

REGULATORY INSPECTIONS: A PRIVATE PRACTITIONER'S PERSPECTIVE

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“Individuals and businesses with questions pertaining to regulatory development or methods of how to comply with Environment and Climate Change Canada administered legislation should consult legal expertise with experience in environmental legislation.”

Environmental Enforcement web page
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I. INTRODUCTION

If, in the 1970's, Canada had followed the U.S. and adopted federal environmental laws requiring standard setting and enforcement for pollution control, and containing citizen suit provisions allowing NGOs and others to force the federal government to comply with those laws, the courts could now play a vital role in helping the country achieve long-term environmental goals by keeping political opportunism at bay.¹ And if Canada had a federal environmental policy agenda built around federal standard setting and oversight and provincial and territorial implementation, which it does not, the courts could, as they do in the U.S., provide a valuable safeguard against federal regulatory overreach, weighing in on the constitutionality of environmental protection rules made by the federal government under its authority to, say, regulate interprovincial commerce or navigation.²

And were the federal government of Canada inclined to use the courts to protect biological diversity on Canadian soil, then there would be a large body of contemporary jurisprudence, as there is in the U.S.,³ describing the reach of federal conservation authority on non-federal land. Indeed, policymakers in Canada have long known that land use planning is the means by which conservation goals are achieved.⁴ The Policy for the

¹ See e.g. *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007) and Kernaghan Webb, “Gorillas in the Closets? Federal-Provincial Fisheries Act Pollution Control Enforcement” in P Fafard & K Harrison, *Managing the Environmental Union* (Montreal & Kingston: McGill-Queen’s University Press, 2000) 163-207, online: Carleton University <<http://http-server.carleton.ca/~kwebb/51.380/misc2/chapter%207.pdf>> (date accessed: 17 January 2016).

² See Ann Althouse, “Enforcing Federalism After *United States v Lopez*” (1996) 38 *Ariz L Rev* 793, online: University of Wisconsin Law School <https://media.law.wisc.edu/m/zmy5m/althouse_enforcing_federalism_after_lopez_38_ariz.pdf> (date accessed: 17 January 2016) and Eugene A Forsey, “Powers of the National and Provincial Governments” in *How Canadians Govern Themselves*, online: Parliament of Canada <http://www.lop.parl.gc.ca/About/Parliament/senatoreugeneforseys/book/chapter_3-e.html> (date accessed: 17 January 2016).

³ See “Definition of Waters of the United States under the Clean Water Act”, online: United States Environmental Protection Agency <<http://www.epa.gov/cleanwaterrule/definition-waters-united-states-under-clean-water-act>> (date accessed: 17 January 2016) and United States Environmental Protection Agency, “Clean Water Rule Litigation Statement”, online: <<http://www.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement>> (date accessed: 17 January 2016). See also RT, “US House votes to block clean water rule as Flint scandal grows” (15 January 2016), online: <<https://www.rt.com/usa/329117-congress-clean-water-flint/>> (date accessed: 17 January 2016).

⁴ See e.g. Alberta, “A Policy for Resource Management of the Eastern Slopes, Revised 1984”, online: <<http://esrd.alberta.ca/lands-forests/landuse-planning/documents/PolicyResourceManagementEasternSlopes.pdf>> (date accessed: 17 January 2016); compare to original, 1977 version of same policy, referenced

Management of Fish Habitat (1986)⁵ and the federal Water Policy (1987)⁶ pretty much say so. Unfortunately, Canada gave up on integrated land use planning in the late 1990's,⁷ and as in other parts of the Constitution,⁸ in the absence of litigation, there is nothing to force the parties back to the table. None of these policy failures can be addressed at a project level without the risk of government being ordered to indemnify aggrieved investors.⁹

What has this got to do with regulatory inspections and the courtroom, you may ask. My point is that there is rarely a connection, in Canada, between environmental regulatory inspections and the courts, and one of the reasons therefor is that in Canada, governments don't normally use the courts to achieve compliance with environmental laws.¹⁰

II. INSPECTIONS

Now for inspections.¹¹ A business can be taken off guard by an environmental regulatory inspection. The owners may not know that the operations are subject to environmental controls, based perhaps on the mistaken assumption that the business is grandfathered. Or a neighbor may have called authorities to report a release to the environment coming from a facility, a release of which company employees or management may as yet be unaware.

here: <<http://www.keepersofthewater.ca/keystonecaribou-documents.pdf>> (date accessed: 22 January 2016). See also Alberta, "Importance of Mountain Headwaters to Alberta" (INARCH Inaugural Workshop, October 2015), online: University of Saskatchewan <http://www.usask.ca/inarch/InauguralWorkshopOct2015/S1_Diiwu.pdf> (date accessed: 22 January 2016).

