEC, Canada committed to provide environmental remedies to its citizens.<sup>35</sup> The *Canadian Environmental Protection Act, 1999* (“CEPA”) creates an “environmental protection action,” a civil suit that can be launched by adult residents of Canada against a party alleged to have committed an offense under CEPA.<sup>36</sup> Provided that the alleged harm to the environment is significant, the plaintiff may apply for various sorts of injunctive relief, but not damages.<sup>37</sup> Before taking such an action, the plaintiff must have first requested that Environment Canada investigate the matter, and then must have convinced a judge that Environment Canada’s response was either too slow or unreasonable.<sup>38</sup> To our knowledge, no environmental protection actions have been brought since the act came into force.

## JUDICIAL REVIEW

Applications for judicial review are favored by environmental groups in Canada as a means of forcing the government to implement conservation statutes such as environmental assessment or endangered species legislation. Such litigation generally turns on an analysis of the administrative authority’s discretion—in other words, does the act say “the Minister *shall*” or “the Minister *may*”? The SCC ruling in *Friends of the Oldman River Society v. Canada (Minister of Transport)*<sup>39</sup> is the leading case regarding ministerial discretion on permitting decisions that trigger environmental assessment requirements. The decision of the SCC in that case set in motion a process that resulted in the adoption of the *Canadian Environmental Assessment Act* (“CEAA”).<sup>40</sup>

The principal focus of judicial review applications under CEAA has been the federal government’s reluctance to conduct wide-ranging reviews of project environmental impacts. Though environmental groups have had some notable successes in this area,<sup>41</sup> the tendency of the Federal Court has been to stick to the plain language of the act, which gives federal authorities broad discretion as regards project and assessment “scoping,” provided

the agency can establish that it did not actively avoid applying the law—for example, by relying on a provincial agency to follow up on matters covered by the federal legislation.<sup>42</sup>

Environmental groups have been somewhat successful in using judicial review to pressure the federal government to develop recovery strategies for species listed under the *Species at Risk Act*.<sup>43</sup> Here, the litigation has focused on questions, such as whether it is reasonable for the federal government not to intervene where provincial recovery actions are potentially ineffectual,<sup>44</sup> and whether the federal government must identify (and therefore protect) the critical habitat of a species as part of the development and implementation of a recovery strategy, along with the question of what is the difference between habitat and critical habitat.<sup>45</sup>

## SUPREME COURT DECISIONS

Summarized below are leading SCC decisions, rendered in the last decade, on matters related to sustainable development.

### THE PRECAUTIONARY PRINCIPLE—*SPRAYTECH*

In *Spraytech v. Hudson*,<sup>46</sup> the SCC decided the constitutionality of a by-law adopted by the Town of Hudson, Québec, banning the use of cosmetic pesticides. Charged with using pesticides in violation of the by-law, Spraytech moved to have the Superior Court of Québec declare the by-law inoperative and *ultra vires* the town’s authority because it conflicted with the provincial *Pesticides Act*.<sup>47</sup> The Superior Court held, and the Québec Court of Appeal confirmed, that Hudson had the power to enact the by-law.<sup>48</sup>

The SCC upheld the by-law because it did not impose a total ban on the use of pesticides.<sup>49</sup> The by-law only prohibited the use of pesticides in non-essential cases, such as for “purely aesthetic pursuits.”<sup>50</sup>

The SCC’s decision in *Spraytech* appears to be informed by a broad vision of environmental law and the role of government in promoting the general welfare. For example, Justice L’Heureux Dubé began her opinion by stating that the context of the case includes “the realization that our common future, that of every Canadian community, depends on a healthy environment.”<sup>51</sup> The Court deferred to the authority of elected municipal bodies, holding that courts should not dictate to municipalities what is best for their constituents.<sup>52</sup> The Court also emphasized that the purpose of the by-law was in line with the precautionary principle recognized in international law, namely, that sustainable development policies “anticipate, prevent and attack the causes of environmental degradation.”<sup>53</sup>

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THE POLLUTER PAYS PRINCIPLE (CLEAN-UP ORDERS)—  
*IMPERIAL OIL*

In *Imperial Oil Ltd v. Quebec (Minister of the Environment)*<sup>54</sup> the SCC decided the legality of a clean-up order issued by the Quebec Minister of the Environment (the “Minister”) against Imperial Oil (“Imperial”) under provincial polluter-pay legislation. In the 1980s, a real estate developer discovered oil pollution at a former Imperial oil site on the shore of the Saint Lawrence River, opposite Quebec City. The land was decontaminated with the approval of provincial governmental authorities and houses were built, but the pollution resurfaced in the 1990s. Residents brought an action against the developer, the town, Imperial Oil, and the environment ministry.<sup>55</sup> The Minister ordered Imperial to carry out a site assessment.<sup>56</sup> Imperial claimed that the Minister had a conflict of interest because the Minister had approved earlier clean-up work and was now being sued.

