
Taking Matters Into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement

Kernaghan Webb*

The role of private prosecutions in Canadian pollution control enforcement is emerging as an important alternative to government-initiated actions. However, citizen-initiated prosecutions are typically viewed as indicia of either government ineptitude or citizen meddling. Through case studies of three Canadian pollution control prosecutions, *R. ex rel. Howe v. Cyanamid Inc.*, *R. v. Crown Zellerbach Properties Ltd.*, and *R. v. Suncor Inc.*, the author shows that reality lies somewhere between these two extremes. Using an historical framework, the author places the role of the citizen-prosecutor within the broader context of participatory democracy, showing the need for mechanisms for citizen input to ensure the proper functioning of government. The author outlines a structured approach to citizen enforcement and, exploring the legal aspects of these issues, suggests ways to facilitate private prosecutions and improve government pollution control efforts.

Le rôle des poursuites privées en tant que moyen de faire respecter les lois canadiennes sur le contrôle de la pollution apparaît comme une alternative importante à l'action gouvernementale en la matière. Cependant, les poursuites intentées par le citoyen sont trop souvent perçues comme un signe d'incertitude gouvernementale ou d'ingérence. L'auteur examine trois affaires mettant en cause de telles poursuites — *R. ex rel. Howe c. Cyanamid Inc.*, *R. c. Crown Zellerbach Properties Ltd.* et *R. c. Suncor Inc.* — et affirme que la vérité se situe entre ces deux extrêmes. En utilisant une grille d'analyse historique l'auteur situe le rôle du citoyen-accusateur dans le cadre plus global d'une démocratie fondée sur la participation, et démontre l'importance de l'apport des citoyens, qui peut seul assurer la représentativité des dirigeants. L'auteur esquisse une approche structurée afin d'examiner le problème du citoyen faisant respecter la loi. Il explore les dimensions juridiques et propose des moyens de faciliter les poursuites privées ainsi que de bonifier les efforts gouvernementaux en matière de contrôle de la pollution.

* Consultant, Administrative Law Project, Law Reform Commission of Canada. Lecturer, Faculty of Law, University of Ottawa. The following article is a substantially revised version of "Taking Matters Into Their Own Hands: The Increasing Role of the Public in Canadian Pollution Control," a paper originally presented by the author at the meeting of the Law and Society Association, Learned Societies Conference, Windsor, Ontario, June 7, 1988. The author would like to thank the Law Reform Commission of Canada for support during preparation of the initial draft. Thanks are also due to the many people who took the time to comment on earlier drafts, and in particular Paul Emond (Faculty of Law, York University) and Robert Paehlke (Political Studies/Environmental and Resource Studies, Trent University). I would also like to express my appreciation for the assistance of government officials across the country who supplied me with information, and numerous representatives from environmental groups for their insights. This article represents the opinions of the author and not those of the Law Reform Commission of Canada, nor any of the aforementioned persons. Any errors or omissions are those of the author.

Synopsis

Introduction

- I. Democracy, Public Participation and Private Prosecutions: Concepts and Mechanics**
 - A. The Basic Concepts*
 - B. Public Participation at the Pre-Enforcement Stage*
 - C. Private Prosecutions and the Machinery of Government*

- II. Pollution Control Enforcement and The Citizen: An Evolving Story**
 - A. Citizen Enforcement of Penal Offenses: Origin and Development*
 - B. The Development of the Regulatory Offense*
 - C. The Canadian Pollution Control Approach*
 - 1. Citizens Out in the Cold: 1960 – 1975
 - 2. Bringing Citizens In, Part I: 1976 – 1986
 - 3. Bringing Citizens In, Part II: 1986 – 1990
 - D. Summary Observations*

- III. Three Case Studies: The Pollution Control Approach in Practice**
 - A. R. ex rel. Howe v. Cyanamid Inc.*
 - B. R. v. Crown Zellerbach Properties Ltd.*
 - C. R. v. Suncor Inc.*
 - D. Analysis*

- IV. Making it Work**
 - A. Wanted: A Structured Approach to Enforcement*
 - B. Improving Private Prosecutions*

Conclusions

* * *

The history of the last 20 years in North America affords a number of instances of why citizens and taxpayers distrust government or are highly skeptical of government actions and promises.¹

Historically, our law has not found favour with the idea that members of the general public should be entitled to invoke the aid of the courts whenever they perceive a wrongful invasion of public as opposed to private rights The spectre of the "busybody" or "meddlesome interloper" has loomed large²

Introduction

When citizens initiate or conduct pollution offence prosecutions,³ two diametrically opposed (and simplistic) reactions are commonly expressed. Either it is concluded that government officials have been co-opted by industry, thus necessitating citizen action; or, alternatively, private prosecutors are characterized as being on some type of personal vendetta against industry and/or government — they are "gadflies" or busybodies, meddling where they have no business to interfere.

As the case descriptions of citizen-initiated prosecutions included in this article reveal, the truth normally lies somewhere between these two extremes:

¹*Waste Not Wanted Inc. v. R.* (1987), [1988] 1 F.C. 239, 2 C.E.L.R. (N.S.) 24 at 57, Collier, J. (T.D.). Note that the decision concerned an action in nuisance, whereas the focus of this article is on citizen enforcement of regulatory pollution control laws.

²P.L. Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can. Bar Rev. 490 at 492. Note that Bryden's article and comments are not directed specifically towards citizen enforcement of regulatory laws.

³The subject matter of this article is citizen prosecution of regulatory offences. Regulatory offences, for the purposes of this article, are penal offences adjudicated upon by the ordinary courts which normally do not require proof of subjective intent to obtain a conviction and are usually part of administrative regimes which control rather than prohibit a particular activity. This definition is based primarily on the analysis of Dickson J. (as he then was) in *R. v. City of Sault Ste. Marie* (1977), [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 at 373-75 [hereinafter *Sault Ste. Marie* cited to C.C.C.].

The two most prevalent regulatory offence types are those of "strict" and "absolute" liability. A strict liability offence was defined by Dickson J. in *Sault Ste. Marie* as one where an accused will be convicted upon proof of the *actus reus*, unless the accused establishes on a balance of probabilities that due diligence or reasonable care was exercised, or that a reasonable mistake of fact occurred. Absolute liability offences were defined as those where the accused will be convicted upon proof of the *actus reus* (*supra* at 373-74). According to E. Swanson & E. Hughes, *The Price of Pollution: Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990) at 159, "the vast majority of environmental offences are ones of strict liability." Recently, the likelihood of certain absolute and strict liability offences withstanding s. 7 and s. 11 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*], challenges has been questioned: see *e.g.*, K. Webb, "Regulatory Offences, the Mental Element and the *Charter*: Rough Road Ahead" (1989) 21 Ottawa L. Rev. 419 [hereinafter "Regulatory Offences"].

in two of the three citizen initiated actions described,⁴ government officials actually assisted citizens with their prosecutions. This hardly fits the stereotypical behaviour of an industry co-opted bureaucracy. In all three cases, courts found the polluters guilty. Assertions that citizens are meddling are difficult to maintain when the courts vindicate their concerns.

In effect, analysis of these cases suggests that private prosecutions are but a symptom of a larger problem — determining how much enforcement is necessary and the proper role for citizens in that enforcement. To address this larger problem it is necessary to focus on why citizen actions have provoked such strong and divergent reactions. Once the causes of the tensions created by private prosecutions are revealed, it may be possible to alleviate them.

The position taken here is that private prosecutions straddle an extremely important cleft which exists in our society. It is the cleft between promise and performance. The promises exist on a number of levels, embodied in expectations that elected officials represent the views of and are accountable to the public, that citizens can meaningfully participate in decisions which affect them, and that what is said in legislation is what will actually occur. To initiate a private prosecution is to put these promises to the test, and to demand that they are kept or that satisfactory explanations are provided for why they are not. The strong emotions expressed when citizens launch prosecutions of pollution offences are indications of the gap between promise and performance.

Perhaps not surprisingly given their educational and practical experience, the natural predilection of many legally trained persons confronted with problems having legal dimensions is to launch into the debate at the level of legislation and caselaw and emerge triumphantly sometime later with the sought-after “technical” legal solution. But, by approaching problems in this manner, there is a real likelihood that the solution arrived at will have missed the mark: for example, it may be based on tacit assumptions about the governing process which cannot withstand critical examination, or it may fail to fully take into account the broader context in which the problem originally arose.

Thus, determining the role that the citizen can and should play in pollution control enforcement necessitates a more fundamental examination of the extent and practical implications of participatory democracy, the historical evolution and development of regulatory processes, and the efficacy and weaknesses of

⁴In *R. ex rel. Howe v. Cyanamid Inc.* (1981), 3 F.P.R. 151 [hereinafter *Cyanamid*], government officials alerted a concerned citizen to the possibility of private prosecution actions, and provided technical assistance and witnesses in the subsequent trial. In *R. v. Crown Zellerbach Properties Ltd.* (1981), 3 F.P.R. 84 (B.C. Prov. Ct), aff'd (1983) 3 F.P.R. 107 (B.C. Co. Ct) [hereinafter *Crown Zellerbach*] a government official actually “set up” the citizen prosecution, and then subsequently the Crown conducted the trial. See below for further details. As to the representativeness of these cases, see below at 801 & 815-17.

current governmental efforts to protect the environment. This article explores legal aspects of these three issues in an attempt to arrive at solutions which can simultaneously reduce the acrimony which surrounds private prosecutions, enhance the ability of the citizen to participate in enforcement, and improve the effectiveness of government pollution control efforts.

The article begins with an examination of some of the implicit expectations which arise through the government law making and implementation process. To do this it is necessary to start at the level of generalities, and then to move to specifics. First, the concepts of public participation and democracy are examined, and links are drawn between them and private prosecutions. It will be seen that at this very basic level, individuals have been instilled with beliefs about the capabilities of government, the responsibilities it has to its citizens, and the importance of public participation — beliefs which give rise to expectations.

The next section examines the machinery of government put in place to create and implement laws and to ensure their enforcement. The question is raised of what role private citizens can and should play in enforcement when elected representatives chosen on the basis of broad based electoral consensus have been given the primary responsibility for administration and enforcement of legislation. It will be seen how weaknesses associated with the ministerial allocation of responsibilities for enforcement, and systemic problems with the openness and accountability of this process, detract from public trust and confidence in government enforcement activities. As a result, the likelihood of citizens engaging in prosecutions to “set things right” is increased.

Next, the history of citizen involvement in penal offence enforcement is briefly reviewed. While today enforcement actions by members of the public are relatively rare, it will be seen that in the past citizen prosecutions were considered essential to the operation of offence regimes. It was only with the introduction of a centralized “expert” bureaucracy charged with the responsibility of implementing social legislation that the practical need for citizen enforcement actions decreased. However, when the weaknesses of the bureaucratic approach became evident, a revived role for private prosecutions was seen by many as necessary, not so much as a supplement to government actions but as a check for their improper or inadequate use.

The following section describes the development of the Canadian pollution control approach. The difficulties created when bureaucrats respond to technical pollution problems by entering into informal arrangements with regulatees and other agencies without public input are examined. Moves toward re-integrating a now distrustful and suspicious public into the process, first through administrative policies and then more recently through statutory commitments, are also noted and discussed. While the recent moves towards governmental recognition of the necessity for public participation in the pollution control decision process

(at least at the level of rhetoric) is a positive development, the weaknesses of the current initiatives are also evident and examined.

With this background, three case descriptions of citizen initiated and/or conducted prosecutions are set out and discussed, as a backdrop to the final part of the article. Here, the problems of uncertain, unaccountable and inconsistent prosecutorial enforcement activities and impediments to private prosecutions are directly addressed and recommendations for changes are made.

Before embarking on this analysis, several preliminary remarks on the approach and scope of the article are in order. First, the author assumes a certain familiarity on the part of the reader with the legal-technical aspects of private prosecutions. A number of studies have dealt with this topic in some detail. Thus, for example, the question of which environmental legislation allows private prosecutions and under what circumstances, and the impact of the distinction between indictable and summary conviction offences on the ability of a citizen to initiate a prosecution will not be discussed here, since they have been comprehensively treated elsewhere.⁵

Second, it is taken as understood that citizen enforcement is not a preferred technique to achieve public environmental objectives. Indeed, it is viewed here as a last recourse taken on by citizens when all other avenues have failed. Nevertheless, the practical experience with such actions (discussed in this article) amply demonstrates that private enforcements can successfully induce changes of behaviour in individual cases, and provoke wholesale re-evaluations and changes in government enforcement practices.

Third, the focus of the article is on industrial emissions control, which is only a small subset of the complete galaxy of environmental protection actions made possible in legislation and private law today. This having been said, it is suggested that the experience of citizens in industrial pollution abatement enforcement may be of value in the broader environmental protection context, and even in other regulatory situations.

Private prosecutions to enforce pollution control offences are controversial today not because of some technical feature or flaw with the mechanism, but because they clearly point to the inadequacies of the current approach. The challenge is to address the weaknesses in current pollution control implementation,

⁵E.g., S.H. Berner, *Private Prosecutions And Environmental Control Legislation: A Study* (Commissioned by the Department of the Environment) (Vancouver: Faculty of Law, University of British Columbia, 1972); P. Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269; L.F. Duncan, *Enforcing Environmental Law: A Guide to Private Prosecution* (Edmonton: Environmental Law Centre, 1990); Law Reform Commission of Canada, *Private Prosecutions* (Working Paper No. 52) (Ottawa: Law Reform Commission of Canada, 1986) [hereinafter *Private Prosecutions*].

while simultaneously integrating citizen enforcement into this improved process. This article represents an attempt to address this challenge.

I. Democracy, Public Participation and Private Prosecutions: Concepts and Mechanics

A. *The Basic Concepts*

The question of the relation between public participation and democracy is a vexing one which has occupied the attention of political theorists for centuries. It underlies any understanding of the role and function of citizen prosecutions, and so a brief discussion of the meanings and linkages between the concepts of democracy, public participation and the ability to engage in private prosecutions will be provided here prior to examining how these ideas have been synthesized in the Canadian governmental system.

The concepts of democracy and public participation overlap to a significant extent, yet the two notions are not identical. The word democracy is derived from the Greek roots *demos*, meaning the "people," and *kratos*, meaning "authority."⁶ In some ancient Greek city-states, democracy was literally government by the many, with all citizens regularly and directly participating in both the making and implementing of laws.⁷

While today such "direct democracy" systems are rare, some commentators have advocated a return to the small scale populist approach, in the interests of bringing a mass-consumption world economy back under control.⁸ Direct democracies assume an active, capable, civic-minded populace, which has the time, resources and inclination to involve itself in both making and carrying out the laws. For most intents and purposes, the direct democratic approach can be described as idealist.