⁵ Canada, *Policy for the Management of Fish Habitat*; online: Fisheries and Oceans Canada <<http://www.dfo-mpo.gc.ca/Library/23654.pdf>> (date accessed: 3 January 2016).

⁶ The policy document has been removed from the federal government's website. Presumably one would have to file an access to information request to obtain a copy. Environment and Climate Change Canada, *Federal Water Policy*, online: <<https://www.ec.gc.ca/eau-water/default.asp?lang=En&n=E05A7F81-1>> (date accessed: 3 January 2016).

⁷ Agriculture and Agri-Food Canada, *National Ecological Framework*, online: <<http://sis.agr.gc.ca/cansis/nsdb/ecostat/index.html>> (date accessed: 3 January 2016). That said, the 2012 Canadian Environmental Assessment Act, adopted in a budget rider, talks about "regional studies" (see *Canadian Environmental Assessment Act, 2012* (SC 2012, c 19, s 52) at ss 73-77).

⁸ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, para 186, online: Lexum <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>> (date accessed: 17 January 2016).

⁹ Paul Withers, CBC News Nova Scotia, "Feds appealing NAFTA tribunal decision of Nova Scotia quarry project", online: CBC <<http://www.cbc.ca/news/canada/nova-scotia/feds-appealing-nafta-tribunal-decision-of-nova-scotia-quarry-project-1.3196817>> (date accessed: 3 January 2016).

¹⁰ See Andy Blatchford, "Environment Canada investigates many, but convicts few" (6 February 2011), online: The Globe and Mail <<http://www.theglobeandmail.com/technology/science/environment-canada-investigates-many-but-convicts-few/article565185/>> (date accessed: 27 January 2016). See also Katia Opalka & Johanna Myszka, "Sustainability and the Courts: A Snapshot of Canada in 2009" (2009) 10 J Sust Dev Law & Pol 59.

¹¹ See Scott Jacobs & Cesar Cordova, "Good Practices for Regulatory Inspections: Guidelines for Reformers" (prepared for the World Bank Group, December 2005), online: Investment Climate <<https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/better-regulation-for-growth/inspection-reform.cfm>> (date accessed: 27 January 2017).

Or maybe it's a spot check. But it can also be routine, or triggered by an application to install new pollution control equipment, or increase production levels, or transfer the company's assets to a new owner.

In all cases, an inspection is an act by which the State reminds a landowner or the operator of a business that ownership or occupancy of land is subject to not only common law rules of tort, such as the rule that if you cause a nuisance you are liable to pay compensation to those whom you owe a duty of care and who have suffered harm attributable to your breaching that duty, but also statutory rules such as the prohibition on unauthorized releases of contaminants to the environment. The arrival of an inspector can also be a reminder that governmental authorizations aren't always a shield against liability, whatever you may have thought.¹²

Whatever the reason behind the inspector's presence in the lobby, an inspection is likely to feel like a medical exam: intrusive, unpleasant, and somehow unfair. You'd rather not have to go through with it. You ask yourself if everyone has to put up with this. You may feel anger mixed with resentment, especially if the inspector appears to be younger than your grandchildren and seems to understand not a word of what you're saying. You probably wonder if you are being given the same treatment as your neighbours and competitors, especially if you are foreign or from out of province. The fact is, your feelings are valid, and the government knows it.

First, there is no common law duty to enforce the law, but if the government chooses to enforce, then there are rules on how that needs to be done in order to avoid government civil liability.¹³ Predictability and fairness are two important considerations in this regard.

Second, while the common law and the laws of Canada may not require enforcement to occur, Canada has an obligation to enforce its environmental laws under a side agreement to the North American Free Trade Agreement.

Since others will talk to you about the common law, the Charter and the Criminal Code, and because it's important, I've chosen to focus on free trade.

¹² See *St Lawrence Cement Inc v Barrette*, [2008] 3 SCR 392 at para 95 and Mark A Geistfeld, "Tort Law in the Age of Statutes" (2014) New York University Public Law and Legal Theory Working Papers, Paper 452, online: <http://lsr.nellco.org/nyu_plltwp/452> (date accessed: 17 January 2016).

¹³ See *Kamloops v Nielsen*, [1984] 2 SCR 2 at 13; *Laurentide Motels Ltd c Beauport (Ville)*, [1989] 1 RCS 705, and André Durocher & Claude Marseille, « *Les recours collectifs et les troubles de voisinage : les répercussions de l'affaire Girard pour le ministère de l'Environnement du Québec* », online: Fasken Martineau <http://www.fasken.com/files/Publication/fd49f905-0745-4ec8-8011-9494048d18a9/0eaaae06-1223-42d9-bb2b-0087918d5356/Presentation/PublicationAttachment/dc4b2fbc-7108-4f08-addf-5724024d1cc7/LES_RECOURS_COLLECTIFS_ET_LES_TR.pdf> (date accessed: 25 January 2016).

