Background paper for the "Seminar on Strengthening the Enforcement and Administration of Environmental law in North America." PANEL 2.- Procedural and evidentiary challenges for effective environmental law enforcement. (a) Standing to sue. Author: CEC Secretariat.

Citizen and non-governmental organization enforcement of environmental laws in Canada has been less prominent than in the U.S. in large part because of the generalized lack of citizen suit provisions. With a few notable (and rarely used) exceptions[1], federal and provincial environmental statutes very rarely fetter the enforcement discretion of the government, and do not provide opportunities for civil proceedings either against offenders and/or delinquent enforcement agencies.

With such limited access to statutory citizen suit provisions, the ability of Canada's public interest organizations and citizens to bring environmental enforcement cases through judicial review applications (administrative actions) is of central importance. By way of example, section 18.1 of the *Federal Court Act* allows the Attorney General and anyone else "directly affected" by a matter to apply for a judicial review. Pursuant to the *Finlay* decision, the test for public interest standing in judicial review proceedings is similar across federal and provincial jurisdictions, and does not require a direct economic or property interest.[2]

Canadian jurisprudence on public interest standing in administrative actions lagged for many years behind U.S. decisions (such as *Sierra Club v. Morton*) until the Supreme Court of Canada "opened the doors" in *Finlay*. This decision establishes that standing will be granted to a public interest organization that challenges the exercise of administrative authority, as well as legislation, where the following tripartite test is met: 1) a serious issue is raised; 2) the applicant shows a genuine interest; 3) and there is no other reasonable and effective manner in which the issue may be brought to the Court.[3] Furthermore, in applying for judicial review, a citizen or public interest organization will not be denied standing despite the fact that others located in greater geographic proximity to a challenged project have not brought an application.[4]

In applying this tripartite test, the Federal Court has consistently rejected the proposition that the words "directly affected" used in subsection 18.1(1) of the *Federal Courts Act* ("FCA") should be given a restricted meaning. An applicant who satisfies the requirements of discretionary public interest standing may seek relief under subsection 18.1(1) of the FCA even though not "directly affected", when the Court is otherwise

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[1] See the Ontario *Environmental Bill of Rights*, S.O 1993 (c. 28), s. 82-102; *Yukon Environment Act*, S.Y.T. 1991, c. 5; Northwest Territories *Environmental Rights Act*, S.N.W.T., 1990, c. 38; *Canadian Environmental Protection Act, 1999* (1999, c. 33), s. 22-38.

[2] *Canada (Minister of Finance) v. Finlay*, 33 D.L.R. (4th) 321 (SCC).

[3] *Finlay*, pp. 632-634; see also *Canadian Council of Churches v. Canada* (1992), 88 D.L.R. (4th) (SCC), *Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada*, [1999] F.C.J. No. 273 at paras. 32-33.

[4] *Citizens' Mining Council*, Ibid. at paras. 34-36.

convinced that the particular circumstances of the case and the type of interest which the applicant holds justifies status being granted.[5]

[5] *Friends of the Island Inc. v. Canada (Minister of Public Works)* [1993] 2 F.C. 229 (T.D.), at pages 280-283; *Sunshine Village Corp. v. Superintendent of Banff National Park* (1996), 44 Admin. L.R. (2d) 201 (F.C.A.), at paragraphs 65-72; *Citizens' Mining*, above, at paragraphs 30-33; *Sierra Club of Canada v. Canada (Minister of Finance)* [1999] 2 F.C. 211 (T.D.), at paragraphs 27-34.