In today's mass population, complex societies the most common form of democracy is known as "representative democracy." Instead of rule by the people as a whole, representatives are elected to make laws and govern on the basis of competitive elections in the interest of the citizenry. In theory, then, the decisions of the representatives derive their authority from popular elections. Actions of those who govern are controlled through elections and a host of other monitoring techniques.

⁶Discussion of basic concepts of democracy derived primarily from R. Jackson, D. Jackson & N. Baxter-Moore, *Politics in Canada: Culture, Institutions, Behaviour and Public Policy* (Scarborough: Prentice-Hall, 1986) at 24-25.

⁷*Ibid.* at 24.

⁸See, e.g., E.F. Schumacher, *Small is Beautiful: A Study of Economics as if People Really Mattered* (London: Abacus, 1974), especially c. 5.

It should be immediately apparent that any system which elevates some individuals to act on behalf of others is susceptible to abuses of power and will inevitably create questions in the minds of some as to who is being represented on any particular decision, and the adequacy of that representation. In effect, this division of responsibilities is an inherent source of tension in society, and the issue of "trust" in the governors by the governed is an on-going concern. The existence of elections, question periods in legislatures, the courts, ombudspersons, etc., perform the function of "checks and balances" and "controls" on the behaviour of the governors. It is probably apparent that Canada operates under a form of representative democracy.

The expression "public participation" is here taken to mean those processes whereby individuals and groups can influence government decisions which affect or matter to them.⁹ The term "influence" is also in need of definition. As one commentator has put it, "[t]o be in a position to influence a decision is not the same thing as to be in a position to ... determine the outcome or to ... make that decision."¹⁰ Thus, the notions of influence and public participation do not necessarily imply control. Rather, they denote a clearly articulated and recognized input into the process.

Ideally, the decision-making process should provide an opportunity for the citizen's individual input, and not simply an interchangeable and generic (perhaps symbolic) gesture. While spontaneous and unstructured forms of public participation are important, the emphasis here is on institutionalized forms of public participation through legally and administratively sanctioned processes.¹¹

While both direct and representative democratic systems are inherently linked to the concept of public participation, there are certain forms of public participation particularly associated with each. In the ancient Athenian model of direct democracy, popular assemblies were a key mode of public participation which allowed all citizens to involve themselves directly in the processes of governing. A major difficulty with such a system might be determining ways of achieving consensus in a fully participatory polity.

In representative democracies the elemental forms of public participation are indirect (for example, elections, question period in Parliament), and so the need for supplemental forms of public participation at the procedural and

⁹For a similar definition, see R. Parenteau, *Public Participation in Environmental Decision-Making* (Ottawa: Supply and Services Canada, 1988) at 6. Parenteau also notes that public participation may serve the political function of obtaining public support for decisions.

¹⁰C. Pateman, *Participation and Democratic Theory* (New York: Cambridge University Press, 1970) at 69.

¹¹The phrase "legal and administrative processes" is intended to encompass both constitutionally and legislatively sanctioned techniques, such as elections, public hearings, private prosecutions, judicial review, and administrative activities, such as the practice of consultation prior to the passage of new policies or regulations, and complaints procedures relating to enforcement.

administrative level to ensure effective representation is increased. The further one strays from the direct democracy model, the more one needs to incorporate every possible form of public participation to compensate for the inadequacies of indirect, representative democracy. Dussault and Borgeat refer to the work of French legal commentator Isaac for the proposition that procedural administrative democracy is becoming an essential tenet in the welfare state, for it

allows a more elaborate degree of democratization ... by situating the democratic process within the procedure for carrying out the decisions themselves, and no longer in the context of designating even local representatives.¹²

Cairns, in a recent article focusing on the symbolic and practical implications of Canada promulgating the *Charter*,¹³ notes that

[s]tate purposes now require so much popular support and participation if they are to succeed that we have no alternative but to move in the direction of a more participant citizenry, which shares on a day to day basis in the task of governing itself.¹⁴

In short, as a general rule, all institutionalized forms of public participation should be encouraged in representative democracies. And given that private prosecutions are a method of influencing government decisions, this form of public participation should be encouraged in the interest of ensuring effective representativeness of government.

B. Public Participation at the Pre-Enforcement Stage

There are probably as many forms of public participation as there are types of government decisions. Obviously, the focus of attention with private prosecutions is the enforcement decision process, but it is important to recognize that enforcement is merely the culmination of a much larger set of decision processes, beginning with the decision to create a law. For law and its enforcement to be accepted in and acceptable to society, it is necessary that there be public participation at all stages of the law making and implementation process. It is necessary "to create a solidarity between (the citizens), and those who have to apply (the decision); in short, enforcement, *which has been agreed upon . . .*"¹⁵ (emphasis added). Thus, it is important to review the processes which culminate in enforcement decisions, and identify the opportunities for public participation, even if at the present time this citizen input does not usually occur.

¹²G. Isaac, *La procédure administrative non contentieuse* (Paris: Librairie générale de droit et de jurisprudence, 1968) at 240, para. 231, trans. in R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, 2d ed. (trans. M. Rankin) (Toronto: Carswell, 1985), vol. 1 at 278 n. 247.

¹³*Supra*, note 3.

¹⁴A.C. Cairns, "The Canadian Constitutional Experiment" (1984) 9 *Dalhousie L.J.* 87 at 87.

¹⁵Isaac, *supra*, note 12 at 236, trans. in Dussault & Borgeat, *supra*, note 12 at 288.

The process of promulgating legislation is normally the subject of extensive public notice and comment. Draft bills are widely circulated to the general public and more specifically affected parties; these bills are reviewed by Standing Committees and Parliament or provincial legislatures before the bill finally becomes law.¹⁶

In theory, Parliament and provincial legislatures are keenly concerned with the implementation of laws because if they do not achieve their policy objectives it will be necessary to amend the laws. In practice, laws may be passed for their symbolic value,¹⁷ or the full implications of implementation (for example, the resource allocations necessary to secure compliance with the law) may not be thought out.¹⁸

Public participation at the legislative stage can help to ensure that these factors are at least recognized if not taken into account by legislators. Regardless of the motivations or limitations of M.P.s or members of provincial legislatures when they promulgate legislation, once such legislation is passed there is an expectation that it will be appropriately implemented.¹⁹ This expectation represents another of the "promises" referred to in the introduction to this article, and is the source of tensions when there is a perception that implementation is not up to the mark.

The process of implementation involves many decisions concerning resource allocation. These decisions are made in light of finite budgets, priorities of the particular department and of the government generally, and the existence of other agencies with related mandates. Again, in theory, this process could be the subject of significant public consultation from the earliest stages and result in a publicly disseminated compliance and enforcement policy, but in practice this rarely takes place. Later in the paper we will examine a rare and promising example where such a consultation process and policy have been adopted for an environmental statute.²⁰

¹⁶See generally, Jackson, Jackson & Baxter-Moore, *supra*, note 6, c. 8.

¹⁷See, e.g., M. Edelman, *The Symbolic Uses of Politics* (Chicago: University of Illinois Press, 1967).

¹⁸For more detailed discussion on this point see, Law Reform Commission of Canada, *Pollution Control in Canada: The Regulatory Approach in the 1980s* (Study Paper) by K. Webb (Ottawa: Law Reform Commission of Canada, 1988) at 49-50 [hereinafter *Pollution Control in Canada*].

¹⁹This expectation arises because certain elected officials have been given the specific responsibility over all matters within a specific policy context, such as "the preservation and enhancement of the quality of the natural environment" (*Department of the Environment Act*, R.S.C. 1985, c. E-10, s. 4(1)(a)), or "the administration of public affairs" (*Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4(a)).

²⁰Environment Canada, *Canadian Environmental Protection Act Enforcement and Compliance Policy* (Ottawa: Supply and Services, 1988) [hereinafter *Enforcement Policy*]. See *infra*, note 255 and accompanying text.

Public participation at the stage of drafting implementation policies provides individuals and regulatees with an indication of the way an agency or department plans to administer and enforce legislation. It also gives individuals the opportunity to bring information to the attention of government, and persuade government of the merits of a particular approach. Where such consultations take place, there is a strong expectation that the law will then be implemented that way. Where implementation policies are not made known in draft and final form, there is still a general expectation that the law will be enforced in a fair, consistent and predictable manner; but there is considerably less certainty as to exactly how implementation will proceed. Again, expectations here represent implicit promises which create tensions when there are later perceptions that nothing or less than adequate implementation is taking place.

Departments or agencies will inevitably be involved in on-going communications with respect to individual regulatees, in order, for example, to set emission standards and target dates for installation of equipment, to respond to new problems, and to receive and exchange monitoring data. Although these on-going communications are usually highly technical, any agreements between government and regulatees could and arguably should be subject to public notice and comment, and compliance data publicly disseminated in regular reports. Hence, public participation at the individual regulatee administrative level could take place. Even in the absence of such consultations and public information dissemination, there is an expectation that the law is being administered in a fair, consistent and predictable manner.

It is within this greater context that agencies and departments eventually make enforcement decisions. A wide range of decisions surround the enforcement process: What is the nature of the violation of the law?²¹ Why has the violation occurred?²² What enforcement response is appropriate?²³ Who should bring that enforcement response?²⁴ In the event that there is a compliance and enforcement policy in place, and that policy was subject to public notice and comment in draft stages, a concerned citizen would have some expectation of a government response. Where information concerning the progress of individual regulatees has been regularly made public and agreements with the regulatees have been subject to public approval, a concerned citizen can make an informed response about the need for private enforcement actions. On the other

²¹*E.g.*, has there been serious damage to the environment?

²²*E.g.*, was the act intentionally committed, the result of carelessness, or was it beyond the control of the accused?

²³*E.g.*, is there a history of non-compliance? How good is the evidence? Will abatement be achieved more readily through administrative means? What is the specific and general deterrence value of a prosecution when compared with other available techniques?

²⁴*E.g.*, should federal Fisheries and Oceans, R.C.M.P., or Environment officials take the lead? What role should provincial authorities play?

hand, where government has failed to inform the public and offer the opportunity for public input concerning the implementation process, there is a greater likelihood that a citizen might feel compelled to initiate an enforcement action on her own initiative.

C. *Private Prosecutions and the Machinery of Government*

The decision to initiate a prosecution is a very serious one in our society, for it directly brings into question the character of the accused, and could result in deprivations of liberty or other interests. Damage to the character of the accused and enormous legal defence expenses may be incurred even though eventually the accused could be acquitted of all charges.²⁵ Reflecting the seriousness with which society treats such accusations, the rights of the accused in the pre-arrest (for example, investigation), arrest and trial stages are preserved in the *Criminal Code*²⁶ and the *Charter*.²⁷

In addition, in an apparent effort to ensure that only technically and substantively sound charges are proceeded with, responsibility for investigation of offences and initiation of prosecutions within government is usually divided among several Ministers. In theory these Ministers are politically accountable to Parliament or the legislatures and the electorate. Whether or not she is aware of it or desires it, the private prosecutor is a part of this process.

The question then becomes, where do citizen legal actions to enforce public wrongs fit, when there are officials who have been elected on the basis of popular consensus, and have been designated the responsibility of carrying out the functions of protecting the environment and supervising the justice system, on behalf of the public? To answer this it is necessary to examine the governmental prosecution decision process and its weaknesses. Once there is recognition of the inherent limitations in this process, the role for private prosecutions becomes clearer.

²⁵The situation with respect to Nurse Nelles in Toronto is perhaps the best example of the damage which can take place to an accused who is eventually found to have been wrongly accused of a crime. In fact, the Nelles affair led to an action for malicious prosecution against the Crown. See *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609 [hereinafter *Nelles*], which set out the parameters for a successful prosecution. I am indebted to Mr. Glenn Gilmour of the Law Reform Commission of Canada for his assistance concerning the *Nelles* case and *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*] provisions.

²⁶More specifically, regarding protection of potential accuseds at the pre-arrest (investigation) stage see, e.g., *Criminal Code*, part VI concerning invasion of privacy by the use of wiretaps. See also procedures circumscribing the issuance of search warrants, especially ss 487 and 487.1. Concerning the limits of powers to arrest, the circumstances in which releases from custody can take place and the judicial obligation to release on bail, see ss 495-499, 515, 520 & 522. With respect to protections at trial see, e.g., ss 603 and 605.

²⁷Ss 7-15. Regarding recent applications of s. 7 and s. 11 to regulatory offences see "Regulatory Offences," *supra*, note 3.

The prosecution process can be broken into three separate functions: detections, investigations and, where warranted, prosecutions. In government, the prosecution functions are divided among several actors, and are subject to certain checks and balances. A major problem, from the perspective of the concerned citizen, is the visibility of this process: if it is difficult to observe what is happening, then there is greater potential for suspicion to arise. The recent British Columbia *Discretion to Prosecute Inquiry*,²⁸ established because of perceived wrongdoing concerning certain enforcement decisions in that province, is a perfect example of the dangers of government proceeding in a non-visible way. The Inquiry revealed that with respect to a government decision not to prosecute a certain public official, a credible, thorough investigation considering the merits of prosecutorial action had taken place and that there was no political or other improper influence or interference at any stage.²⁹ But this had not been made clear to all members of the public. As a result, one of them engaged in a private prosecution.³⁰

With respect to environmental enforcement, responsibility for the process leading to prosecutions is divided primarily between the Minister of Environment and the Attorney General. Officials under the Minister of Environment are in the logical position to detect offences, and conduct investigations concerning them, relying primarily on information obtained through inspections, monitoring reports, and communications with regulatees and members of the public. This may lead to recommendations for prosecutions to the Attorney General, or to other enforcement actions, or to no action whatsoever. As will be discussed in greater detail later in the article, the need for the Minister to develop a publicly vetted and disseminated implementation policy which explains the Minister's approach to implementation and the criteria upon which responses are made, is clear. The need for publication of non-compliant regulatees is also readily apparent.³¹

It is interesting to compare this Environment-Attorney General recommendatory process with that for enforcement of *Criminal Code* offences. In all but three provinces, the police not only are the primary officials responding to violations and conducting investigations, they are also responsible for laying the charges.³² The Attorney General then may either proceed with or stay the prosecutions.³³

²⁸British Columbia, *Discretion to Prosecute Inquiry* (November 1990) (Chair: S. Owen) [hereinafter Owen].

²⁹*Ibid.* at 58ff.

³⁰*Ibid.* The prosecution was later abandoned.

³¹On this point, see recent initiative of the B.C. Ministry of Environment, described *infra*, note 290 and accompanying text.

³²Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor* (Working Paper 62) (Ottawa: Law Reform Commission of Canada, 1990) at 69-70 [hereinafter *Controlling Criminal Prosecutions*].