III. ENVIRONMENTAL MEASURES CONDITIONED BY TRADE AGREEMENTS

Canada and its provinces do not argue about jurisdiction over environmental protection only.¹⁴ Among many other things, they fight about jurisdiction to implement the terms of international treaties. So for example, when Canada negotiates a trade agreement with one or more countries, the provinces will take the position that they are not bound by that agreement on matters under their jurisdiction until they say so.¹⁵ If the treaty contains undertakings relating to environmental protection and conservation, you can see how matters can get muddled.¹⁶ You would think that if an environmental problem is serious enough to warrant a global, regional or bilateral treaty, then the federal government has authority to require the provinces to step up and ensure compliance or get out of the way.¹⁷ Yet only the courts can say for sure, and even on the bench, there has been considerable disagreement.¹⁸

The difference between trade agreements and environmental agreements is that in the former, the focus is on reducing barriers to the free flow of goods, services, and even capital, while in the latter, the objective is generally to slow down or reverse the loss of biological diversity or control pollutants. One is a green light, the other is red; in the words of the Beatles, “you say stop and I say go.” So it should come as no surprise that in international business circles, much of environmental law is shrugged off as protectionism, thinly disguised.¹⁹ It follows that when you read the dispute resolution provisions of trade

¹⁴ See *R v Hydro-Québec*, [1997] 3 SCR 213.

¹⁵ See e.g. Sue Bailey, “Newfoundland and Labrador says it won’t participate in ongoing trade talks”, online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/newfoundland-and-labrador-says-it-wont-participate-in-trade-agreements/article22519888/>> (date accessed: 9 January 2016).

¹⁶ Laura Barnett, “Canada’s Approach to the Treaty-Making Process” (Background Paper 2008-45-E, Revised 6 November 2012) at 4.3 *Working with the Provinces*, online: Canada (Library of Parliament Research Publications) <<http://www.parl.gc.ca/content/lop/researchpublications/2008-45-e.htm#a13>> (date accessed: 9 January 2016).

¹⁷ See *Canadian Environmental Protection Act, 1999* provisions on international air pollution and international water pollution, which allow the federal government to step in and regulate if a province fails to control a pollution source that is causing pollution outside Canada or causing Canada to violate a commitment under an international agreement. But see “PCBs Overview”, online: United Nations Environment Programme <<http://chm.pops.int/Implementation/PCBs/Overview/tabid/273/Default.aspx>> (date accessed: 17 January 2016); « L’incendie des BPC de Saint-Basile-Le-Grand, 25 ans plus tard » (23 August 2013), online: ici Radio-Canada <<http://ici.radio-canada.ca/regions/Montreal/2013/08/23/001-25-ans-catastrophe-saint-basile-le-grand.shtml>> (date accessed: 17 January 2016); and Marie-Ève Maheu, « Entreposage illégal de BPC à Pointe-Claire: Québec veut récupérer 4 millions » (5 March 2015), online: ici Radio-Canada <<http://ici.radio-canada.ca>> (date accessed: 17 January 2016).

¹⁸ *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

¹⁹ See Daniel C Esty & Maria H Ivanova, “Globalization and Environmental Protection: a Global Governance Perspective” (Prepared for Global Environmental Governance: the Post-Johannesburg Agenda, Yale Center for Environmental Law and Policy, New Haven, CT, 23-25 October 2003), online: Yale University

agreements, you learn that when a foreign investor challenges an environmental measure adopted by a party to such an agreement, the tribunal set up to look into the matter will be hearing arguments on whether the measure really is about protecting the environment and whether it affects local and foreign companies equally. Third, even if it really is about protecting the environment and applies to everyone equally, the tribunal will examine whether the measure has the effect of expropriating the foreign investor without compensation and runs contrary to assurances made by the host government upon which the foreign investor relied in making its investment decision. Every litigator should know this. Trade law is a treasure trove.

Normally, it is trade agreements that speak to environmental agreements. Near the beginning, you are told that nothing in the trade agreement takes away from the obligations of the parties under the following environmental agreements: [...]. Deeper in the text, trade agreements often specify that when countries make environmental laws, they should endeavour to do so in the least trade restrictive manner possible. And when they enforce those laws, they must treat local and foreign companies in like manner, they should not use non-enforcement of environmental laws as a means of attracting or retaining investment, and if an environmental measure amounts to expropriation, then indemnification must be paid. Insofar as a sudden, overwhelming concern for the environment not infrequently coincides with the realization that a project that was supposed to be a vote getter is actually guzzling political capital,²⁰ you may say that trade agreements help keep decision-makers honest by making governments pay damages to aggrieved investors.

