



**Background paper for the
"Seminar on Strengthening the Enforcement and
Administration of Environmental law in North America."
PANEL 1.- How legal arguments are formed in environmental
enforcement cases.
Author: CEC Secretariat.**

Canada's *Constitution Act, 1867* did not articulate the environment as a distinct subject matter, although it distributed the basis for legislative jurisdiction over the environment between Canada's federal and provincial levels of government. Likewise, the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* are silent on the issue of environment as a human right. Notwithstanding this situation, there remains a distinct possibility that public interest organizations will seek recognition of a right to a healthy environment as part of the existing constitutional architecture.

Federal and provincial courts have yet to decide the issue of whether environmental rights exist as an unwritten or analogous aspect of our express *Charter* rights – although the Supreme Court of Canada has alluded both to the possibility of a right to a “safe” environment free of harmful pollution in *Ontario v. Canadian Pacific*¹, and a possible positive government obligation to protect the environment for the benefit of all Canadians *British Columbia v. Canadian Forest Products Ltd.*² With formal constitutional amendment an unlikely prospect, any future recognition of environmental rights in Canada will have to proceed through judicial interpretation of existing human rights.

The main federal environmental protection statutes include the *Canadian Environmental Protection Act, 1999* (CEPA), the pollution prevention provisions of the *Fisheries Act*, and the species and habitat protection provisions of the *Species-at-Risk Act*. At the provincial level, examples of core legislation include the *Alberta Environmental Protection and Enhancement Act*, the *Ontario Environmental Protection Act* and the *Environmental Bill of Rights*, and the *Quebec Environmental Quality Act*. Each of these laws contains a variety of criminal, administrative, and civil mechanisms for achieving compliance with its provisions, such as inspection and investigation authority, remedial and preventive orders of various types, prosecution authority, self-reporting and monitoring obligations of the regulated community, and related measures.

There are several characteristics of federal and provincial environmental legislation which have implications for evaluating enforcement and compliance. A key characteristic of the federal law (CEPA and the *Fisheries Act*) is that compliance is considered primarily in relation to general pollution prohibitions and the regulations promulgated under both laws. With some exceptions, CEPA does not employ a permit or licensing regime or test compliance in relation to general statutory prohibitions. Compliance with the *Fisheries Act* is also largely driven by compliance with the regulations under that statute and with the statute's general pollution prohibitions. Thus, federal pollution prevention law tends to involve the use of command and control statutory prohibitions or

¹ [1995] 2 S.C.R. 1031

² [2004] 2 S.C.R. 74



**Background paper for the
"Seminar on Strengthening the Enforcement and
Administration of Environmental law in North America."
PANEL 1.- How legal arguments are formed in environmental
enforcement cases.
Author: CEC Secretariat.**

regulations, violations of which are prosecuted in the courts in virtually the same manner as criminal offenses. This process is expensive, time-consuming, and requires intensive preparation and resources. The decision to prosecute is made by the Department of Justice, not by Environment Canada.

In comparison to federal environmental law, a key characteristic of provincial law is that compliance must be measured to a substantial degree in relation to approvals, licenses and permits, prohibitions, administrative orders and regulations. Given the scope of provincial constitutional authority, this is a much wider area of responsibility involving a correspondingly wider segment of the regulated community. This broad regulatory authority can present a challenge to provincial governments in developing measures of compliance performance across the large areas of responsibility encompassed by provincial law, particularly when government enforcement resources are limited.

Furthermore, in comparison to federal environmental law, a key characteristic of provincial law is that enforcement mechanisms for violations are more multi-faceted and include, besides prosecutions: administrative orders, directives, minor offense ticketing and cancellation of permits or approvals and, in some provinces, administrative monetary penalties. This authority to respond to violations in a variety of ways gives the provinces more enforcement options, the ability to deal with less serious violations before they become more serious, and a wider variety of forums in which to proceed.