³³*Criminal Code*, s. 579(1).

The advantage of such an approach is that there is a "window" for public scrutiny — it is possible for M.P.s or members of provincial legislatures, the media and the public to become aware of the fact that there have been detections of offences, and that there were reasonable and probable grounds for police to believe that an offence had taken place. Should the Attorney General then decide against going ahead with the prosecution, it would be at least theoretically possible for M.P.s or members of provincial legislatures to follow up on the matter in Parliament or the legislatures. The disadvantage of this approach is that Attorney General pre-scrutiny of police information could reveal technical or other problems with the charge. This would avoid the necessity of a flawed prosecution, with costs to both the accused and the state.³⁴ For this reason, the Law Reform Commission of Canada has suggested that police should only lay charges after consultations with the Attorney General or a suggested new body, the Director of Public Prosecutions.³⁵

The Attorney General has the primary responsibility over prosecutions. In the Canadian justice system, the peculiar and difficult position of the Attorneys General as both representatives of the Crown responsible for public prosecutions *and* members of Cabinet, has been noted by several writers. A recent Law Reform Commission of Canada Working Paper speaks of the potential for conflict of interest inherent in the office of the Attorney General in performance of its prosecution responsibilities, and the need "to have someone act independently and free of political pressure or other conflicts."³⁶ Arguably, this is particularly so in the environmental context, where the actions of Crown agents might very well be the focus of concern.³⁷

It is in recognition of these problems that the Law Reform Commission of Canada has recommended creation of an independent office of the Attorney General (the Director of Public Prosecutions) who would report to the Attorney General.³⁸ It is not necessary, for the purposes of this discussion, to describe in full the nature of this proposed office and its relation to the Attorney General. It is sufficient to note that, given awareness of the current position of the Attorney General and its inherent limitations, the need for private prosecutions as a check on the improper exercise of the Attorney General's powers is self-evident.

Currently, it is the responsibility of the Attorney General to decide which recommendations for prosecutions it will pursue. However, recent studies suggest that, with respect to criminal offences, the criteria upon which such deci-

³⁴*Supra*, note 32 at 71.

³⁵*Ibid.* at 73. This recommendation must be read in light of the other recommendations, which include stipulations that guidelines be published concerning prosecution decisions, and the creation of a new office of public prosecutor (see *infra*, note 37 and accompanying text).

³⁶*Ibid.* at 1-2.

³⁷*E.g.*, where a Crown corporation is polluting, or a where a federal Minister responsible for reviewing the environmental viability of a project appears to be neglecting her duties.

³⁸*Supra*, note 32 at 115.

sions are made vary from one jurisdiction to another,³⁹ and in some cases there is no clearly articulated test.⁴⁰ In the interests of certainty, consistency, fairness, equality of treatment and predictability, there is a clear need for articulation of criteria. Moreover, there is a readily apparent need for the public to comment on these criteria in draft form and for the publication of the final version.⁴¹ Again, in the absence of such published criteria, the likelihood of public suspicion arising, and a concerned person feeling the need to initiate proceedings, is increased.

The Attorney General has the authority to intervene in any private prosecution to either conduct or stay it.⁴² The authority of the Attorney General to supervise private prosecutions and ensure that improper actions do not proceed seems to be a sensible check on the private prosecutorial power, given that, at least theoretically, political accountability exists for this decision, and some private prosecutions may be ill-conceived. When the Attorney General *does* intervene and/or stay a private prosecution, the question of whether the public interest is being appropriately represented becomes an issue. The ability of Parliament and the courts to hold the Attorney General accountable for such decisions has increasingly been the subject of question in recent years.⁴³ The political accountability of Ministers of the Crown to the House of Commons, in the form of being called upon to answer questions and being censured in the case of wrongdoing, is limited in practice by party solidarity and the "after-the-fact" nature of any questioning which does take place.⁴⁴

There is also a limited possibility of judicial accountability with respect to the Attorney General's decision to initiate and continue prosecutions and to intervene in the actions of private citizens. The most recent cases suggest that courts would not interfere with an Attorney General's decision to stay a proceeding absent proof of flagrant impropriety⁴⁵ or demonstration to the satisfaction of the court that the Attorney General acted with bias or had abused the law.⁴⁶ The introduction of the *Charter* may open further avenues for review and

³⁹*Supra*, note 28 at 30-32.

⁴⁰*E.g.*, in Alberta there is no clearly articulated test with respect to "routine" cases (*ibid.* at 30).

⁴¹For a Law Reform Commission of Canada recommendation along these lines, see *Controlling Criminal Prosecutions*, *supra*, note 32 at 79-84.

⁴²*Criminal Code*, s. 579(1). See, *Re Dowson and R.* (1980), 57 CCC (2d) 140, 19 C.R. (3d) 384 (Ont. H.C.), *aff'd* (1981), 24 C.R. (3d) 139, 62 C.C.C. (2d) 286, *rev'd* [1983] 2 S.C.R. 144, 35 C.R. (3d) 289; *R. v. Hauser*, [1979] 1 S.C.R. 984, 98 D.L.R. (3d) 193; *Controlling Criminal Prosecutions*, *ibid.* at 18 & 65.

⁴³See *Controlling Criminal Prosecutions*, *ibid.* at 11-15.

⁴⁴*Ibid.* at 11-12.

⁴⁵*Campbell v. A.G. Ontario* (1987), 60 O.R. (2d) 617, 35 C.C.C. (3d) 480 (C.A.), *aff'g* (1987), 58 O.R. (2d) 209, 31 C.C.C. (3d) 289 (H.C.) [hereinafter *Campbell*]; *R. v. Osiowy* (1989), 77 Sask. R. 1, 50 C.C.C. (3d) 189 (C.A.) [hereinafter *Osiowy*].

⁴⁶*A.G. Quebec v. Chartrand (sub nom. Macabee v. Chartrand)*, [1987] R.J.Q. 1732, 59 C.R. (3d) 388 (C.A.). See also, *Controlling Criminal Prosecutions*, *supra*, note 32 at 23. The question can

control of prosecutorial discretion, particularly in relation to the notions of fundamental justice⁴⁷ and equality.⁴⁸ Since *Operation Dismantle v. R.*⁴⁹ it has been clear that all executive powers are subject to scrutiny under the *Charter*; however, to date, the *Charter* has not been invoked successfully to overturn a decision of the Attorney General to stay a prosecution.⁵⁰

The need for publicly vetted and disseminated criteria upon which decisions to stay or intervene are made is, again, readily apparent. Some jurisdictions, such as Alberta and British Columbia, have express policies that private prosecutions will not be allowed to proceed: the actions will either be conducted by the Attorney General or stayed.⁵¹ Given the possible impact such a policy can have on the actions of citizens, a strong argument can be made that such policies should be publicly vetted and disseminated, and that the criteria upon which such decisions are made should be included. A general policy of providing reasons upon request for a decision to stay would appear to be a sensible additional check on the Attorney General's stay power, bearing in mind the limitations of political and judicial accountability at the present time.

It can be seen, then, that as the elected official appointed the task of supervising the prosecution, the Attorney General is the *primary* although *not* the exclusive guardian of the public interest. To some degree, her actions are accountable to Parliament and to the courts. However, in the absence of private prosecutions, it may be more difficult to hold the Attorney General accountable for decisions *not* to undertake prosecutions, than for decisions to prosecute.

In effect, a decision by the Attorney General not to prosecute can be all but invisible to Parliament, the public, and the courts. Private prosecutions force this decision process to the surface: either the Attorney General allows the private action to go ahead (raising the issue of why the Attorney General did not bring the action herself), intervenes and conducts the prosecution (raising the same issue), or stays the proceeding (which provokes questions as to why an enforcement action should not take place).

be asked whether failure on the part of government to establish a publicly vetted compliance and enforcement policy might be considered a "flagrant impropriety" or an abuse of law.

⁴⁷S. 7.

⁴⁸S. 15(1).

⁴⁹[1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

⁵⁰*Campbell*, *supra*, note 45 (a stay of proceedings does not infringe the complainant's *Charter* rights). See generally, *Controlling Criminal Prosecutions*, *supra*, note 32 at 25. For an optimistic perspective on the potential of the courts to review stays in light of inequalities, see P. Finkle & D. Cameron, "Equal Protection in Enforcement: Towards More Structured Discretion" (1989) 12 *Dalhousie L.J.* 34.

⁵¹With respect to Alberta, see I. Cartwright, "Practice Note — A Private Prosecution in Alberta — A Painful Process" (1990) 1 *J. Env. L. & Practice* 110 at 110. For British Columbia, see Owen, *supra*, note 28 at 90-91.

In light of these difficulties and the potential for conflict of interest, the importance of private prosecutions seems self-evident. It can be seen that emphasis on the function of private prosecutions as a check on government enforcement action or inaction bespeaks of its negative, constraining, and reactive characteristics as a means of participation — that is, in keeping with the philosophy underlying the representative theory of democracy, its purpose is to control the elected officials and the administrators responsible to them.

In a more positive light,⁵² private prosecutions offer the opportunity for direct citizen involvement in the criminal justice process. One commentator remarks as follows:

[A] criminal justice system that makes provision for private prosecution of criminal and quasi-criminal offences has advantages over one that does not... . In any system of law, particularly one dealing with crimes and quasi-crimes, it is of fundamental importance to positively involve the citizen. Giving him the opportunity of presenting his case before a court, even where a public official has declined to take up the matter, is one way of ensuring such participation.⁵³

Thus, private prosecutions can be viewed as a useful supplement to government action, and not merely a check on government efforts. As will be seen, historically this was the primary function of citizen enforcement.

In those cases where private prosecutions are allowed to proceed, the issue is how and why a citizen conducted prosecution differs from a public prosecution. Because of the strict rules of evidence and procedure associated with the proof process, there is little opportunity at the proof stage for the citizen to express a particular viewpoint on the incident different from a Crown prosecutor conducting the same proceedings.⁵⁴

Nevertheless, it is probably true to say that the Crown prosecutor, as a public official, acting in the public interest and accountable for his actions ultimately to Parliament (and to a certain extent to the courts), operates under practical constraints which may not similarly impede a citizen prosecutor. The position of the Crown prosecutor in conducting a trial has been described as a

⁵²*I.e.*, in the sense that private prosecutions are not merely constraints on improper government action.

⁵³Burns, *supra*, note 5 at 296. See an almost identical sentiment expressed in *Private Prosecutions*, *supra*, note 5 at 3.

⁵⁴To put it another way, assuming both private prosecutors and Crown prosecutors are competent, dedicated to their task, and in possession of the evidence needed to prove guilt, the technical constraints of the trial proof of guilt process require the prosecutor to closely follow certain steps. These include: proof of the *actus reus*, proof that the accused committed the *actus reus*, and, in the case of a strict liability offence where the defence of due diligence is in dispute, proof that the accused did not exercise reasonable care. These constraints do not provide prosecutors with the type of latitude which would facilitate the communication to the judge of a distinctive citizen, as opposed to Crown, perspective.

“quasi-judicial office.”⁵⁵ This implies that the office holder must act in a somewhat reserved and impartial manner, when compared with, for example, a private litigant. In the Supreme Court of Canada decision of *Boucher v. R.*,⁵⁶ Mr. Justice Rand elaborated on the role of the Crown prosecutor as follows:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which [*sic*] in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.⁵⁷

In practical terms, this would appear to mean that a Crown prosecutor may not be as single-mindedly aggressive as a private prosecutor in the same situation. In her inherent supervisory capacity, there is always the possibility that the Crown prosecutor could either take over a private prosecution or stay it if it was felt that the aggressive conduct of the private prosecutor exceeded the bounds of propriety.⁵⁸

Apart from the act of initiating a prosecution, the real opportunity for citizen prosecutors to clearly exhibit their distinctive perspective would appear to be in speaking to sentence. Even with the most basic pollution control offences, the question of the magnitude of the fine sought and, in certain cases, the appropriateness of the imprisonment option, are issues where the eloquence, tenacity and unique perspective of the citizen prosecutor can be fully revealed, and can lead to different results. The more elaborate pollution control regimes provide for considerably more diverse sentencing options than simply fines and/or imprisonment. For example, under the *Canadian Environmental Protection Act*⁵⁹ once a finding of guilt has been made, the court can make orders having the following effects:

⁵⁵*E.g., Re Forrester and R.* (1976), 1 Alta. L.R. (2d) 326, 33 C.C.C. (2d) 221 at 277 (S.C.T.D.).

⁵⁶[1955] S.C.R. 16, 20 C.R. 1 [hereinafter *Boucher* cited to S.C.R.].

⁵⁷*Ibid.* at 23-24.

⁵⁸For example, in *Controlling Criminal Prosecutions*, *supra*, note 32 at 19 the following is stated:

Ultimately, ... the Attorney General has supervisory authority over all prosecutions. Even in the case of privately commenced and conducted prosecutions, it will be true that no criminal proceeding occurs without at least the Attorney General's sufferance. In this sense, then, the Attorney General is ultimately accountable to Parliament not only for using the power to intervene and stay charges, but also for a decision not to intervene.

⁵⁹R.S.C. 1985, 4th Supp., c. 16 [hereinafter *C.E.P.A.*].

130.(1) ...

(a) prohibiting the offender from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;

(b) directing the offender to take such action as the court considers appropriate to remedy or avoid any harm to the environment ...

(c) directing the offender to publish, ... the facts relating to the conviction;

(d) directing the offender to notify, at the offender's own cost ... any person aggrieved or affected by the offender's conduct ... relating to the conviction;

(e) directing the offender to post such bond or pay such amount of money into court as will ensure compliance with any order made ...

(h) directing the offender to perform community service, subject to such reasonable conditions as may be imposed therein;

(i) directing the offender to pay ... an amount for the purposes of conducting research into the ecological use and disposal of the substance in respect of which the offence was committed; or

(j) requiring the offender to comply with such other reasonable conditions as the court considers appropriate and just in the circumstances ...

131.(1) the court may, ... on the application of the person aggrieved, order the offender to pay to that person an amount by way of satisfaction or compensation for loss or damage to property ...

Faced with this diversity of options, it is apparent that a private prosecutor could decide to pursue different sentencing avenues than a Crown prosecutor in the same circumstance. In some respects, the private prosecutor is undoubtedly at a disadvantage in speaking to sentence when compared with the position of a Crown prosecutor (for example, in obtaining the information upon which to base a request for an order requiring remedial action), but at the same time the impassioned pleas of citizen prosecutors speaking as local victims of the pollution may carry greater weight with sympathetic judges than would the same arguments made by a dispassionate Crown prosecutor.