IV. RECESSIONS, FREE TRADE & FEDERAL FACILITIES ENFORCEMENT

Canada's experience with negotiating free trade agreements centers on the Canada-U.S. agreement, followed by NAFTA.²¹ The relevant time period is the recession in the early 1980's to the recession of the 1990's.²² Not surprisingly, this was also the period when

<<http://www.yale.edu/gegdialogue/docs/dialogue/oct03/papers/Esty-Ivanova.pdf>> (date accessed: 26 January 2016).

²⁰ Jane Taber, "New Brunswick, Alberta join forces to push Energy East pipeline" (30 October 2015), online: *The Globe and Mail* <<http://www.theglobeandmail.com/news/politics/new-brunswick-alberta-join-forces-to-push-energy-east-pipeline/article27054317/>> (date accessed: 27 January 2016); Keith Brooks, "Time for Kathleen Wynne to take a stand against Energy East" (24 January 2016), online: *The Star* <<http://www.thestar.com/opinion/commentary/2016/01/24/time-for-kathleen-wynne-to-take-a-stand-against-energy-east.html>> (date accessed: 27 January 2016).

²¹ John Ibbitson, "After Twenty-Five Years, Free Trade Deal with U.S. has Helped Canada Grow Up" (29 September 2012), online: *The Globe and Mail* <<http://www.theglobeandmail.com/report-on-business/economy/after-25-years-free-trade-deal-with-us-has-helped-canada-grow-up/article4576313/?page=all>> (date accessed: 17 January 2016).

²² Armine Yalnizyan, "Exposed: Revealing Truths About Canada's Recession" (29 April 2009), online: *Canadian Centre for Policy Alternatives* <<https://www.policyalternatives.ca/publications/reports/exposed-revealing-truths-about-canadas-recession>> (date accessed: 17 January 2016).

Canada made best efforts to get its act together on environmental protection. Indeed, “[i]n the post-Cold War world, free trade plus sustainable development was supposed to achieve, for all of us, what regular capitalism and communism hadn’t: an improvement in the human condition motored by self-interest and conditioned by ecological constraints.”²³

So aside from issuing policy mentioned earlier on fish habitat protection and water resources conservation, in 1988, Canada adopted the *Canadian Environmental Protection Act*, a legislative *fourre-tout* for dealing with federal environmental responsibilities. Canada then created a Canadian Council of Ministers of the Environment (CCME) to work on aligning Canada’s jurisdictions on all things environmental.²⁴ In 1992, Canada was the first of the treaty’s signatories to ratify the United Nations Convention on Biological Diversity;²⁵ in 1993, Canada entered into the North American Agreement on Environmental Cooperation (NAAEC),²⁶ and in 1994, Canada’s provinces entered into the Internal Trade Agreement²⁷ which, among other things, gives people and provinces standing to challenge a province’s relaxation of environmental controls in cases where this is done to attract or retain investment.²⁸

In the NAAEC, which was signed to placate a very wary U.S. Congress, the countries of North America promised each other to effectively enforce their environmental laws through appropriate governmental action, and they defined enforcement as including, among other things, inspections (see Article 5 of the NAAEC, reproduced in Annex 1 to this paper, “NAAEC Part II – Obligations”). I believe that the obligations found in the NAAEC explain much of what has happened in Canadian environmental law and policy since the mid 1990’s. Below I’ll identify some of the information I rely on.

In 2002, Fisheries and Oceans Canada and Environment Canada made public a compliance and enforcement policy for the habitat protection and pollution prevention provisions of

²³ Katia Opalka, “Sustainable Development, NAFTA and Water” in Kinvin Wroth & Hoi Kong, eds, *Sustainable Development and NAFTA* (Cambridge, UK: Cambridge University Press, 2015) 204, online: Cambridge University Press <<http://universitypublishingonline.org/cambridge/aaa/chapter.jsf?bid=CBO9781316157763&cid=CBO9781316157763A019&p=15&pageTab=ce>> (date accessed: 17 January 2016).

²⁴ See CCME, *Guide to the Canada-Wide Accord on Environmental Harmonization*, online: <http://www.ccme.ca/files/Resources/harmonization/guide_to_accord_e.pdf> (date accessed: 17 January 2016). See also Canadian Environmental Law Association, “Federal-Provincial Harmonization Accord” (Petition No 10, 22 January 1998), online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/pet_010_e_28706.html> (date accessed: 24 January 2016).

²⁵ Online: United Nations <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27&lang=en> (date accessed: 17 January 2016).

²⁶ See Sierra Legal Defence Fund, “Canada’s Support For and Commitment to the North American Agreement on Environmental Cooperation” (Petition No 166, 4 April 2006), online: Auditor General of Canada <http://www.oag-bvg.gc.ca/internet/English/pet_166_e_28901.html> (date accessed: 17 January 2016).