In deciding that the Minister did not have a conflict of interest, the SCC held that the Minister wears two hats, adjudicative and managerial, and that when the Minister issued the assessment order the Minister was not adjudicating but rather performing the Minister’s jobs of implementing Québec’s environmental protection legislation.<sup>57</sup> The Minister had a political duty to address the contamination problem and “choose the best course of action, from the standpoint of the public interest.”<sup>58</sup> The SCC went beyond analyzing principles of administrative law when it decided *Imperial Oil* by also considering the context of environmental protection legislation. As in *Spraytech*, the SCC emphasized that Québec environmental legislation is concerned not only with safeguarding the environment of today, but it is also concerned with “evidence of an emerging sense of inter-generational solidarity and acknowledgment of an environmental debt to humanity and the world of tomorrow.”<sup>59</sup>

THE POLLUTER PAYS PRINCIPLE (CLASS ACTIONS)—  
*ST. LAWRENCE CEMENT*

In *St. Lawrence Cement Inc v. Barrette*,<sup>60</sup> residents of Beauport, Québec, instituted a class action against St. Lawrence Cement Inc. (“SLC”) for dust, odor, and noise nuisances related to the operation of a local cement plant. The residents based their claim on the general rules of fault-based civil liability, as well as on the good-neighbour provision of the Québec Civil Code.<sup>61</sup>

Under Article 1457 of the Civil Code, the claimants were required to establish fault, damage, and causation.<sup>62</sup> The SCC reversed the Québec Court of Appeal and upheld the decision of the trial judge, finding that SLC had not committed a civil fault since plant operations complied with applicable standards. The

SCC also found that Article 976 of the Civil Code requires no proof of fault.<sup>63</sup> This article reads: “Neighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.”<sup>64</sup>

According to the SCC, conduct is not the deciding criterion when it comes to abnormal annoyances under Article 976.<sup>65</sup> Rather, liability is triggered when the nuisance becomes excessive or intolerable. The SCC relied on legal commentary and precedent to find that Article 976 required no proof of fault, but the court also asserted that no-fault liability “further environmental protection objectives” and “reinforces the application of the polluter-pay principle, which [the] Court discussed in [*Imperial Oil*].”<sup>66</sup> Quoting *Imperial Oil*, the SCC reinforced the principle that, in order to promote sustainable development, polluters should be liable for the direct and immediate costs of pollution.<sup>67</sup>

ENVIRONMENTAL LOSS—  
*CANFOR*

In *British Columbia v. Canadian Forest Products Ltd.*,<sup>68</sup> the British Columbia (“BC”) government sought a damages award against Canadian Forest Products Ltd. (“Canfor”) in connection with a forest fire that burned 1,491 hectares of forest in the BC interior. Canfor was largely responsible for the fire.<sup>69</sup> The BC government sued in its capacity as owner of the land, that is, it

launched a commercial action for the diminution of the value of timber.<sup>70</sup> The SCC ruled that the government could also have sued as a representative of the public, for damages resulting from the environmental impact of the forest fire.

The SCC held that as defender of the public interest, the government can sue for environmental loss based on the law of public nuisance.<sup>72</sup> The Court considered, and eventually dispensed with, the argument that in such cases, only injunctive relief is available. First, it noted that Canadian courts have not always adhered to the narrow view that the role of the government in public nuisance is to put a stop to the activity that constitutes an interference with the public’s rights.<sup>73</sup> Second, the Court indicated that, under the common law of the United States, “it has long been accepted that the state has a common law *parens patriae* jurisdiction to represent the collective interests of the public.”<sup>74</sup>

According to the Court, the *parens patriae* doctrine has led to successful claims for monetary compensation for environmental damage in the United States, and there should be no legal barrier to a government claim for compensation in an action based on public nuisance in Canada.<sup>75</sup> Nonetheless, the SCC refused to assess and award such damages because complete arguments for such a claim were not made at the trial and appellate level.<sup>76</sup>

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*Canada’s refusal to own up to its shortcomings has resulted in Canadian delegations being sidelined at global summits*

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## CONCLUSION

Neither the common law nor Canada's environmental statutes make the government liable for failing to enforce environmental laws. This makes it difficult for environmental groups to require government to improve its performance in this area. Private law is returning to the fore as a source of remedies for citizens seeking redress for environmental wrongs. Until Canada has a government plan for sustainable development, one that is translated into binding standards, the courts will be of limited assistance. Canada's international influence will continue to wane.