II. Pollution Control Enforcement and the Citizen: An Evolving Story

Although legislation addressing aspects of the pollution problem can be traced at least as far back as fourteenth century England⁶⁰ and the early days of Confederation in Canada,⁶¹ the "modern" era of Canadian pollution control is generally considered to have commenced in about 1960.⁶² At about that time, blanket prohibitions of polluting behaviour started to be replaced by control regimes, whereby pollution was prohibited *unless* the effluent discharge was of

⁶⁰See *infra*, note 63 and accompanying text.

⁶¹E.g., *Fisheries Act*, S.C. 1868, c. 60, s. 14; *Ontario Public Health Act*, S.O. 1884, c. 38, s. 69(1); *Manitoba Sanitary Act*, S.M. 1871, c. 28, s. 1.

⁶²See, e.g., J.A. Kennedy, "Foreword to the First Edition" in D. Estrin & J. Swaigen, eds, *Environment on Trial: A Handbook of Ontario Environmental Law* (Toronto: Canadian Environmental Law Research Foundation, 1978) at x. See also, A.R. Thompson, *Environmental Regulation in Canada: An Assessment of the Regulatory Process* (Vancouver: Westwater Research Institute, University of British Columbia, 1980) at 27.

a type, in a quantity or concentration, and under conditions authorized by regulations or licences.⁶³

The role of the private prosecution in pollution control today is to a large extent the result of its historical development in relation to the more basic penal offence regimes of the past. Originally, private prosecutions played a prominent role in the enforcement of public wrongs, but, starting in the nineteenth century, this role was diminished as a centralized full-time public inspectorate became more common.⁶⁴ There can be no doubt that in the last two centuries the legal, administrative and institutional machinery of governing has developed considerably, but the question is, how has this development affected the rationale for and practice of private prosecutions?

To answer this, the origin and development of citizen enforcement of penal offences will be discussed, as will the rise of a centralized bureaucracy to administer social regulation. With this background it will then be possible to undertake a more focused review of how the pollution control regulatory approach evolved, and how this development has affected the need for citizen prosecutions and the ability of citizens to conduct them.

A. *Citizen Enforcement of Penal Offences: Origin and Development*

Before the nineteenth century, England depended heavily on citizen actions to enforce many of its penal statutes. At least since the thirteenth century, a special means of bringing a legal action known in Latin as *qui tam pro domino rege quam pro seipso* ("he who as much for the king as for himself") permitted the consolidation of the king's and private party's interests into one proceeding.⁶⁵ In effect, a *qui tam* action was initially one where a private wrong coincided with a wrong to the king.⁶⁶ The *qui tam* suit was available to combine royal and private interests in both civil and penal actions.⁶⁷

Although the *qui tam* suit was originally a common law remedy, as early as the fourteenth century there began to be provisions in penal statutes permitting private actions for public wrongs.⁶⁸ Early public health acts — the prede-

⁶³See generally, *supra*, note 18 at 11-15.

⁶⁴See, e.g., the discussion of the creation of public inspectorates for food and drug legislation in I. Paulius "Strict Liability: Its Place in Public Welfare Offences" (1977-1978) 20 *Crim. L.Q.* 445 at 452-53.

⁶⁵Discussion of *qui tam* based primarily on Note, "The History and Development of Qui Tam" (1972) *Wash. Univ. L. Qlty* 81.

⁶⁶In fact, the king's interests were originally considered a special class of private interest. As sovereignty and national status interests developed, those which were "directed toward the general well being of the kingdom" (*ibid.* at 83-84) became public interests. These public interest wrongs came to be set out in statutes.

⁶⁷Needless to say, the distinction between civil and penal proceedings has become considerably clearer as time has progressed.

⁶⁸*Supra*, note 65 at 86.

cessors of modern pollution control legislation — included specific reference to citizen enforcement. Thus, for example, a 1388 statute enacted by Parliament to address the problem of “so much Dung and Filth of the Garbage and Intraills as well as of Beasts killed ... cast and put in Ditches, Rivers, and other Waters” stipulated that offence proceedings could be initiated either by public officials or any who “feel [themselves] aggrieved.”⁶⁹

Commentators classify the private parties who could bring actions under common law *qui tam* or penal statutes which provided for private enforcement into two different types. The first were the direct victims of the offender’s actions. The second were “common informers.”⁷⁰ Private parties could both initiate the *qui tam* actions, and share with the king or some public use the penalty awarded.⁷¹ In some legislation it was stipulated that the plaintiff had to be a victim of the wrongdoing, while in other instances informers could bring the action.⁷²

Starting in the fourteenth century, informers who initiated proceedings under certain penal statutes could receive a share of the penalty imposed. For example, the 1331 *Statute Prohibiting the Sale of Wares After Close of Fair*⁷³ gave the private prosecutor a quarter share of the penalty imposed upon conviction.⁷⁴ In time, common informer provisions came to be subject to various forms of abuse: “[a] friend of the wrongdoer would bring suit and either obtain a confessed judgment for a small part of the penalty or permit the wrongdoer to prevail at a feigned trial.”⁷⁵ As well, some informers became “overly aggressive” and “vexatious” by prosecuting little known and obsolete violations.⁷⁶

In fact, abuses of informer provisions became so widespread that in the face of public outcry, Parliament at various times abolished informer actions altogether, only to subsequently re-introduce them (because informers were still needed to enforce English penal laws) with amendments intended to limit the potential for abuse.⁷⁷ It is important to keep in mind that during this time period prosecuting offences was often a straightforward task. The simple nature of offences and the comparatively unsophisticated nature of proceedings meant that informers did not need to prepare detailed briefs nor hire lawyers. Thus,

⁶⁹The Statute of 12 Rich. II, c. 13 (1388), reproduced in B. Boyer & E. Meidinger, “Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws” (1985) 34 Buffalo L. Rev. 833 at 947 n. 279.

⁷⁰*Supra*, note 65 at 84-87.

⁷¹*Ibid.* at 87. With respect to the “public use” see *supra* and especially n. 34 and accompanying text.

⁷²*Ibid.* at 86.

⁷³5 Edw. 3, c. 5, s. 6.

⁷⁴*Supra*, note 65 at 86.

⁷⁵*Ibid.* at 89.

⁷⁶*Ibid.*

⁷⁷*Ibid.* discussing legislative provisions in the fifteenth and sixteenth centuries.

there were few impediments, and considerable incentives, to pursuing such actions.

By the seventeenth century, the concept of private enforcement of English penal statutes had gained widespread acceptance.⁷⁸ The industrial revolution rose to full prominence in England in the eighteenth and nineteenth centuries. The impact of industrialization on the lives of the average individual was devastating. Polanyi talks of a “miraculous improvement in the tools of production, which was accompanied by a catastrophic dislocation of the lives of the common people.”⁷⁹ Small shops, guilds, and a rural/agrarian population base were replaced by corporations, factories and massive urbanization.

In the face of this frontal assault on the fabric of English society, Parliament promulgated new and/or expanded factory, public health, as well as food and drug legislation in the nineteenth century.⁸⁰ But these initial legislative forays proved inadequate: according to commentators, part of the problem was resistance by Parliament to the need for a centralized and professional inspectorate charged with the responsibility of administering and enforcing the legislation. Paulius describes the situation that faced private prosecutors of adulterated food offences prior to the introduction of full time inspectorates:

Needless to say, the time, money and expertise required to instigate a prosecution made it impossible for the bulk of the working population, and very inconvenient for the middle-class consumer, to enforce the law.⁸¹

In effect, at a practical level, the centralized bureaucracy gradually assembled to administer this social regulation over the following century was intended to do away with the necessity for private prosecutions.

B. The Development of the Regulatory Offence

Other factors also contributed to the marginalization of the citizen's role in enforcement. By the nineteenth century, courts had established the general rule that *mens rea* was a required element to be proved for all penal offences.⁸² Proving the intent of corporate defendants presented a formidable barrier to any prosecutor⁸³ and obviously placed citizens at a particular disadvantage.

⁷⁸*Ibid.* at 90.

⁷⁹K. Polanyi, *The Great Transformation* (Michigan: Octagon Books, 1975) at 33.

⁸⁰See generally, *supra*, note 64.

⁸¹*Ibid.* at 452.

⁸²Blackstone, *Commentaries on the Laws of England* (1809), Book IV, 15th ed., c. 15 at 21.

⁸³*Supra*, note 64 at 451 states:

Some one hundred years ago people starved to death; were accidentally killed during work; lived in indescribably unhealthy and filthy conditions and, as a consequence, died of infectious diseases; ... were poisoned or made ill by unwholesome food — *all because means were lacking to prove that those who were exploitative or negligent were in fact guilty of morally reprehensible crimes.* This history of the Passenger Acts,

Although there developed a line of cases approving offences where no intent needed to be proved,⁸⁴ confusion in Canada continued through the 1970s as to which offences required intent and which did not.⁸⁵ In the face of this uncertainty alone, it is no wonder that private prosecutions were not common occurrences.

The judicial acceptance of the strict liability offence in the *Sault Ste. Marie* case resolved much of the confusion concerning the nature of most pollution offences. Speaking for the Supreme Court of Canada, Dickson J. unambiguously characterized most pollution offences as ones of strict liability, *i.e.* not requiring proof of intent but allowing the accused to escape conviction if he could establish due diligence or reasonable mistake of fact on a balance of probabilities.⁸⁶ However, the availability of the due diligence defence represented a new barrier to the private prosecutor: frequently, the actions of government seem to be on trial almost as much as those of the accused when due diligence defences are raised.⁸⁷ Private prosecutors are in a difficult position to counter an accused's assertions that the abatement equipment installed was "state of the art" and that government officials agreed with the accused's progress.⁸⁸

C. *The Canadian Pollution Control Approach*

1. Citizens Out in the Cold: 1960 – 1975

As was said earlier, although there were basic outright prohibitions of pollution in Canadian legislation since Confederation, the "modern" era of Canadian pollution control is generally considered to have commenced in about 1960, when prohibitions began to give way to "command and control" regimes permitting certain effluent discharges authorized by regulation or licencing type agreements.⁸⁹

To enforce these new control regimes, administrators were given increased powers to require polluters to make modifications, disclose information, conduct tests, install equipment and to take clean up action.⁹⁰ New obligations on

factory legislation, sanitary and public health regulations, and the food and drug laws, clearly shows that the overall abuses resulting from the industrial revolution, could only be curbed by a compulsorily enforced criminal law which suspended the requirement of *mens rea* (emphasis added).

⁸⁴See discussion, "Regulatory Offences," *supra*, note 3.

⁸⁵As discussed in *Sault Ste. Marie*, *supra*, note 3.

⁸⁶*Ibid.* at 374. For a discussion of a new potential difficulty in the ability of the due diligence defence to withstand challenges under the *Charter*, see "Regulatory Offences," *supra*, note 3.

⁸⁷See case descriptions below at 803-15.

⁸⁸More will be said on these points below.

⁸⁹See generally, *Pollution Control in Canada*, *supra*, note 18 at 11-15.

⁹⁰*Ibid.* at 12-13.

the part of polluters to monitor their effluents and supply the results to government were also commonly included. Although undeniably the control approach was considerably more realistic than the blanket prohibitions it replaced, it also represented a significant shift of the locus of decision-making in pollution matters — a shift away from the courts and toward the bureaucracy. Responding to the predominantly technical nature of pollution control, government officials engaged in on-going communications with regulatees, negotiating abatement plans, reacting to advances in technologies, plant expansions and new problems.⁹¹ Because the work of government environmental agencies frequently overlapped with that of other agencies at the same and different levels of government, many informal administrative arrangements were entered into among cooperating agencies in an effort to avoid duplication and enhance coordination.⁹² In effect, then, the “modern” control approach “drove pollution abatement decisions underground into the quiet and less visible regulation and licence-negotiating processes of government.”⁹³

In retrospect, it is clear that this initial wave of pollution control legislation and administration marginalized the role of the citizen; rarely (if ever) was there any mention of the public, let alone a clearly articulated role for the citizen in the decision-making process. There were no requirements for public notice of draft regulations, few duties to supply information to the public, infrequent obligations to hold public hearings regarding proposed licences or Control Orders, nor were there any express edicts to involve the public in enforcement. In fact, the creation of such legislation tended to restrict or deny pre-existing common law rights for private actions.⁹⁴

This lack of statutory recognition of a role for the public was probably attributable not so much to a deliberate and malicious attempt to shut out the citizenry as naive confidence on the part of legislators that government could manage things by itself. No doubt, at the time, many members of the public shared that faith.⁹⁵ After all, by the 1970s new departments of environment had been

⁹¹For examples of this, see case descriptions below.

⁹²For illustrations of how these agreements work in practice, see case descriptions below. For a more detailed discussion of the position of the pollution control bureaucrat, see K. Webb, “Between Rocks and Hard Places: Bureaucrats, Law and Pollution Control” in R. Paehlke & D. Torgerson, eds, *Managing Leviathan: Environmental Politics and the Administrative State* (Peterborough: Broadview Press, 1990) 201.

⁹³*Pollution Control in Canada*, *supra*, note 18 at 15.

⁹⁴D. Estrin, “Tokenism and Environmental Protection” in O.P. Dwivedi, ed., *Protecting the Environment: Issues and Choices — Canadian Perspectives* (Vancouver: Copp Clark, 1974) 123 at 135.

⁹⁵On the initial faith of conservationists in government experts, and their later realization of the limitations of closed processes, see particularly R. Paehlke, “Democracy and Environmentalism: Opening a Door to the Administrative State” in Paehlke & Torgerson, eds, *supra*, note 92, 35 at 38-42.

established at the federal level and in virtually every provincial jurisdiction in the country: weren't these agencies supposed to represent the public interest?

Even in the early years, some individuals and groups were cognizant of the need for integrated citizen involvement in pollution control decision-making (for example, formalized channels of input and public notice of actions) and championed the cause of greater participation. In the United States, the notion of administrative agency capture was well known in the 1960s. One of the first books to seize the imagination of the public with its concern for the environment was Rachel Carson's 1961 classic *Silent Spring*⁹⁶ — above all it was a plea for citizen information and participation in environmental decisions.⁹⁷ In 1971, the Canadian Environmental Law Association and Research Foundation, in their brief regarding the (then) proposed Ontario *Environmental Protection Act*, warned Ontario legislators of the dangers of shutting out the public:

Far too often an over-worked bureaucracy develops a narrow single-mindedness of purpose. It evolves into a working entente, with the persons subject to their regulation, that fosters a further narrowing of perspective. The probing of private citizens, through public hearings and other actions, is the only cure for the normal malaise affecting any administrative agency, regardless of its zeal, equanimity, or devotion to responsibility. It is a fact of administrative life.⁹⁸

As the cracks in the closed government-private sector *modus operandi* became evident, the first reactions were, not surprisingly, angry criticisms levied by concerned and affected persons shut out of the process.⁹⁹ Then came grudging (and

⁹⁶Greenwich, Conn.: Fawcett, 1962.

