



**Background paper for the
"Seminar on Strengthening the Enforcement and
Administration of Environmental law in North America."
PANEL 3.- Development of environmental laws and the
enforcement of environmental laws in the three countries and
their efficacy.
Author: CEC Secretariat.**

The experience of trends in environmental enforcement is dependant on where one sits in the courtroom and during the inspection/investigation processes. Certainly, industry defendants have a different perspective than government officials, and the viewpoint of public interest environmental lawyers differs greatly from both.

The latest development in Canadian environmental enforcement was the recently re-elected Conservative Party's platform commitment to dramatically improve and invest in this area. An investment of \$113 million over 5 years, and then an additional \$25 million annually, for increased environmental enforcement was promised. Also highlighted was a commitment to legislate a new *Environmental Enforcement Act* to strengthen and consolidate enforcement and penalty provisions in existing environmental legislation.

Specifically, the "Environmental Enforcement Action Plan" calls for: 1) stiffer penalties for the most serious environmental crimes: up to \$6 million for corporations and \$1 million for individuals¹; 2) minimum penalties and a penalty structure that differentiates between individuals and organizations; 3) increased inspection and seizure powers; 4) a (new) team of specialized environmental prosecutors to bring offenders to justice, and enhanced forensics and laboratory scientific support of enforcement officers; 5) a searchable and publicly-accessible database that provides details of a corporation's convictions for environmental crimes; 6) a requirement that corporations convicted of environmental crimes notify their shareholders of any conviction and punishment.

Shifting from what the new government has committed to enforce, towards an environmental law that environmental groups allege the previous Conservative Government did not enforce, one of the most remarkable legal developments in Canada over the past two years occurred with the enactment and litigation of the *Kyoto Protocol Implementation Act* (KPIA). The KPIA is a federal statute whose purpose is "to ensure that Canada takes effective and timely action to meet its obligations under the *Kyoto Protocol* and help address the problem of global climate change". The KPIA was introduced to the House of Commons as a Private Member's Bill and despite the fact that the Government did not support the bill, it was voted into law in June 2007 with the combined votes of the opposition parties in both the House and Senate.

¹ The minimum penalties are proposed for the following acts: Canadian Environmental Protection Act, 1999 (CEPA), Antarctic Environmental Protection Act, Migratory Birds Convention Act, Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, Canada Wildlife Act, Canada National Marine Conservation Areas Act, Saguenay St Lawrence Marine Park Act, Canada National Parks Act. Notably not included in this list are the Canadian Environmental Assessment Act, the Species-at-Risk Act, and the Fisheries Act.



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The *KPIA* sets mandatory actions and deadlines for the government to take action to address climate change, including: 1) requiring the preparation and public release of a climate change plan setting out specific measures to be taken to ensure that Canada meets its obligations under the *Kyoto Protocol*; 2) requiring the Government to prepare draft carbon emission regulations and hold public consultations; and 3) requiring the Government to enact final regulations. Pursuant to the Government's (alleged) failure to meet its obligations under the *KPIA*, judicial review proceedings were brought before the Federal Court in 2008 by environmental groups in an attempt to obtain a mandatory order requiring compliance with this law. On October 20, 2008, the Federal Court of Canada rejected the application for judicial review on the basis that the *KPIA* is not justiciable, stating that "the court has no role to play reviewing the reasonableness of the government's response to Canada's Kyoto commitments within the four corners of the *KPIA*".² It remains to be seen whether or not the environmental groups will appeal this decision to the Federal Court of Appeal.

² *Friends of the Earth v. Governor-In-Council*, 2008 FC 1183, <http://decisions.fct-cf.gc.ca/en/2008/2008fc1183/2008fc1183.html>