There is some irony to Canada's predicament. Since the 1950's, Canada has enjoyed an unlikely place at the sides of the world's powerful countries because of its ability to exercise moral suasion effectively. In the 1980's, when Canada and the world began to fully appreciate the need to protect people and nature from the negative effects of economic development, the government sought to gain acceptance of domestic

environmental regulation by inviting stakeholders to do the right thing, an approach that had worked for Canada in international relations. If only the federal government could work on a cooperative basis with industry and the provinces to achieve mutually beneficial outcomes, it was thought, Canada would again shine through its non-confrontational approach. Unfortunately, after twenty years of industry self-regulation, voluntary programs, and federal-provincial environmental accords, the country is nowhere near its goal of building a sustainable economy.

Canada's refusal to own up to its shortcomings has resulted in Canadian delegations being sidelined at global summits. In all likelihood, it is not so much the failure itself as the refusal to own up to it that has other countries riled. What they are probably thinking is: if the country with the second largest land base (and one of the smallest populations) in the world cannot figure out how to meet the needs of current generations without compromising the ability of future generations to meet theirs, then at the very least, we should stop taking their advice. 

## Endnotes: SUSTAINABILITY AND THE COURTS: A SNAPSHOT OF CANADA IN 2009

<sup>1</sup> See CBC History, Suez Canal Crisis: Lester B. Pearson Pulls the World Back from the Brink of War and Wins the Nobel Peace Prize, [http://history.cbc.ca/history/?Mlval=EpisContent&series\\_id=1&episode\\_id=15&chapter\\_id=1&page\\_id=3&lang=E](http://history.cbc.ca/history/?Mlval=EpisContent&series_id=1&episode_id=15&chapter_id=1&page_id=3&lang=E) (last visited Oct. 9, 2009) (hailing Pearson's proposal for the French and British to withdraw but allow United Nations forces to stay, resulted in the first international peacekeeping force helping to deescalate the Suez Canal Crisis).

<sup>2</sup> United Nations Convention on Biological Diversity art. 27, Jun. 5, 1992, 31 I.L.M. 1004.

<sup>3</sup> See generally I.B. MARSHALL & P.H. SHUT, AGRIC. & AGRI-FOOD CAN., A NATIONAL ECOLOGICAL FRAMEWORK FOR CANADA 2 (1999), <http://sis.agr.gc.ca/cansis/nsdb/ecostrat/intro.html> (last visited Oct. 30, 2009) (explaining the ecological framework established in response to a report by the Ecological Stratification Working Group).

<sup>4</sup> See CAN. DEP'T OF FISHERIES & OCEANS, POLICY FOR THE MANAGEMENT OF FISH HABITAT 3 (1986), [http://www.dfo-mpo.gc.ca/oceans-habitat/habitat/policies-politique/operating-operation/fhm-policy/page08\\_e.asp](http://www.dfo-mpo.gc.ca/oceans-habitat/habitat/policies-politique/operating-operation/fhm-policy/page08_e.asp) (last visited Oct. 10, 2009) (defining "integrated resources planning" in Canada).

<sup>5</sup> See Constitution Act, 1867, 30 & 31 Vict., Ch. 3 (U.K.), §§ 91-92 [hereinafter Constitution Act] (showing two lists dividing legislative authority among Parliament and provincial legislatures).

<sup>6</sup> *Id.* at §. 109; see also BRITISH COLUMBIA MINISTRY OF AGRIC. & LANDS, CROWN LAND FACTSHEET 1, [http://www.agf.gov.bc.ca/clad/crownland\\_factsheet.pdf](http://www.agf.gov.bc.ca/clad/crownland_factsheet.pdf) (last visited Oct. 30, 2009) (noting that ninety-four percent of land in British Columbia is Provincial Crown land).

<sup>7</sup> Reference Re: Offshore Mineral Rights, [1967] S.C.R. 792, 799 (Can.) (recounting the historical development of provincial land control in British Columbia).