⁹⁷For example, Carson states as follows:

It is not my contention that chemical insecticides must never be used. I do contend that we have put poisonous and biologically potent chemicals indiscriminately into the hands of persons largely or wholly ignorant of their potentials for harm. We have subjected enormous numbers of people to contact with these poisons, *without their consent*, and often without their knowledge (*ibid.* at 22, emphasis added).

⁹⁸Canadian Environmental Law Association, "Critique on Proposed Ontario *Environmental Protection Act* (Bill 94)" (July 1971) [unpublished] cited in Estrin, *supra*, note 94 at 127.

⁹⁹For example, D. Estrin, "Annual Survey of Canadian Law Part 2: Environmental Law" (1975) 7 *Ottawa L. Rev.* 385 at 408, where he states:

The procedures for approval of new pollution sources ... are also the subject of criticisms. Again the general rule is that such applications are handled in a secret process between the applicant and the agency. No notice of the application is given to other industries or residents in the area, nor are they given, even if they are aware of it, any legal right to meaningfully make their views known ...

See also criticisms of the closed industry-government negotiations underlying the formulation of the federal *Pulp and Paper Effluent Regulations*, C.R.C. 1978, c. 830, in D. Estrin & J. Swaigen, *Environment on Trial*, 2d ed. (Toronto: Canadian Environmental Law Research Foundation, 1978) at 271. See also Estrin's discussion of lead smelter and charcoal cases in "The Legal and Administrative Management of Ontario's Air Resources 1967-74" in P. Elder, ed., *Environmental Management and Public Participation* (Toronto: Canadian Environmental Law Research Foundation, 1975) 182.

limited) recognition by some governments and industry members of the need for greater public involvement.¹⁰⁰

It is evident, then, that the initial development of the pollution control approach largely destroyed public confidence in the capabilities of government to effectively administer and enforce the law. In its place, with good reason, the public became distrustful and suspicious. Thus, the nineteenth century faith in "leaving it to the experts" — the initial justification for a diminished citizen prosecution role — had proven to be ill-founded. But while it was the private prosecution mechanism which again began to be used, the motives underlying its use had changed dramatically. Citizen enforcement action was not so much a helpful supplement to modest government efforts (as it had been in pre-nineteenth century England) as it was a control on suspect bureaucratic action or inaction.

2. Bringing Citizens In, Part 1: 1976 – 1986

Following the lead of the American *National Environmental Policy Act*,¹⁰¹ there began to be recognition in Canada of a functional distinction between the initial approval process and on-going control of polluting industries.¹⁰² On the approvals side, during the 1970s many Canadian jurisdictions started to require that certain proponents undertake environmental impact assessments of their projects before any construction could commence.¹⁰³ In theory, those proposed projects which could have a significant environmental impact were subject to a public hearing conducted by an independent tribunal.

With respect to regulation of on-going undertakings, administrative policies in more enlightened jurisdictions began to stipulate that citizens be provided (on request) with a modicum of information,¹⁰⁴ and be brought into aspects of the decision-making process. Thus, for example, in 1981 in Ontario, the Ministry of Environment (M.O.E.) announced a policy that most proposed

¹⁰⁰See, e.g., comments of Inco officials who reported to an Ontario Standing Committee that, "after the announcement of the new Control Order in July 1978, they had felt the negative effects of what they perceived to be public misunderstanding and mistrust resulting from inadequate public information about the Control Order process, rationale and contents" (Ontario Standing Committee on Resource Development, *Final Report on Acidic Precipitation, Abatement of Emissions From the International Nickel Company Operators at Sudbury, Pollution Control in the Pulp and Paper Industry, and Pollution Abatement at the Reed Paper Mill in Dryden* (October 1979) at 48).

¹⁰¹(1969) 83 Stat. 852, 42 U.S.C.A. s. 4321.

¹⁰²As described in M.I. Jeffery, *Environmental Approvals in Canada* (Toronto: Butterworths, 1989).

¹⁰³See generally D.P. Emond, *Environmental Assessment Law in Canada* (Toronto: Emond-Montgomery, 1978) and *ibid.*

¹⁰⁴P. Elder, "An Overview of the Participatory Environment in Canada" in Elder, ed., *supra*, note 99, 370 at 374, talks of a British Columbia "open file" and hearing policy in the mid-1970s.

or new Control Orders must be open to public discussion.¹⁰⁵ Although these public hearings only occur *after* the negotiations with industry have taken place, M.O.E. officials maintain that comments received by the public have resulted in significant changes to Control Order terms.¹⁰⁶ At the level of enforcement, the Ontario policy stipulates that where the M.O.E. decides not to prosecute it "will make information regarding the pollution available to other parties upon request, subject to constraints imposed by legislation."¹⁰⁷ The difficulty remains that it is up to the public to ascertain when an M.O.E. decision *not* to prosecute has been made (*i.e.*, a non-visible decision in many circumstances) and then to request information concerning it.¹⁰⁸

At the federal level, in 1981, the Department of Environment announced the establishment of a *Policy for Public Consultation and Information Availability*,¹⁰⁹ which was intended to ensure "regular and predictable"¹¹⁰ opportunities for the public to meet with department officials in order to discuss environmental issues and concerns, public comment on new regulations and guidelines, information availability, and assistance for transportation costs to help qualifying groups attend designated meetings.¹¹¹ In 1986, the federal *Citizens' Code of Regulatory Fairness*¹¹² was introduced, which, among other things stated that

the citizen is entitled to know the government's explicit policy and criteria for exercising regulatory power in order to have a basis for "regulating the regulators," ... government will encourage and facilitate a full opportunity for consultation and participation by Canadians in the federal regulatory process, [and] will provide Canadians with adequate early notice of possible regulatory initiatives.¹¹³

It could well be argued that these initiatives to involve and inform the public were little more than rhetoric — "mere" administrative policies, not well publicized, not binding and easily changed or ignored. While these criticisms have merit, there seems to be little doubt that they were forerunners of the latest development — statutorily entrenched rights to citizen participation in the pollution control process.

¹⁰⁵Ontario, Ministry of the Environment, *Pollution Abatement Program: Development, Compliance and Enforcement* (Policy manual no. 05-02-07) (March 1981), s. 1.9. This policy is still in effect.

¹⁰⁶See R. Gibson, *Control Orders and Industrial Pollution Abatement in Ontario* (Toronto: Canadian Environmental Research Foundation, 1983) at 56.

¹⁰⁷Ontario, Ministry of the Environment (Policy manual no. 05-02-11), para. 3.2.3.

¹⁰⁸For further elaboration on this point and suggestions for its improvement see part IV below.

¹⁰⁹Environment Canada, *Policy for Public Consultation and Information Availability* (Ottawa, 1981).

¹¹⁰*Ibid.* at 2.

¹¹¹*Ibid.* at 1-2. The emphasis of this policy seems to be more on policy and regulation formulation than on enforcement.

¹¹²Office of Privatization and Regulatory Affairs, *The Citizens' Code of Regulatory Fairness* (Ottawa, 1986).

¹¹³*Ibid.*

3. Bringing Citizens In, Part II: 1986 – 1990

In the late 1980s, two jurisdictions introduced new environmental protection legislation intended to entirely replace existing statutes: in 1987, Manitoba passed the *Environment Act*,¹¹⁴ superceding the *Clean Environment Act*¹¹⁵ and in 1988 the federal *C.E.P.A.* was passed. *C.E.P.A.* replaced the *Environmental Contaminants Act*,¹¹⁶ the *Ocean Dumping Control Act*,¹¹⁷ the *Clean Air Act*¹¹⁸ and parts of various other statutes (e.g., Part III of the *Canada Water Act*¹¹⁹), as well as adding entirely new provisions, most notably pertaining to toxic substances¹²⁰ and federal entities/undertakings.¹²¹

With both of the new statutes, explicit attention was paid to citizen information and input. A brief examination of some of the public participation features of the new Manitoba statute, with selected comparisons to its predecessor, will serve to highlight the new legislative commitment to public involvement at virtually all stages of the regulatory process.

Looking first at generalities, the Manitoba *Clean Environment Act* of 1972 included no general statement of objectives. Subsection 2 (1) of the new *Environment Act* provides that the goals of the department are “to protect the quality of the environment and environmental health ... and to provide the opportunity for all citizens to exercise influence over the quality of their living environment” (emphasis added). While undoubtedly a statement such as this is largely an empty platitude if there are no accompanying rights for citizens and binding obligations imposed on government, it nevertheless represents heretofore unheard of statutory recognition of the importance of public involvement in the pollution control process.¹²² In fact, the ebullient terms of this opening section in the new *Environment Act* are an accurate foreshadowing of significant rights provided to the public and concomitant obligations attaching to government contained in subsequent sections of the *Environment Act*.

The Minister is given the power to “cause the preparation and production of informational material respecting the environment ... and make the material

¹¹⁴S.M. 1987-88, c. 26, C.C.S.M. E125 [hereinafter *Environment Act*].

¹¹⁵S.M. 1972, c. 76, C.C.S.M. C130 [hereinafter *Clean Environment Act*].

¹¹⁶S.C. 1974-75-76, c. 72.

¹¹⁷S.C. 1974-75-76, c. 55.

¹¹⁸S.C. 1970-71-72, c. 47.

¹¹⁹R.S.C. 1970 (1st Supp.), c. 5.

¹²⁰Part II.

¹²¹Part IV.

¹²²Such statutory statements in favour of public involvement can be alluded to by citizens in legal suits where members of the public are attempting to compel a government decision, obtain information concerning a particular environmental situation, or engage in a direct enforcement action against an alleged polluter.

available to the public.”¹²³ As this is not written in imperative language, this is in itself not particularly significant except to the extent that once more the needs of the public for information are made explicit. Within three years from the coming into force of the Act, and at least every two years thereafter, the Minister is obligated to prepare a “State of the Environment Report,” describing Manitoba’s environmental quality, and activities related to present environmental issues as well as future issues, projected trends and environmental management activities.¹²⁴ The requirement to prepare the report is in addition to the standard duty to prepare an annual report.¹²⁵ The antecedent *Clean Environment Act* contained no obligation comparable to the “State of the Environment Report.” While there is still no guarantee that such a report will accurately and forcefully portray the environmental realities in the province, it seems self-evident that publication of this type of document will help to inform the public and keep the government and private sector accountable.

The *Environment Act* sets out a three-tiered licensing system for polluting activity. Because the class 1 development licence is intended to govern typical industrial discharges, it will be the focus of discussion here. Pursuant to s. 10(1) of the *Environment Act*, persons wishing a class 1 development licence must submit a proposal. A summary of this proposal is filed on a central public registry, and notice of the proposal is made to the public through advertisements in the local newspaper or radio.¹²⁶ These advertisements must notify the public that an opportunity for comments and objections is provided.

Where objections are received, the director may recommend to the Minister that public hearings be held.¹²⁷ If the director decides against a recommendation for a public hearing he must provide written reasons to the objector and advise him that the decision can be appealed to the Minister.¹²⁸ Furthermore, where the director refuses to issue a licence, he must provide written reasons for the decision to the proponent, the Minister, and the central registry.¹²⁹ Where the Minister has requested a public hearing, and subsequently advice and recommendations are presented to the Minister, and the recommendations are not adopted in the licence or refusal, the director shall provide written reasons for the decision to the proponent, the Minister, the commission which held the public hearing, and the central registry.¹³⁰ There are no comparable explicit public participation provisions in the antecedent *Clean Environment Act*.

¹²³*Environment Act*, s. 2(3)(a).

¹²⁴*Ibid.*, s. 6(1).

¹²⁵*Ibid.*, s. 6(10).

¹²⁶*Ibid.*, s. 10(4).

¹²⁷*Ibid.*, s. 10(7).

¹²⁸*Ibid.*

¹²⁹*Ibid.*, s. 10(9).

¹³⁰*Ibid.*, s. 10(10).

In the absence of a specific procedure for objections such as that set out for class 1 development licences, any person who is "affected" by the issuance of a licence or permit, or refusal of same, or any order of the director, can appeal to the Minister.¹³¹ Upon receipt of notice of the appeal, the Minister can require a public hearing, refer the matter back to the Director for reconsideration, vary, cancel or stay the decision appealed against, or dismiss the appeal.¹³² Regardless of his decision, he must serve notice of it upon the appellant within seven days.¹³³ Where the appellant is dissatisfied with a decision of the Minister which does not result in public hearings, he may appeal to the Lieutenant Governor in Council.¹³⁴ The Lieutenant Governor in Council may require public hearings, vary or cancel the licence appealed against, refer the matter back to the director for reconsideration, or dismiss the appeal.¹³⁵ Again, there is nothing comparable to this in the antecedent *Clean Environment Act*.

Except in emergencies,¹³⁶ in the formulation and substantive review of regulations incorporating environmental standards under the new Act, the Minister is required to provide opportunity for public consultation and to seek advice and recommendations regarding the proposed regulations or amendments.¹³⁷ The old *Clean Environment Act* contained nothing similar to this requirement.

With respect to enforcement, any person may lay an information¹³⁸ in respect of any offence, providing that it be laid within one year from the time when the subject matter of the proceedings arose or from the day on which the evidence came to the knowledge of the environment officer.¹³⁹ Clearly, the fact that the time limitation comes into effect from the day on which the evidence came to the knowledge of the environment officer would work against most private prosecutors, who would presumably not be privy to that evidence unless they themselves initiated the original complaint concerning the polluter, or the information was otherwise made available.¹⁴⁰

¹³¹*Ibid.*, s. 27(1). The term "affected" is not defined in the *Act* or regulations.

¹³²*Ibid.*, s. 27(2).

¹³³*Ibid.*

¹³⁴*Ibid.*, s. 28(1).

¹³⁵*Ibid.*, s. 28(2).

¹³⁶Defined by *ibid.*, s. 41(2) as "circumstances considered by the Minister to be of an emergency nature."

¹³⁷*Ibid.*, s. 41(2).

¹³⁸Indictable and summary conviction offence proceedings (with the exception of preferred indictments under ss 574 and 577 of the *Criminal Code*) are initiated by laying an "information" pursuant to ss 504 and 788 of the *Criminal Code*. Informants must have "reasonable grounds" (s. 504) to believe that a person has committed an offence. However, they need not have witnessed the events in question (see Burns, *supra*, note 5 at 274).

¹³⁹*Environment Act*, ss 30-39.

¹⁴⁰On this point, see discussion of British Columbia's new quarterly "Non-Compliance Lists," *infra*, note 290 and accompanying text.