²⁷ Online: Agreement on Internal Trade <<http://www.ait-aci.ca/>> (date accessed: 17 January 2016).

²⁸ *Ibid*, Chapter 17.

the federal Fisheries Act. The policy document states (p. 1):

One of the principal tools available to the federal government to ensure sustainable fisheries for Canadians is the *Fisheries Act*. The *Act* provides the legal basis for protecting and conserving fish and fish habitat. Specifically, the habitat protection and pollution prevention provisions of the *Fisheries Act* include sections 20 through 22, 26 through 28, 30, 32, and 34 through 42, and are intended to protect fish and fish habitat from harm caused by physical alteration or pollution (a synopsis of these sections is presented in Annex A). These provisions are an important component of the federal government's overall environmental protection program.

However, laws and regulations are not sufficient in themselves; they must be administered and enforced in a fair, predictable, and consistent manner. Those who administer the laws and those who must comply with them need to understand how the government intends to achieve compliance with the legal requirements. For these reasons, this *Compliance and Enforcement Policy* has been developed for the habitat protection and pollution prevention provisions of the *Fisheries Act*.

[...]

This *Compliance and Enforcement Policy* lays out general principles for application of the habitat protection and pollution prevention provisions of the *Fisheries Act*. The *Policy* explains the role of regulatory officials in promoting, monitoring and enforcing the legislation. It is a national *Policy* which applies to all those who exercise regulatory authority, from Ministers to enforcement personnel.

The *Policy* explains what measures will be used to achieve compliance with the *Fisheries Act* habitat protection and pollution prevention provisions. It sets out principles of fair, predictable, and consistent enforcement that govern application of the law, and responses by enforcement personnel to alleged violations. This *Policy* also tells everyone who shares a responsibility for protection of fish and fish habitat—including governments, industry, organized labour and individuals—what is expected of them.

You can see how this policy is relevant to regulatory inspections. It tells the regulated community that inspections will be part of an overall plan, that regulatees will know what is expected of them, and that government enforcement activity will be fair, predictable and consistent.

The *Fisheries Act* was gutted in a budget rider in 2012²⁹ and it's not clear where the enforcement policy stands. But that doesn't mean that we can't glean information from the document itself and statements made about the policy more than twenty years ago, for

²⁹ See Elizabeth May, "Bill C-38, The Environmental Destruction Act" (10 May 2012), online: The Tyee <<http://thetyee.ca/Opinion/2012/05/10/Bill-C38/>> (date accessed: 24 January 2016). See also Gloria Galloway, "Controversial Changes to Fisheries Act Guided by Industry Demands" (5 August 2013), online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/fisheries-act-change-guided-by-industry/article13606358/>> (date accessed: 25 January 2016).

example, in this excerpt from a speech given by Environment Canada's head of enforcement at an international conference in 1992:³⁰

In addition to the Canadian Environmental Protection Act, environment [*sic*] Canada enforces the pollution prevention provisions of the Fisheries Act. That act is probably Canada's first environmental statute, and has been in force since 1868. The purpose of the statute is to protect fish, fish habitat and human use of fish. One of the strongest provisions to achieve that statutory objective is the prohibition against the deposit, into waters where fish are found, of any substance that is harmful to fish. Like CEPA, the Fisheries Act states, in section 2, that the federal government is subject to the act and all its regulations.

So, the concept of federal law applying to Canada's federal government is not new in Canadian law. But what is new is that in 1988 the minister of environment announced the intention of his department to treat the public sector, that is government, the same way as the private sector in terms of enforcement of Environmental law. The minister believed that the federal government must be exemplary in its environmental behavior and specifically committed the government of Canada to that goal.

Consequently, in July 1988, environment [*sic*] Canada published its enforcement and compliance policy for the Canadian Environmental Protection Act which provided equal treatment in enforcement to both government and non-government regulatees. The soon to be published compliance policy for the habitat protection and pollution prevention provisions of the Fisheries Act takes the same approach.

Give this some time to sink in. Now take a moment to enter “federal facilities enforcement” into Google.

Making information available to the public has never been our governments' strong suit,³¹ so you can understand why Canadian government websites are relatively empty on all things environmental, including enforcement.³² Luckily, the same does not hold true in the U.S.

The U.S. EPA and FWS (Fish and Wildlife Service) enforce the law against the federal

³⁰ See Paul Cuillerier, Director Office of Enforcement, Environmental Protection, Environment Canada, “Enforcement of Canadian Laws of Environmental Protection to Federal Facilities” (1992), online: International Network for Environmental Compliance and Enforcement (INECE) <<http://www.inece.org/2ndvol1/CULLERI.html>> (date accessed: 17 January 2016).