<sup>8</sup> See CROWN LAND FACTSHEET, *supra* note 6, at 1.

<sup>9</sup> LAURA BARNETT, PARLIAMENTARY INFORMATION & RESEARCH SERV., CANADA'S APPROACH TO THE TREATY-MAKING PROCESS 1, 5 (2008), available at <http://www.parl.gc.ca/information/library/PRBpubs/prb0845-e.htm>.

<sup>10</sup> North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 5, Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC], available at [http://www.ccc.org/pubs\\_info\\_resources/law\\_treat\\_agree/naaec/naaec03.cfm?varlan=english](http://www.ccc.org/pubs_info_resources/law_treat_agree/naaec/naaec03.cfm?varlan=english).

<sup>11</sup> NAAEC, Canadian Implementation, [http://www.naaec.gc.ca/eng/implementation/implementation\\_e.htm](http://www.naaec.gc.ca/eng/implementation/implementation_e.htm) (last visited Oct. 30, 2009) (noting that most environmental legislation in Canada falls under the jurisdiction of the provinces).

<sup>12</sup> Migratory Birds Convention Act, 1994 S.C. ch. 22, schedule 1 (Can.), available at <http://www.canlii.org/en/ca/laws/stat/sc-1994-c-22/latest/sc-1994-c-22.html>.

<sup>13</sup> See Constitution Act, *supra* note 5, § 132 ("The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.").

<sup>14</sup> R. v. Hydro-Québec, [1997] 3 S.C.R. 213 (Can.), available at <http://csc.lexum.umontreal.ca/en/1997/1997rcs3-213/1997rcs3-213>.

<sup>15</sup> See *id.* at para. 161 (finding that the provisions of the Canadian Environmental Protection Act are constitutional because the Parliament of Canada acted within its jurisdiction pursuant to the Constitution Act, 1867).

<sup>16</sup> Paul Muldoon & Richard D. Lundgren, *The Hydro-Quebec Decision: Loud Hurray or Last Hurrah?*, LAW TIMES, Sept. 16, 1997, available at <http://www.cela.ca/publications/hydro-quebec-decision-loud-hurray-or-last-hurrah>.

<sup>17</sup> *Cf. id.* (explaining that the federal government is being forced to push its environmental responsibilities onto the provinces because of budgetary concerns).

<sup>18</sup> *Laurentide Motels Ltd. v. City Beauport*, [1989] 1 S.C.R. 705, para. 355 (Can.), available at <http://csc.lexum.umontreal.ca/en/1989/1989rcs1-705/1989rcs1-705.html> (explaining that the public authority to enforce the law is discretionary).

<sup>19</sup> *Id.*

<sup>20</sup> See ENVIRONMENT CANADA, COMPLIANCE AND ENFORCEMENT POLICIES FOR THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 4 (2001), available at <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=8233E4B5-1> (weighing multiple factors, including intent of the alleged violator, past violations, and the seriousness of the harm when determining the nature of an alleged violation).

<sup>21</sup> See *id.* (stating that Environment Canada's enforcement activities include measures to compel compliance through court action but remaining silent on how such actions are initiated).

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<sup>22</sup> See generally CANADA, HOUSE OF COMMONS STANDING COMM. ON THE ENV'T AND SUSTAINABLE DEV., THIRD REPORT, ENFORCING CANADA'S POLLUTION LAWS: THE PUBLIC INTEREST MUST COME FIRST! (1998), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031521&Language=E&Mcode=1&Parl=36&Ses=1&File=2> (discussing the shrinking budget of Environment Canada throughout the country over recent years).

<sup>23</sup> See TREASURY BOARD OF CANADA SECRETARIAT, PUBLIC SERVICE RENEWAL—MAKING A DIFFERENCE! (2009), available at <http://www.tbs-sct.gc.ca/ren/psrpres-eng.asp> (charting the declining employment numbers in public service); Environment Canada, Careers at Enforcement—Enforcement Officers Wanted!, <http://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=C10CCF9D-1> (last visited Sept. 29, 2009) (recruiting new enforcement officers).

<sup>24</sup> See, e.g., *Irving Launches Constitutional Challenge of Migratory Birds Act*, CBC NEWS, Mar. 10, 2008, available at <http://www.cbc.ca/canada/new-brunswick/story/2008/03/10/irving-herons.html> (detailing the constitutional challenge to Canada's Migratory Birds Convention Act by a New Brunswick company accused of violating the act during tree-felling activities).