The registry must include a summary of proposals for licences, a copy of the licence, a copy of the assessment report prepared by the Director as part of his decision regarding a licence, justification for not accepting the advice and recommendations of the public hearing Commission (where applicable), and such other information as the Minister or Director may from time to time direct.¹⁴¹ In the absence of such a direction, it would appear that monitoring reports will not be included in the registry.¹⁴²

Finally, it is interesting to note that the Minister has been given the power to appoint an environmental mediator.¹⁴³ Short of the proviso that the "conflicting parties concur"¹⁴⁴ with the appointment, there is no indication in the legislation as to when the services of a mediator would be called upon. It is suggested that such a conflict resolution technique be used as an alternative enforcement mechanism and perhaps even one where the initial call for enforcement came from a citizen. However, this would only be possible in the right set of circumstances and if it were read with the general obligation on the Department to provide the opportunity for all citizens to exercise influence over the quality of the environment.

While the foregoing description is far from comprehensive, it nevertheless provides an indication of at least the appearance of a considerably more open attitude toward citizen participation in the regulatory decision making process than was previously evident. The *Environment Act* is far from perfect: among other problems, there are no citizen "request-for-investigation" provisions, the limitation period for prosecutions works against the private prosecutor, the Department is not obliged to publish regular non-compliance reports, there is no provision requiring the use of publicly disseminated Minister approved agreements for intra- and inter-governmental administration and enforcement.

While these shortcomings are undeniable, it is clear that citizens are being encouraged through legislation to participate in a process of which they have long been distrustful and from which they have often been effectively excluded. A right to participate is one thing, while meaningful participation may be quite another. It is doubtful whether the legislation will amount to anything if it is not accompanied by a sincere effort on the part of government officials to welcome the citizen into the process. This entails the creation of publicly vetted compliance and enforcement policies, the regular publication of compliance data, and a willingness to adjust government actions to meet local concerns. Following the case descriptions, this article will explore such implementation strategies.

¹⁴¹*Environment Act*, s. 17.

¹⁴²According to conversations with Manitoba government officials, monitoring information will generally be provided to citizens upon request unless it would impair the course of an investigation. As a fallback, there is freedom of information legislation in Manitoba which could be resorted to.

¹⁴³*Environment Act*, s. 3(3).

¹⁴⁴*Ibid.*

D. Summary Observations

This brief examination of the public participation provisions in environmental protection legislation suggests that there has been a significant evolution in approaches to citizen involvement in the past thirty years. The initial pollution control legislation was silent as to the role of the public, but the problems produced by letting the government and private sectors work without citizen participation soon became apparent. The next step was administrative recognition (in enlightened jurisdictions) of the role of the public through notice and comment procedures.

Finally, statutory integration of public participation in pollution control is now taking place in some leading jurisdictions. If the experience with other progressive legislation such as freedom of information and human rights statutes is any indication, once one Canadian jurisdiction has "taken the plunge" by establishing new, more rigorous standards, other jurisdictions will likely follow suit. The Manitoba *Environment Act* and the federal *C.E.P.A.* have taken the lead by formally recognizing the important role played by citizens in the pollution control process. Draft legislation for Alberta seems to follow this lead.¹⁴⁵ Unless there prove to be problems with this approach, it seems inevitable that the other provinces will soon adopt similar provisions in their own legislation.

The situation facing a private prosecutor in 1991 is not, however, a promising one. Administration of pollution control regimes is still largely an on-going technical liaison between government and regulatees, enveloped in informal intra- and inter-governmental agreements. There are few publicly disseminated compliance and enforcement policies, and information concerning the non-compliance of regulatees is not easily available. Thus, the citizen is still outside the "inner circle" of decision-making, and still has solid grounds for suspicion and distrust of government actions.

III. Three Case Studies: The Pollution Control Approach in Practice

Discussion to this point suggests that governments are beginning to appreciate the need for citizen involvement in environmental decision-making. In some enlightened jurisdictions there seems to be recognition that the legitimacy of government decisions is enhanced, and the likelihood of these decisions being challenged is reduced, when there is early and meaningful citizen participation. Usually, it is only when government fails to accommodate the concerns of the public in the early stages that private prosecutions occur. As the following

¹⁴⁵Alberta Environment, *A Guide to the Proposed Environmental Protection and Enhancement Legislation*, Appendix "A" Discussion Draft of the Proposed Alberta Environmental Protection and Enhancement Legislation (1990).

three case studies demonstrate, private prosecutions are initiated out of fear, lack of understanding and frustration, in addition to genuine concern about the environment. Private prosecutions are the cry of the disenfranchised.

The three prosecutions included here all involve proceedings under the *Fisheries Act*,¹⁴⁶ and took place during the first half of the 1980s. The *Fisheries Act* has become the private prosecutor's vehicle of choice for a variety of reasons.¹⁴⁷ First, the Act is national in scope, so that its provisions are applicable in every region. Second, at the present time, it can be used in spite of existing provincial legislation,¹⁴⁸ and in spite of compliance with provincial standards.¹⁴⁹ Indeed, as we shall see, it can even be used when *federal officials* are satisfied with provincial actions.¹⁵⁰ Third, penalties for breach of the *Fisheries Act* pollution provisions are significant — higher than in some provincial legislation.¹⁵¹ Fourth, the *Fisheries Act* is binding on both the federal and provincial Crown, thus permitting actions against both levels of government. Finally, regulations passed pursuant to the Act entitle those who initiate or conduct prosecutions to one half of any penalty imposed.¹⁵²

These three actions have been chosen for their variety: the proceedings take place in three different provincial jurisdictions, concern both spill and continuous pollution incidents and demonstrate both citizen-conducted and citizen-

¹⁴⁶Now R.S.C. 1985, c. F-14 [hereinafter *Fisheries Act*].

¹⁴⁷In addition to the private prosecutions set out in the case descriptions below, the following other *Fisheries Act* prosecutions initiated by citizens have been reported: *R. v. Panarctic Oils Ltd.* (1983), 3 F.P.R. 429, 12 C.E.L.R. 78 (Terr. Ct); *R. v. Greater Vancouver Regional District and Greater Vancouver Sewage and Drainage District* (1981), 3 F.P.R. 134 (B.C. Prov. Ct); *F.C. Bellas v. A.G. British Columbia (sub nom. Re: Riley Creek)* (1980), 3 F.P.R. 58 (B.C. Prov. Ct). In 1986, a private prosecution with respect to Eldorado Mining Ltd. at Baker Lake Saskatchewan was stayed. In 1988, a private prosecution in relation to a permit to construct under the Alberta *Clean Water Act*, R.S.A. 1980, c. C-13 [hereinafter *Clean Water Act*] was stayed. In that same year, a *Fisheries Act* private prosecution in relation to the Old Man Dam was stayed, and another concerning the same Dam project was stayed in early 1990. Another action with respect to the same Dam activity is currently active. Information concerning these actions obtained from Mr. John MacLachy, federal Department of Environment, and Ms. Jillian Flett, Alberta Ministry of the Environment.

¹⁴⁸This is particularly significant for those jurisdictions where consent of the Attorney General is required before private prosecutions can be entered: see, e.g., New Brunswick *Clean Environment Act*, R.S.N.B. 1973, s. 33.2, and Newfoundland *Department of Environment Act*, S.N. 1981, s. 49 (consent of Minister required).

¹⁴⁹See, e.g., *Cyanamid* case description below at 803.

¹⁵⁰Discussion of this characteristic of the current federal-provincial approach to emissions control follows the case studies below.

¹⁵¹For example, penalties under the *Fisheries Act*, s. 40(2) for first offences are fines not to exceed \$50,000, whereas the comparable penalty under the Alberta *Clean Water Act*, s. 19 is only \$25,000.

¹⁵²*Penalties and Proceeds Forfeitures Regulations*, C.R.C. 1978, c. 827 [hereinafter *Forfeitures Regulations*].

initiated litigation. All three illustrate the range of obstacles which face citizens wishing to initiate actions against perceived industrial emission polluters and the range of governmental reactions to such proceedings.

A. **R. ex rel. Howe v. Cyanamid Inc.**¹⁵³

Over the period of 1976 through 1980, Michael Dickman, an associate professor of biology at Brock University, with the assistance of some of his students, monitored the effluent deposited into the Welland River by Cyanamid Canada of Niagara Falls, Ontario. The Cyanamid plant manufactures chemical fertilizers. The results of Dickman's monitoring efforts indicated that Cyanamid was discharging substances which were highly toxic to fish into the Welland River. Dickman learned that Cyanamid was the subject of a Control Order issued under the provincial *Environmental Protection Act*.¹⁵⁴ The terms of the Control Order permitted Cyanamid to discharge air and water pollution until 1984, as long as specified improvements and additions to the plant's pollution control equipment were introduced at various dates in the interim.

In 1979, Dickman contacted officials of the provincial Ministry of Environment (M.O.E.) and expressed his concerns with respect to the toxic discharge. In a letter to the Director of Legal Services of the M.O.E. dated February 27, 1979, Dickman concludes: "I feel that I lack the legal experience to pursue this much further and I'm seeking your advice re a vehicle for pursuance."

In reply to this letter, the Director of Legal Services of the M.O.E. pointed out that Cyanamid was in compliance with the terms of the Control Order, and that, by what was then ss. 102(2) of the *E.P.A.*, compliance with a Control Order renders an operation virtually immune from prosecution under that Act. The Director also noted that prosecution of Cyanamid by the M.O.E. under another statute, be it provincial (for example, the *Ontario Water Resources Act*¹⁵⁵) or federal (for example, the *Fisheries Act*), in the absence of some new development or indication of bad faith on the part of Cyanamid, would detrimentally affect the credibility of the M.O.E. However, in closing, the Director added "[i]t may be that these considerations would not be serious obstacles to yourself or some private prosecutor taking action under the Fisheries Act."¹⁵⁶

¹⁵³Information for this case description was obtained from the Canadian Environmental Law Association and Department of Environment files, newspaper accounts (as noted *infra*), a telephone conversation with Dr. Brockman, and the case decision, *supra*, note 4. An earlier version of this case description appeared in K. Webb, *Industrial Water Pollution Control and the Environmental Protection Service*, Law Reform Commission of Canada Background Study (1983) [unpublished] [hereinafter *Industrial Water Pollution*].

¹⁵⁴R.S.O. 1980, c. 141 [hereinafter *E.P.A.*].

¹⁵⁵R.S.O. 1980, c. 361.

¹⁵⁶Letter from Mr. Neil Mulvaney, Director of Legal Services Branch, Ontario Ministry of Environment, to Professor M. Dickman, dated April 10, 1979.

In 1980, Dickman, in conjunction with a local environmental group, Operation Clean, and the Canadian Environmental Law Association (C.E.L.A.), began preparations in earnest for a *Fisheries Act* prosecution. Officials from the Ontario Ministries of Environment and Natural Resources were contacted. They confirmed that the Ontario position had not changed from that expressed in the 1979 letter to Dickman from the Director of Legal Services of the M.O.E.¹⁵⁷

The federal Departments of Environment (D.O.E.) and Fisheries and Oceans were also contacted. Officials from the D.O.E. provided the Dickman group with technical advice on how to successfully prosecute under s. 33(2) of the *Fisheries Act*. However, the D.O.E. itself declined to conduct the actual prosecution against Cyanamid. The Honourable John Roberts, speaking for the D.O.E., replied:

I understand that the Cyanamid Company (Welland Plant) has so far been in compliance with the water pollution control requirements outlined in the Ontario Ministry of the Environment Control Order. While I recognize the current problem with fish toxicity at the Cyanamid plant, the Control Order does specify future requirements for the complete installation of control measures to achieve the Ministry's objectives for fish toxicity and other parameters. Therefore, in this particular instance, we accept the Ministry of the Environment Control Order issued under provincial legislation as being a satisfactory means of achieving our objectives. My officials and I do not believe that there is anything to be gained through unilateral legal action against the company or further bioassay tests by the Department.¹⁵⁸

Finally, on March 23, 1981, Margherita Howe, head of Operation Clean, laid an information against Cyanamid, alleging that the company discharged substances deleterious to fish into Welland River contrary to the terms of the *Fisheries Act* ss. 33(2) (as it then was). The case was closely followed by the press from the time of the laying of the information through to the court's verdict.¹⁵⁹

At trial, Wallace J., noted that "[t]he charge is a private complaint, Federal Justice and/or Fisheries authorities having declined an invitation to prosecute."¹⁶⁰

¹⁵⁷Letter from the Honourable James Auld, Ontario Minister of Natural Resources, dated December 19, 1980; Letter from the Honourable Harry Parrot, Ontario Minister of Environment, to Mr. Robert Timberg, Counsel for C.E.L.A., dated January 5, 1981.

¹⁵⁸Letter from the Honourable John Roberts, federal Minister of Environment, to Mr. Robert Timberg, C.E.L.A., dated January 5, 1981.

¹⁵⁹*E.g.* see "Chemical Producer Charged By Biologist" *The [Toronto] Globe and Mail* (3 March 1981) A5; "Trout Die in Discharge From Plant, Court told" *The [Toronto] Globe and Mail* (24 June 1981) A2; "Firm is fined \$1 for pollution, given a month to pay by the judge" *The [Toronto] Globe and Mail* (29 August 1981) A12.

¹⁶⁰*Supra*, note 4 at 152.

Wallace J. observed that the only fish in the canal are catfish, "a scavenger fish not prized by sport fishermen."¹⁶¹ He also noted that the Welland river system empties into the Ontario Hydro generating plants and turbines, so that "[a]ny fish finding their way into the hydro canal system are doomed."¹⁶²

Dickman conducted the toxicity tests for the prosecution and provided expert testimony regarding the effluent at trial. The prosecutor's cause was also furthered by the testimony of an Ontario M.O.E. toxicity scientist. Wallace J. noted that tests using rainbow trout placed in the effluent revealed that "[w]ithin 51 seconds all fish placed in the aquariums containing effluent were dead. All of the fish in the aquariums containing Welland River water lived for many hours."¹⁶³

In his summary of the facts of the case, Wallace J. made the following observations which foreshadowed his eventual decision:

The effluent in issue was being deposited into the Welland River under the watchful eyes of Ontario environmental authorities. These authorities ... had spent more than a year in attendance daily at the Cyanamid factory studying the Cyanamid production processes and preparing an engineering emission study with respect to both air pollution and water pollution. These authorities had complete cooperation and assistance from Cyanamid executives at all times.

The efforts of the Ontario environmental authorities culminated with their issuing ... a Control Order, directing and ordering Cyanamid to install certain pollution control equipment by certain dates set out in the Control Order. Certain of the equipment was to be installed during the first year of the order, certain of it to be installed in the second year of the Order and so on until the year 1984, by which time all equipment would be in place.