³¹ See Information Commissioner of Canada, “Open Information” (Chapter 6) in *Stopping the erosion of access to information in Canada – The Information Commissioner's recommendations to modernize the Access to Information Act* (31 March 2015), online: Office of the Information Commissioner of Canada <http://www.oic-ci.gc.ca/eng/communique-de-presse-news-releases-2015_1.aspx> (date accessed: 25 January 2016). See also Gloria Galloway, “Information Commissioner Takes Tories to Court Over Long-Gun Data” (23 June 2015), online: The Globe and Mail <<http://www.theglobeandmail.com/news/politics/judge-orders-ottawa-to-hand-over-gun-registry-data/article25072076/>> (date accessed: 25 June 2016).

³² “Environmental Enforcement”, online: Environment and Climate Change Canada <<https://www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=C3039403-1>> (date accessed: 25 January 2016).

government of the United States, notably because they are directed to do so by presidential fiat.³³

According to the NAAEC, inspections are enforcement. For details on how governments plan and carry out inspection programmes, google “U.S. EPA inspections.” We know from the NAAEC that enforcement needs to occur and it needs to be fair. If the law is not enforced against government, then enforcement is not fair if it is done against industry. One of the ways to prevent enforcement from occurring is by not exercising the power to regulate. So for example, the federal government has not issued regulations under the *Canadian Environmental Protection Act* requiring federal facilities to assess and clean up their contaminated sites, including those that might be contaminating waters frequented by fish, even though in 2002, the Office of the Auditor General of Canada issued a report containing the following recommendation and response:

2.71 Recommendation. Environment Canada should develop a clear, mandatory requirement for federal organizations to clean up or manage their contaminated sites.

Environment Canada’s response. The Department does not accept this recommendation at this time. It does not propose to develop a mandatory instrument under the *Canadian Environmental Protection Act* (CEPA) at this time. Environment Canada views Treasury Board Policies as mandatory. Departments are making progress and significant investments are being made. The Department will continue to monitor progress on the implementation of the Treasury Board policy and will explore the development of CEPA instruments.

If federal facilities are not required by law to clean up their contaminated sites, it would seem unfair to force industry to do so.

Fast forward to the U.S. presidential elections in 2008. The Democratic candidates made statements to the press about reopening NAFTA, notably to bring the terms of the NAAEC into the trade agreement itself, to make them enforceable.³⁴ Then in 2009, the federal government of Canada made sweeping amendments to its environmental laws to toughen the enforcement provisions and put more tools in the toolbox, including adding a system

³³ See e.g. “Executive Order 13186 – Responsibilities of Federal Agencies to Protect Migratory Birds” (10 January 2001), online: United States of America – Government Services Administration <<http://www.gsa.gov/portal/content/101570>> (date accessed: 25 January 2016).

³⁴ See Doug Palmer, “Clinton, Obama threat to end NAFTA alarms business” (27 February 2008), online: Reuters <<http://www.reuters.com/article/us-usa-politics-nafta-idUSN2744905320080227>> (date accessed: 22 January 2016); Alex Spillius, “Barack Obama wants to reopen NAFTA” (18 February 2009), online: The Telegraph <<http://www.telegraph.co.uk/news/worldnews/barackobama/4685362/Barack-Obama-wants-to-reopen-NAFTA.html>> (date accessed: 22 January 2016); and Alexander Panetta (The Canadian Press), “Obama’s NAFTA promise resurfaces; Harper spokesperson denies renegotiations” (18 February 2014), online: Huffington Post <http://www.huffingtonpost.ca/2014/02/18/barack-obama-nafta-tpp_n_4810868.html> (date accessed: 22 January 2016).

of administrative penalties.³⁵ Quebec followed suit in 2011.³⁶

These developments are instructive. First, the timing of these systematic changes to Canadian environmental laws is in keeping with what I said earlier about recessions being good for environmental law in Canada. 2008 was a disastrous year for the American economy. It was therefore not surprising that NAFTA would take a beating during the primaries and that environmental law enforcement by the U.S.'s NAFTA partners would come under scrutiny. I have heard it said that the changes to Canadian legislation that were brought into force in 2009 had been in the works for a long time, the implication being that they were in no way related to statements coming from U.S. presidential candidates in 2008 about reopening NAFTA. I do not doubt that Canada had been working on these amendments for quite a while. All I'm saying is that U.S. pressure might have had something to do with getting them across the finish line.

V. CONCLUSION

To enforce a law fairly, you need to have the ability to detect non-compliance and you need a range of measures for dealing with violations appropriately. There is no point in inspecting facilities when the only tool you have for dealing with violations is prosecution.³⁷ In the vast majority of cases, prosecution is too blunt a tool. Administrative penalties, issued like parking tickets, are usually more fitting.³⁸ Also, for chronic offenders, levying administrative penalties repeatedly allows you to build a case file that you can later table with the Justice Department along with a recommendation that charges be laid.