<sup>25</sup> See, e.g., British Columbia Environmental Appeal Board, available at <http://www.eab.gov.bc.ca/waste/2003was002a.pdf> (noting one of many decisions of the British Columbia Environmental Appeal Board on applications brought by responsible parties seeking to have governments and government entities added as responsible parties under a provincial site clean-up order).

<sup>26</sup> See DAVID R. BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY 239 (2003) (explaining that federal departments with environmental responsibilities saw their budgets cut by up to seventy-two percent in the 1990s).

<sup>27</sup> Minister of the Environment, Fact Sheet No. 27 Tioxide Canada Inc. (1996), available at [http://www.slv2000.qc.ec.gc.ca/bibliotheque/centre\\_docum/protection/027\\_a.pdf](http://www.slv2000.qc.ec.gc.ca/bibliotheque/centre_docum/protection/027_a.pdf).

<sup>28</sup> Fisheries Act, R.S.C., ch. F-14, §§. 35(1), 36(3), 40 (1985).

<sup>29</sup> See Department of Justice Canada, *The Federal Prosecution Service Desk-book* ch. 26, July 31, 2009, available at <http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch26.html> (noting the Department of Justice's policies regarding staying charges and pursuing prosecution).

<sup>30</sup> See, e.g., *R. v. Robert G. Lutes & Gemtec Ltd.*, File 16355201, 2006 N.P.P.C. 12, paras. 67-68 (Apr. 26, 2006) (Can.) (convicting a company hired to develop a landfill of *Fisheries Act* violations); *Fletcher v. Kingston (City)*, [2004] 7 C.E.L.R. (3d) 198 (Ont. C.A.) (Can.) (affirming the City's conviction for violations under the *Fisheries Act* for seepage into the shoreline caused by rusty pipes); see also Sentinelles Petitcodiac Riverkeeper, Landfill Investigation Case Update, <http://www.petitcodiac.org/riverkeeper/english/Campaigns/PolutionPrevention/landfupdate.htm> (last visited Oct. 30, 2009) (explaining that engineers in the Gemtec litigation had recently been found guilty of environmental statutory breaches).

<sup>31</sup> See EcoJustice, Private Prosecution Process, <http://www.eco-justice.ca/media-centre/media-backgrounder/private-prosecution-process/?searchterm=None> (last visited Nov. 5, 2009) (recounting the efforts of a Sierra Legal Defence Fund investigator to lay a charge of environmental violations against the Vancouver government).

<sup>32</sup> See INFRASTRUCTURE CANADA, SIERRA LEGAL DEFENCE FUND'S NATIONAL SEWAGE REPORT CARD III (2009), available at [http://www.infcc.gc.ca/research-recherche/results-resultats/rp-pr/rp-pr-2004-10\\_02-eng.html](http://www.infcc.gc.ca/research-recherche/results-resultats/rp-pr/rp-pr-2004-10_02-eng.html) (summarizing a 2004 Sierra Legal Defence Fund report).

<sup>33</sup> E.g., ENVIRONMENTAL BUREAU OF INVESTIGATION, CITIZEN'S GUIDE TO ENVIRONMENTAL INVESTIGATION AND PRIVATE PROSECUTION (2009), available at <http://www.e-b-i.net/ebi/guide.html>.

<sup>34</sup> *St. Lawrence Cement Inc. v. Barrette*, [2008] 3 S.C.R. 392 (Can.); *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 (Can.).

<sup>35</sup> See NAAEC, art. 6.1 (ensuring that private citizens have a right to request the competent authorities to investigate allegations of environmental law violations).

<sup>36</sup> Canadian Environmental Protection Act, S.C. 1999, ch. C-33, §§. 22 *et seq.* [hereinafter CEPA].

<sup>37</sup> *Id.* § 22(a) (noting orders preventing action, orders requiring the cessation of action, and orders to create mitigation or correction plans as valid forms of injunctive relief).

<sup>38</sup> *Id.* § 25.

<sup>39</sup> Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 (Can.), available at <http://csc.lexum.umontreal.ca/en/1992/1992rcs1-3/1992rcs1-3.html>.

<sup>40</sup> See Canadian Environmental Assessment Act, 1992 S.C., ch. 37 (Can.), available at <http://www.canlii.org/en/ca/laws/stat/sc-1992-c-37/latest/sc-1992-c-37.html> (establishing the right of judicial review to decisions made by the Minister of the Environment).