The Ontario authorities therefore, set up a schedule of priorities concerning pollution control. They gave higher priority to air pollution control than to water pollution control, presumably on the basis that air pollution affecting thousands of citizens was of higher priority than water pollution affecting a handful of catfish.

The cost to Cyanamid by the conclusion of the program in 1984 will be about 20 million dollars. Nine million dollars has been spent by Cyanamid up to the end of 1980. ... All equipment has been installed on time and Cyanamid is not in default under the pollution Control Order.

At all times the Ontario pollution control and authorities [*sic*] have monitored the progress of Cyanamid. At all times the cooperation of Cyanamid with these authorities has been exemplary.

Some difficulty has been encountered with respect to the installation of equipment ... There was a delay to permit the necessary technology to be developed. Then some processes considered were found unsuitable because they would not function in cold weather. ...

Because of the provisions of ... The *Environmental Protection Act*, ... and because Cyanamid Canada Inc. is not in default under the provisions of the Control

¹⁶¹*Ibid.*

¹⁶²*Ibid.*

¹⁶³*Ibid.* at 153.

Order ... Cyanamid ... cannot be prosecuted under the provisions of the said ... Act.¹⁶⁴

Counsel for Cyanamid raised three defences: first, that the prosecution had failed to prove the *actus reus* of the offence beyond a reasonable doubt; second, that the *Fisheries Act* pollution offence applies only to commercial waters; and third, that the company had exercised due diligence.¹⁶⁵ With respect to the *actus reus* contention, although there were some weaknesses in the evidence of the prosecution,¹⁶⁶ the court held that there was proof beyond a reasonable doubt.¹⁶⁷ On the basis of several cases and dictionary definitions, Wallace J. held that the *Fisheries Act* pollution offence applied to the protection of the entire natural resource of the fishery, not merely commercial fisheries as maintained by the counsel of the defence.¹⁶⁸

Wallace J. then considered the defence of due diligence. The defence had a district engineer with the Ontario Ministry of Environment testify that the company was complying with the provincial Control Order and that the control program would cost Cyanamid about \$20 million when completed in 1984. Nevertheless, Wallace J. rejected the defence in the following manner:

It appears to this Court to be obvious that the due diligence to be established must be referable to the specific offence before the court. The test is whether Cyanamid did all that a reasonable corporation would have done in the circumstances and took all reasonable steps to avoid the outflow of ammonia effluent from its factory into the Welland River on March 23rd, 1981.

The evidence discloses and I find that Cyanamid has done all that a reasonable corporation would have done in the circumstances and has taken all reasonable steps to avoid the outflow of ammonia effluent from its factory into the Welland River as of the year 1984 when all processes required by the Control Order of February 10th, 1978, have been installed and are operational.

*I find, however, that due diligence to prevent an offence in 1984 is not an answer to an offence to have occurred on March 23rd, 1981 (emphasis added).*¹⁶⁹

Wallace J. found Cyanamid guilty as charged. He added the following comment:

I appreciate the fact that it would have created a tremendous financial burden upon the accused corporation to have closed and sealed the pipe on or before March 23rd, 1981, and it may have required that the Cyanamid factory be shut down and that many jobs be lost. These factors, however, do not relate to the issue of guilt or innocence with respect to the charge before this Court. They are mitigating factors which will be weighed by this Court in the imposition of sentence.¹⁷⁰

¹⁶⁴*Ibid.* at 153-54.

¹⁶⁵*Ibid.* at 154.

¹⁶⁶Most notably a lack of chemical analysis, so that there was no conclusive evidence of ammonia in the effluent other than a notable odour detected at the time. *Ibid.*

¹⁶⁷*Ibid.* at 157.

¹⁶⁸*Ibid.* at 158.

¹⁶⁹*Ibid.* at 159.

¹⁷⁰*Ibid.*

He then considered sentencing, and began by enumerating eleven "mitigating circumstances which are to the benefit of Cyanamid."¹⁷¹ These included the poor quality of fish in the Welland River, the fact that there was no evidence of a fish kill in the Welland River because of the Cyanamid effluent and no evidence of deterioration of the water because of the ammonia effluent, the compliance of Cyanamid with the Ontario Control Order, the approval of Ontario officials of Cyanamid's activities, the excellent cooperation with Ontario officials, the substantial financial commitment of Cyanamid to abatement, and the fact that shutting off the pipe would cause a loss of jobs and severe financial consequences to Cyanamid.¹⁷²

Wallace J. concluded by saying "I trust that the penalty that I am about to impose will reflect where I consider this case rests on any scale of severity," he then levied a penalty of one dollar with one month to pay.¹⁷³ Subsequently, Cyanamid installed a \$23 million ammonia waste treatment plant.¹⁷⁴

B. R. v. Crown Zellerbach Properties Ltd.¹⁷⁵

From March 1977 through January 1980, Crown Zellerbach Properties Ltd. of British Columbia and its associates (Crown Zellerbach) were engaged in a landfill operation on a site which had two creeks flowing through it. The creeks eventually emptied into the Fraser River. On February 11, 1977, Crown Zellerbach applied for what was then called a pollution discharge permit from what was then known as the British Columbia Pollution Control Board (P.C.B.). The P.C.B. referred the application to federal D.O.E. officials for comment, as was the agreed upon practice, and on October 17, 1977 the P.C.B. permit was granted. The interactions between P.C.B. and D.O.E. officials with respect to the landfill operations from 1977 to 1980 indicate continuous friction between the two authorities, with the D.O.E. desirous of stricter terms and stricter enforcement by P.C.B. (the lead agency).

While it is quite evident that the D.O.E. was not satisfied with the enforcement efforts of the P.C.B., there is no available information suggesting that the D.O.E. intended to prosecute on its own. In 1980, a federal official privately assisted a citizen, David Aldcroft, with the gathering of samples for a prosecu-

¹⁷¹*Ibid.* at 160.

¹⁷²*Ibid.* at 160-61.

¹⁷³*Ibid.* at 161.

¹⁷⁴Telephone conversation with Prof. Dickman, October 9, 1990.

¹⁷⁵*Supra*, note 4. Information concerning *Crown Zellerbach* derived from federal Department of Environment files, L. Kolankiewicz, *Implementation of B.C.'s Pollution Control Act in the Lower Fraser River* (M.Sc. Thesis, Faculty of Graduate Studies, School of Community and Regional Planning, University of British Columbia, 1981) [unpublished], and telephone conversations with federal officials. An earlier version of this case description was included in *Industrial Water Pollution*, *supra*, note 153.

tion. Aldcroft was a member of the environmental group the Fraser River Coalition. He laid an information against Crown Zellerbach, alleging breach of s. 33(2) of the *Fisheries Act* (as it then was).

As in the Cyanamid situation, the local media took a strong interest in the action: Aldcroft told a reporter that he laid the charges "to shame the federal government into acting."¹⁷⁶ In fact, agents of the federal Department of Justice actually conducted the prosecution. At trial, Groberman J. took full cognizance of the P.C.B.-D.O.E. referral system, and noted that D.O.E. concerns were not being fully met by the P.C.B. enforcement actions.¹⁷⁷

Expert testimony from D.O.E. personnel played an integral role in the eventual findings of the Court. Crown Zellerbach raised a defence of due diligence, claiming that it was conforming with the terms of a provincial discharge permit, which had itself received federal input. Groberman J. rejected the due diligence defence:

Vendev [an associate of Crown Zellerbach] did respond to problems raised by the Pollution Control Branch but did not carry out a sufficient site inspection which, in my opinion, is a serious flaw in the system.

I am also mindful of the differing opinions expressed between the Provincial Pollution Control Branch and the Federal Environmental Protection Services. However, they both agreed, "No leachates".¹⁷⁸

Two of the four corporate members of the Crown Zellerbach landfill operation were found guilty as charged, and fined a total of \$28,000. Pursuant to the *Fisheries Act Forfeitures Regulations*, Aldcroft received one half of this penalty (\$14,000). At the conclusion of the trial, Aldcroft announced his intention to "sink the money into further prosecutions against polluting industry, individuals or municipalities."¹⁷⁹

The problems with Crown Zellerbach did not end with the private prosecutions. In 1981, the federal Department of Fisheries and Oceans brought several more charges against the company.¹⁸⁰ The Provincial Court held that Crown Zellerbach had acted with due diligence by cooperating with authorities, setting up a regular inspection process, and attempting to contain the leachate.¹⁸¹ The Court held that there were no leachate solutions available prior to the spring of 1982, at which time the company installed power aeration units costing \$250,000 which solved the problem.¹⁸²

¹⁷⁶S. Fournier, "River Crusader wins \$14,000" *The Province* (30 April 1981) 1.

¹⁷⁷Crown Zellerbach, *supra*, note 4 at 105.

¹⁷⁸*Ibid.*

¹⁷⁹Fournier, *supra*, note 176.

¹⁸⁰*R. v. Crown Zellerbach Properties Ltd.* (1984), 4 F.P.R. 117.

¹⁸¹*Ibid.* at 127.

¹⁸²*Ibid.* at 125.

C. R. v. Suncor Inc.¹⁸³

In 1964, the Great Canadian Oil Sands Company (G.C.O.S.) began construction of a plant for the extraction and commercial recovery of oil from the Athabasca tar sands. Located at Tar Island, some thirty five miles north of Fort McMurray in northern Alberta, the facility commenced operation in 1967, the first of its kind. Later, G.C.O.S. amalgamated with Sun Oil to form Suncor.¹⁸⁴

As part of plant operations leading to the extraction of oil, the facility uses large volumes of water from the Athabasca river, and eventually, through a wastewater system, liquid effluent is deposited back into the river. The plant itself is massive, occupying 7500 acres, designed to produce 58,000 barrels of oil a day. It employed over 1700 persons at the time of the prosecutions under study here.¹⁸⁵ The wastewater pond alone is 45 acres.¹⁸⁶ Because oil sands themselves are unique, in turn the methods and technology used to extract oil have been distinctive, and defy comparison with traditional extraction and refinery techniques. One judge who viewed the plant facilities said the following:

After completing this [tour of the plant] I could not help but be struck by the magnitude and complexity of this facility which consists of a mining operation and extraction plant, a refinery and a power generator and steam generator plant, and one becomes totally aware of the tremendous amount of materials that are required to be handled under high temperature and high pressures in all kinds of weather conditions and it was thereafter much easier to conceptualize the difficulties faced by Suncor in pioneering these methods and in applying this new technology to oil sands extraction.¹⁸⁷

The only other major oil sands recovery operation, Syncrude, came on stream in the 1970s, years after the original G.C.O.S. facility had been constructed, and uses what is known as a "closed water system" which apparently avoids many of the effluent problems associated with the G.C.O.S./Suncor facility.¹⁸⁸ While the federal government has developed regulations under the *Fish-*

¹⁸³Information for *Suncor* case study was derived from federal Department of Environment files, three reported decisions (*R. v. Suncor Inc.* (1982), 3 F.P.R. 264 (Alta. Prov. Ct) [hereinafter *Suncor* 1982], *R. v. Suncor Inc.* (1983), 3 F.P.R. 270 (Alta. Prov. Ct) [hereinafter *Suncor* 1983] and *R. v. Suncor Inc.* (1985), 4 F.P.R. 409 (Alta. Prov. Ct) [hereinafter *Suncor* 1985]) and Environmental Law Centre, *Enforcement of Environmental Law in Alberta: A Critical Examination of Alberta Government Law, Policy and Practice with Illustration from the Case R. v. Suncor Inc.* (Edmonton: Environmental Law Centre, Alberta Law Foundation, 1983) [hereinafter E.L.C.].

¹⁸⁴*Suncor* 1985, *ibid.* at 411.

¹⁸⁵*Suncor* 1983, *supra*, note 183 at 274.

¹⁸⁶*Suncor* 1985, *supra*, note 183 at 413.

¹⁸⁷*Ibid.* at 415.

¹⁸⁸*Suncor* 1983, *supra*, note 183 at 295. Horricks, Prov. Ct. J., stated:

It [Suncor] was the first one of its type, and clearly it suffers from defects of design with respect to the treatment of wastewater that would not be permitted now in the light of experience and indeed as we are aware, because it appeared in the evidence, the only

eries Act for the discharge of effluent from conventional refineries,¹⁸⁹ none have been forthcoming for oil sands recovery plants.¹⁹⁰

The Fort McKay Indian Band is located downstream from the Suncor plant,¹⁹¹ as is a fish plant.¹⁹² Lake Athabasca, also downstream, supports commercial fishing.¹⁹³ The Chief of the Fort McKay Indians, Dorothy Mary McDonald, is reported to have said, "Our problems began in 1967 when Suncor opened. We've had to stop using river water that we have used for generations. Our babies especially started getting sick."¹⁹⁴ In 1978, permission was granted by the Alberta government for a major expansion of the plant, scheduled for completion in 1981. While there have been many water pollution problems at the G.C.O.S./Suncor plant since its inception,¹⁹⁵ the focus of discussion here will be on the period beginning immediately prior to the laying of charges in February and March, 1982.

Although both federal and provincial governments have jurisdiction (and legislation) to control water pollution, in Alberta and across the country it is provincial officials who play the lead role.¹⁹⁶ During the time period under consideration here, the main regulatory tool pertaining to Suncor's wastewater effluent was the provincial *Clean Water Act*,¹⁹⁷ and more specifically, a licence to operate issued pursuant to that legislation. The Alberta Ministry of Environment had (and continues to have) the lead responsibility with respect to pollution matters, although, as we shall see, provincial Ministry of Public Lands and Wildlife officials in the Fish and Wildlife division and Energy Resources Conservation Board officials in the Ministry of Energy also participate in environment-related decisions. Provincial Fish and Wildlife officials have been appointed fisheries officers under the federal *Fisheries Act*.¹⁹⁸

other oil sands recovery Plant, being Syncrude works on a closed water system, but then everybody by then perhaps had smartened up about what was necessary.

¹⁸⁹*Petroleum Refinery Liquid Effluent Regulations*, C.R.C. 1978, c. 828.

¹⁹⁰Horricks, Prov. Ct. J. in *Suncor* 1983, *supra*, note 183 at 295: "[I]n fifteen years the people responsible for producing regulations for Plants have not seen fit to produce regulations for Plants of this nature and it's a factor I take into account."

¹⁹¹See M. Dent, "Will Prosecutor Be Ready at Suncor Trial?" *Fort McMurray Today* (21 January 1983) 5.

¹⁹²*Suncor* 1985, *supra*, note 183 at 420.

¹⁹³Dent, *supra*, note 191.