So you would think that by forcing us to upgrade our environmental laws, NAFTA has been good for the environment in Canada. Well, it's not that simple. Remember that the provinces don't like federal interference on environmental matters. And remember that the NAAEC obligation is only to enforce the laws you've got; repeal the laws and the

³⁵ Penny Becklumb, "Legislative Summary of Bill C-16, Environmental Enforcement Act" (1 April 2009), online: Library of Parliament Research Publications <http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/Bills_ls.asp?lang=E&ls=c16&Parl=40&Ses=2&source=library_prb> (date accessed: 22 January 2016).

³⁶ See Québec, « *Loi modifiant la Loi sur la Qualité de l'environnement afin d'en renforcer le respect* », online: Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques <<http://www.mddelcc.gouv.qc.ca/lqe/>> (date accessed: 22 January 2016).

³⁷ Dick Martin, Secretary, Canadian Labour Congress, Evidence to the House of Commons Standing Committee on Environment and Sustainable Development (19 February 1998), online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=36&Ses=1&DocId=1038418>> (date accessed: 25 January 2016).

³⁸ See e.g. "Policy on Civil Penalties – EPA General Enforcement Policy – GM 21" (16 February 1984), online: US Environmental Protection Agency <http://www.epa.gov/sites/production/files/documents/epa_policy-civilpenalties021684.pdf> (date accessed: 24 January 2016).

obligation becomes less burdensome.³⁹ In the period 2010-2012, the federal government rolled back federal environmental laws drastically, shrinking the territorial scope of application and refocusing the statutes as natural resource management laws.⁴⁰ By doing so, the Prime Minister called the provinces' bluff. Generally speaking, each province can now protect its environment as much or as little as it likes.⁴¹ The Prime Minister even hinted that henceforward, any penalties the federal government has to pay because of a failure by a province to meet commitments under international agreements entered into by Canada may be deducted from the province's transfer payments.⁴²

The approach described above is fiscally advantageous for the federal government at two levels. First, the federal balance sheet is not thrown off by a province's actions because although the federal government is still on the hook vis-à-vis its treaty partners, it can set off the penalty when making transfer payments to the offending province. Second, the relative absence of federal environmental law requirements means that the problem of non-enforcement against federal facilities is resolved: the law is not being enforced unfairly because more often than not, it simply doesn't apply. This shields the federal government from civil liability and, significantly, it rules out the problem of having to account for extremely onerous environmental liabilities in the financial statements of the Government of Canada, something which is required under accounting principles to which Canada subscribes.⁴³

To wrap up, then: governmental inspections are key to environmental law enforcement but to withstand judicial scrutiny, they need to be part of a coherent, defensible system. We

³⁹ See NAAEC, Article 3 and Annex 41; and Québec, Décret 930-96, « *CONCERNANT l'Accord intergouvernemental canadien concernant l'Accord nord-américain de coopération dans le domaine de l'environnement entre le gouvernement du Québec et le gouvernement du Canada* » (22 July 1996), online: Publications du Québec <<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=1&file=26030.PDF>> (date accessed: 25 January 2016).

⁴⁰ Elizabeth May, "Bill C-38 – The Environmental Destruction Act" (10 May 2012), online: The Tyee <<http://thetyee.ca/Opinion/2012/05/10/Bill-C38/>> (date accessed: 24 January 2016).

⁴¹ *Point de presse de M. David Heurtel, ministre du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques* (25 September 2014), online: Quebec National Assembly <<http://www.assnat.qc.ca/fr/actualites-salle-presse/conferences-points-presse/ConferencePointPresse-17903.html>> (date accessed: 25 January 2016).

⁴² See Bertrand Marotte & John Ibbitson, "Provinces on hook in future trade disputes" (26 August 2010), online: The Globe and Mail <<http://www.theglobeandmail.com/report-on-business/provinces-on-hook-in-future-trade-disputes-harper/article1378647/>> (date accessed: 27 January 2016). See also Scott Sinclair, "130 million NAFTA payout sets troubling precedent" (22 March 2011), online: Canadian Center for Policy Alternatives <<https://www.policyalternatives.ca/publications/commentary/130-million-nafta-payout-sets-troubling-precedent>> (date accessed: 24 January 2016).