<sup>41</sup> See, e.g., Pembina Inst. for Appropriate Dev. v. Canada (Minister of Fisheries & Oceans), [2006] 3 F.C. D-13 (Can.), available at <http://recueil.cmf.gc.ca/eng/2005/2005fc1123/2005fc1123.html>; Alberta Environmental Network, *Environmentalists Win Landmark Tar Sands Lawsuit*, Mar. 5, 2008, available at <http://www.aenweb.ca/node/2151>; Robert R.G. Williams, Env'tl. Law Ctr., *Court Affirms Federal Role in Environmental Assessment*, 17 News Brief No.1, 6-9 (2002), available at [http://www.elc.ab.ca/Content\\_Files/Files/NewsBriefs/CourtAffirmsFederalRole-V17-1.pdf](http://www.elc.ab.ca/Content_Files/Files/NewsBriefs/CourtAffirmsFederalRole-V17-1.pdf) (summarizing *Environmental Resource Centre v. Minister of Environment (Canada)*, [2002] 3 F.C. D-7 (Can.)).

<sup>42</sup> See *Prairie Acid Rain Coal. v. Minister of Fisheries & Oceans of Canada*, [2006] 3 F.C. 610 (Can.), available at [http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=FDD096400CA5C37BFF353F38104EB8A1?id=COU-143872&index=courtdecisions](http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=FDD096400CA5C37BFF353F38104EB8A1?i d=COU-143872&index=courtdecisions); see also MiningWatch Canada, *Fight for Public Involvement in Environmental Assessment Heads To Supreme Court: First Time Environmental Group Granted Leave to Appeal to Supreme Court of Canada*, Dec. 18, 2008, available at <http://www.miningwatch.ca/en/fight-public-involvement-environmental-assessment-heads-supreme-court-first-time-environmental-group>.

<sup>43</sup> See, e.g., Ecojustice, *Piping Plover Lawsuit: Victory*, <http://www.ecojustice.ca/cases/reprieve-for-piping-plover> (last visited Oct. 10, 2009) (noting that the federal government identified critical habitat for endangered shorebirds after the environmental group filed a lawsuit).

<sup>44</sup> Media Release, Ecojustice, *BC Government Interfering with Endangered Species: Groups Call for Federal Investigation*, Dec. 6, 2007, available at <http://www.ecojustice.ca/media-centre/press-releases/bc-government-interfering-with-endangered-species/>.

<sup>45</sup> Janice Walton, Blakes LLP, *Federal Court Decision Interpreting Species at Risk Act May Create Problems for Landowners and Resource Users*, July 16, 2009, available at [http://www.blakes.com/english/view\\_disc.asp?ID=3280](http://www.blakes.com/english/view_disc.asp?ID=3280).

<sup>46</sup> [2001] 2 S.C.R. 241 (Can.).

<sup>47</sup> R.S.Q., ch. P-9.3 (2009).

<sup>48</sup> *Spraytech*, 2 S.C.R. at paras. 55-56.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at para. 24.

<sup>51</sup> *Id.* at para. 1.

<sup>52</sup> *Id.* at para. 55.

<sup>53</sup> *Id.* at para. 31.

<sup>54</sup> [2003] 2 S.C.R. 624 (Can.).

<sup>55</sup> *Id.* at para. 1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at paras. 35-39.

<sup>58</sup> *Id.* at para. 38.

<sup>59</sup> *Id.* at para. 19.

<sup>60</sup> *St. Lawrence Cement Inc v. Barrette*, [2008] 3 S.C.R. 392 (Can.).

<sup>61</sup> *Id.* at paras. 6-7.

<sup>62</sup> *Id.* at para. 14.

<sup>63</sup> *Id.* at para. 75.

<sup>64</sup> *Id.* at para. 30.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at para. 80.

<sup>67</sup> *Id.*

<sup>68</sup> *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 (Can.).

<sup>69</sup> *Id.* at para. 1.

<sup>70</sup> *Id.* at para. 3.

<sup>71</sup> *Id.* at para. 9.

<sup>72</sup> *Id.* at paras. 10-12, 150.

<sup>73</sup> *Id.* at paras. 66-72.

<sup>74</sup> *Id.* at para. 78.

<sup>75</sup> *Id.* at para. 80.

<sup>76</sup> *Id.* at para. 150.