⁴³ See Paul M Kazenski, "Recognition, Measurement and Disclosure of Environmental Liabilities" (1994), online: Casualty Actuarial Society <<https://www.casact.org/pubs/forum/94sforum/94sf367.pdf>> (date accessed: 27 January 2016). See also "Liability for Contaminated Sites", online: Financial Reporting and Assurance Standards Canada <<http://www.frascanada.ca/standards-for-public-sector-entities/projects/completed/item55574.aspx>> (date accessed: 24 January 2016).

can thank our biggest trading partner for pushing us to make such a system. As for the fact that our response has been to dismantle federal environmental laws, we have only ourselves to blame.⁴⁴

⁴⁴ See Eugene Lee & Anthony Perl, *The Integrity Gap: Canada's Environmental Policy and Institutions* (Vancouver: UBC Press, 2003). See also "In Wake of Systemic Dismantling of Canada's Environmental Laws, Political Parties Vie for Environmental High Ground" (Media Release, 14 October 2015), online: West Coast Environmental Law Association <<http://www.marketwired.com/press-release/media-release-in-wake-systemic-dismantling-canadas-environmental-laws-political-parties-2063782.htm>> (date accessed: 24 January 2016).

ANNEX A

North American Agreement on Environmental Cooperation Part II – Obligations

Article 2: General Commitments

1. Each Party shall, with respect to its territory:
 - (a) periodically prepare and make publicly available reports on the state of the environment;
 - (b) develop and review environmental emergency preparedness measures;
 - (c) promote education in environmental matters, including environmental law;
 - (d) further scientific research and technology development in respect of environmental matters;
 - (e) assess, as appropriate, environmental impacts; and
 - (f) promote the use of economic instruments for the efficient achievement of environmental goals.
2. Each Party shall consider implementing in its law any recommendation developed by the Council under Article 10(5)(b).
3. Each Party shall consider prohibiting the export to the territories of the other Parties of a pesticide or toxic substance whose use is prohibited within the Party's territory. When a Party adopts a measure prohibiting or severely restricting the use of a pesticide or toxic substance in its territory, it shall notify the other Parties of the measure, either directly or through an appropriate international organization.

Article 3: Levels of Protection

Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.

Article 4: Publication

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.
2. To the extent possible, each Party shall:

- (a) publish in advance any such measure that it proposes to adopt; and
- (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.

Article 5: Government Enforcement Action

1. With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37, such as:
 - (a) appointing and training inspectors;
 - (b) monitoring compliance and investigating suspected violations, including through on-site inspections;
 - (c) seeking assurances of voluntary compliance and compliance agreements;
 - (d) publicly releasing non-compliance information;
 - (e) issuing bulletins or other periodic statements on enforcement procedures;
 - (f) promoting environmental audits;
 - (g) requiring record keeping and reporting;
 - (h) providing or encouraging mediation and arbitration services;
 - (i) using licenses, permits or authorizations;
 - (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations;
 - (k) providing for search, seizure or detention; or
 - (l) issuing administrative orders, including orders of a preventative, curative or emergency nature.
2. Each party shall ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations.
3. Sanctions and remedies provided for a violation of a Party's environmental laws and regulations shall, as appropriate:
 - (a) take into consideration the nature and gravity of the violation, any economic benefit derived from the violation by the violator, the economic condition of the violator, and other relevant factors; and
 - (b) include compliance agreements, fines, imprisonment, injunctions, the closure of facilities, and the cost of containing or cleaning up pollution.

Article 6: Private Access to Remedies

1. Each Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law.

2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations.

3. Private access to remedies shall include rights, in accordance with the Party's law, such as:

- (a) to sue another person under that Party's jurisdiction for damages;
- (b) to seek sanctions or remedies such as monetary penalties, emergency closures or orders to mitigate the consequences of violations of its environmental laws and regulations;
- (c) to request the competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm; or
- (d) to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations or from tortious conduct.

Article 7: Procedural Guarantees

1. Each Party shall ensure that its administrative, quasi-judicial and judicial proceedings referred to in Articles 5(2) and 6(2) are fair, open and equitable, and to this end shall provide that such proceedings:

- (a) comply with due process of law;
- (b) are open to the public, except where the administration of justice otherwise
- (c) requires;
- (d) entitle the parties to the proceedings to support or defend their respective
- (e) positions and to present information or evidence; and
- (f) are not unnecessarily complicated and do not entail unreasonable charges or time limits or unwarranted delays.

2. Each Party shall provide that final decisions on the merits of the case in such proceedings are:

- (a) in writing and preferably state the reasons on which the decisions are based;
- (b) made available without undue delay to the parties to the proceedings and,
- (c) consistent with its law, to the public; and
- (d) based on information or evidence in respect of which the parties were offered the opportunity to be heard.

3. Each Party shall provide, as appropriate, that parties to such proceedings have the right, in accordance with its law, to seek review and, where warranted, correction of final decisions issued in such proceedings.

4. Each Party shall ensure that tribunals that conduct or review such proceedings are impartial and independent and do not have any substantial interest in the outcome of the matter.