¹⁹⁴*Ibid.*

¹⁹⁵*E.g.*, apparently, a similar wastewater problem to the 1982 discharges under consideration in this case study occurred as early as the winter of 1967-1968 (see *Suncor* 1985, *supra*, note 183 at 472), and there were proceedings under the *Fisheries Act* in 1977 and 1978 concerning a deposit unlike the 1982 situation (*supra* at 431).

¹⁹⁶In place at the time was the Canada-Alberta Accord for the Protection and Enhancement of Environmental Quality, Alta. Reg. 87/75.

¹⁹⁷*Supra*, note 151.

¹⁹⁸E.L.C., *supra*, note 183 at 57.

Expansion of the plant was authorized in 1978 by a *Clean Water Act* licence, which was subsequently amended in November, 1980 to include further reporting requirements.¹⁹⁹ For the whole of 1981, Suncor experienced many serious operational problems which the plant associated with the completion of the expansion in that year.²⁰⁰ Records submitted by Suncor pursuant to its licence of operation indicate that in all but one month in 1981, oil and grease emissions were above permitted levels.²⁰¹ According to one report, Alberta Environment officials were aware of problems with the release of water contaminants since June 1981, but apparently had not required any specific studies or followup action by Suncor at that time.²⁰²

In November 1981, Alberta Environment officials met with Suncor representatives and requested that the company investigate certain matters and report back to the department.²⁰³ In December, 1981 and again in January, 1982, the plant was hit by a series of fires and explosions, which caused significant damage and forced shutdowns of some processes.²⁰⁴ It was evident following a major fire on the wastewater pond on January 21, 1981, that a large amount of oil had escaped from the plant into the water pond.²⁰⁵ Suncor attempted to clean up this oil using vacuum trucks for several weeks after the fire.²⁰⁶

One report indicates that a meeting took place between Suncor and Alberta Environment on January 26, 1982, but that prior to that time "the company showed no concern for the safety of downstream users of the Athabasca River."²⁰⁷ As a result of that meeting, Suncor was ordered to warn the Fort McKay Indian Band.²⁰⁸ Nevertheless, as we shall see, the Fort McKay Indian Band was not notified until late February.

While records kept by Suncor indicated substantial increases in effluent starting on February 9,²⁰⁹ company employees showed no "particular concern."²¹⁰ An external habitat biologist flying over the site between February 12 and 15 observed "orange substances" on the ice beside the Suncor plant, and on February 15 notified a Fish and Wildlife officer who attended the site on February 16, and contacted the water quality manager from Suncor. The two men observed excessive oil in the wastewater pond and a sheen of oil in the river.²¹¹

¹⁹⁹*Suncor* 1985, *supra*, note 183 at 414.

²⁰⁰*Suncor* 1983, *supra*, note 183 at 278.

²⁰¹*Ibid.*

²⁰²E.L.C., *supra*, note 183 at 45; see also *Suncor* 1985, *supra*, note 183 at 419.

²⁰³E.L.C., *ibid.* at 19-20.

²⁰⁴*Suncor* 1985, *supra*, note 183 at 415.

²⁰⁵*Ibid.*

²⁰⁶*Ibid.* at 416.

²⁰⁷E.L.C., *supra*, note 183 at 53.

²⁰⁸Dent, *supra*, note 191.

²⁰⁹*Suncor* 1985, *supra*, note 183 at 416.

²¹⁰*Ibid.* at 418.

²¹¹*Ibid.*

On February 17 and March 9 samples were taken by the Fish and Wildlife officer.²¹²

On February 18, an official from the Energy Resources Conservation Board inspected the site and suggested remedial measures to Suncor or contract employees of Suncor.²¹³ Members of the Fort McKay Indian Band were not informed of the situation until February 24.²¹⁴ On February 25, Alberta Environment officials issued a Water Quality Control Order with respect to Suncor's problems.²¹⁵ On February 26, Chief McDonald laid five separate informations, alleging breaches of s. 33(2) of the *Fisheries Act* between February 21 and 25, 1982.²¹⁶ Chief McDonald testified that band members began complaining of mouth sores, diarrhea and headaches while drinking melted river ice during January and February.²¹⁷ Following this, the Alberta Attorney General's office laid an additional fifteen charges under the *Fisheries Act* and two others under the *Clean Water Act*.²¹⁸

The first actions to reach the court were with respect to the *Clean Water Act*, for exceeding licence effluent limits for the period February 20 through 24, 1982, and failing to report the incident to Alberta Environment on or about February 21, 1982. With respect to the charge of exceeding the licence limits, Suncor raised a due diligence defence, maintaining that the fires and explosions of December 1981 and January 1982 were disasters not caused by their negligence, that the disasters occurred during the worst winter in twenty-five years, and that they had acted reasonably in the circumstances.²¹⁹ Because there was no suggestion by the Crown that the disasters were caused by negligence (*i.e.*, the due diligence defence was not challenged by the Crown), the Court accepted the due diligence defence.²²⁰ The company was, however, found guilty of failing to report, and a fine of \$500.00 was levied.²²¹

The lack of challenge to the due diligence defence, and failure on the part of the Attorney General to appeal the verdict was to haunt the Crown in subsequent proceedings. The next set of informations to be decided upon by the Court were those *Fisheries Act* charges initiated by Chief McDonald. The Attorney General of Alberta assumed responsibility for conducting the case. Shortly after

²¹²*Ibid.*

²¹³*Suncor* 1983, *supra*, note 183 at 294.

²¹⁴*E.L.C.*, *supra*, note 183 at 53.

²¹⁵*Suncor* 1985, *supra*, note 183 at 420.

²¹⁶*Suncor* 1983, *supra*, note 183 at 271.

²¹⁷*Dent*, *supra*, note 191. But, the same article goes on to note that under cross-examination, McDonald admitted she had no proof that it was Suncor effluent which made members of the band sick.

²¹⁸"Suncor trial moved" *Fort McMurray Today* (14 July 1983) 9.

²¹⁹*Suncor* 1982, *supra*, note 183 at 267.

²²⁰*Suncor* 1983, *supra*, note 183 at 271.

²²¹*Suncor* 1982, *supra*, note 183 at 268.

proceedings began, the original Crown prosecutor became “emotionally and mentally prostrated and was unable to continue with the Trial.”²²² A long delay followed (the defence unsuccessfully made an application for relief on the grounds of s. 11(b) of the *Charter*), after which the Court dismissed four out of five charges on grounds of issue estoppel. The Court ruled that since the *Fisheries Act* deleterious deposit and *Clean Water Act* licence contravention charges overlapped for all but one day, and since the Court had already found that due diligence had been exercised with respect to the *Clean Water Act* contraventions, it would lead to inconsistent verdicts for the court to find Suncor guilty under the *Fisheries Act* for those overlapping days.²²³

However, as there was no overlap between the *Clean Water Act* verdicts and the February 25 *Fisheries Act* charge, the Court proceeded to consider this charge. After considering extremely technical arguments concerning, (1) the inaccuracy of measuring techniques used by the accused Suncor in its effluent reports which were relied upon by the Crown in its case (it was held that the inaccuracies were not significant²²⁴); (2) whether the emissions were deleterious (the oil and grease concentrations were held to be “capable of giving rise to sub-lethal effects in fish” and therefore deleterious²²⁵); and (3) a due diligence defence (hiring of an inexperienced official to clean up oil spills, failure on the part of the company to properly react to inspector’s warnings²²⁶), Suncor was found guilty. In sentencing, the Court made several strong criticisms concerning the response of government to Suncor’s situation. First, that “the people responsible for producing regulations for Plants have not seen fit to produce regulations for Plants of this nature and it’s a factor I take into account.”²²⁷ Second, the Court took into account the fact that Suncor had been exceeding permitted limits on numerous occasions and that

this seems to have taken place without causing any excitement in the authorities who were supposed to look after this and, you know, if the watchdogs aren’t going to get worried, it is a little difficult to see why the company should get excessively worried in those circumstances.²²⁸

A fine of \$8,000 was imposed.²²⁹ Proceedings had begun on October 21, 1982, but, because of problems with the prosecutor and the “complicated and

²²²*Suncor* 1983, *supra*, note 183 at 271.

²²³*Ibid.* at 273. This finding is questionable, because the nature of the offence in the case of the *Fisheries Act* — depositing deleterious substances — is potentially broader than that of exceeding specific licence terms under the Alberta licence.

²²⁴*Ibid.* at 287.

²²⁵*Ibid.* at 292.

²²⁶*Ibid.* at 294.

²²⁷*Ibid.* at 295. This presumably alludes to the fact that there are federal regulations for conventional petroleum refineries, but not oil sands extraction and recovery facilities.

²²⁸*Ibid.*

²²⁹*Ibid.* at 296.

technical nature of the proceedings,²³⁰ the verdict was not delivered until June 3, 1983.

On October 17, 1983, the Provincial Court commenced hearings concerning two other alleged deposits of substances deleterious to fish contrary to s. 33(2) of the *Fisheries Act*, occurring February 17, 1982 (*i.e.*, before the other already decided upon charges) and March 9, 1982. The informations had been laid by officials from the Ministry of Fish and Wildlife, not private citizens; however, they were initiated after charges had been brought by the Fort McKay Indian Band concerning the same situation. As with the previous proceedings, the trial was extremely lengthy and convoluted. There were some 49 witnesses called, many of whom were expert. The trial lasted 76 court days, with final supplementary written argument from the Crown being submitted on March 26, 1985, and the decision being rendered May 25, 1985. The court waded through evidence and arguments concerning the legal definition of "deleterious to fish," the actual deleteriousness of the deposits, the correct testing procedures and constitutional arguments.²³¹ Eventually, Suncor was found guilty on both counts, and a total fine of \$30,000 was levied.

Total prosecution costs for the February and March, 1982 incidents at Suncor have been estimated to be several million dollars.²³² In March, 1982, the wastewater system was altered and upgraded with considerable success.²³³ The real impact of the Suncor trials, however, appears to have been on the Alberta Ministry of Environment. Following the trials, in 1987, Alberta Environment established a Review Panel on Environmental Law Enforcement which reported in January, 1988. Among other things, the Panel recommended promulgation of a government approved, publicly reviewed enforcement policy outlining detailed criteria for enforcement responses, and the creation of an environmental enforcement unit. The Review Panel also recommended changes in the legislation which would improve administrative and court powers to respond to pollution incidents, and place new responsibilities on polluters.²³⁴

In 1988, the Pollution Control Division was reorganized, with two branches, one responsible for investigating complaints and responding to emer-

²³⁰*Ibid.* at 270.

²³¹The Court relied on the Supreme Court of Canada decision *Northwest Falling Contractors Ltd. v. R.*, [1980] 2 S.C.R. 292, 53 C.C.C. (2d) 353 upholding the validity of s. 33(2) (*Suncor* 1985, *supra*, note 183 at 432). The Court also upheld the reliability of the measurements made by Suncor, and rejected the due diligence defence (*supra* at 474).

²³²See comments of E. Kupchanko, Assistant Deputy Minister of the Alberta Environment Department, as reported in "Prosecuting Polluters is Effective Strategy, Ministry Lawyer Says" *The [Toronto] Globe and Mail* (24 May 1984) A13.

²³³*Suncor* 1985, *supra*, note 183 at 471.

²³⁴Review Panel on Environmental Law Enforcement, *An Action Plan for Environmental Law Enforcement in Alberta* (1988).

gencies (the Investigation Branch), the other responsible for reviewing draft licences and making decisions on correct compliance responses (the Compliance Branch).²³⁵ Negotiation no longer takes place at the enforcement stage regarding, for example, the type of enforcement or whether there should be an enforcement response.²³⁶ In 1990, new draft legislation was announced which followed many of the Review Panel's recommendations,²³⁷ and a formal enforcement policy is currently being drafted,²³⁸ in the meantime, officials maintain that they are following the general approach contained in the Action Plan.²³⁹ Several private prosecutions have been attempted since the Suncor incident, but have been stayed or are still under consideration at the time of writing.²⁴⁰

D. Analysis

It would be impossible to assert that these three case studies of private prosecutions are in some way typical or indicative of the range of outcomes and issues which arise when citizens take matters into their own hands. Nevertheless, they do illustrate many of the problems which face private prosecutors: the attitudes of courts in such cases, the technical nature of many pollution incidents, and the extent of inter- and intra-governmental, as well as government-regulatee, interactions. For this reason, these cases provide a factual backdrop for the analysis which will follow.

A first and self-evident observation that emerges from the case studies is that private prosecutions can be successful. Obviously, however, "success" is a relative term. There are a host of possible criteria for determination of a successful prosecution. These include convictions, penalties and the effect on the reputation of the private prosecutor. Measured in terms of convictions, all three prosecutions were a success. If some modicum of penalty were to be imported into the equation, arguably the *Cyanamid* case was a failure. Those who maintain that citizen prosecutors are mere "busybodies" and meddlers might point to *Cyanamid* and the thinly veiled irritation of Wallace J. for support of their position. On the other hand, the Cyanamid company *did* install a major ammonia recycling plant after the prosecution.

²³⁵J. Flett (Ministry of Environment), "New Directions in Environmental Law Enforcement in Alberta" (Insight paper, September 19, 1990) at 4-5.

²³⁶*Ibid.*

²³⁷Proposed Alberta Environmental Protection and Enhancement Legislation.

²³⁸Flett, *supra*, note 235 at 3-4.

²³⁹September 26, 1990 phone call with Mr. Tom Dixon, Pollution Control Division.

²⁴⁰According to Ms. Jillian Flett, Branch Head, Compliance Branch, Pollution Control Division, in a phone call of Oct. 26, 1990, private prosecutions were attempted in 1988, in relation to the Daishowa pulp and paper mill permit to construct (stayed), and subsequently three prosecutions concerning the Old Man Dam have been attempted, of which two have been stayed and the third is still active.

In fact, in all three cases, significant pollution abatement actions took place following the prosecutions. While one cannot state with certainty that the abatement action itself, or the speed of that action, was due to the prosecutions, the alternative theory available — that clean up was merely a coincidence — seems considerably less plausible.

All three actions forcefully illustrate the inadequacies of informal and *ad hoc* inter-governmental agreements. These agreements are strung like tripwires across the hazy enforcement landscape, ready to fell the unwary. Their status is unclear: the public may or may not be aware of them, governments may or may not follow them, and judges may or may not choose to recognize them. An alternative system is necessary, and is discussed in part IV below.

Equally problematic are the on-going relationships between government and regulatees. As can be seen from all three of the case studies, the fact that regular communication between government and regulatees takes place as technical solutions are worked out appears to be a necessary evil. But there is a heavy price to pay for this necessity. There is the increased likelihood that on-going relationships will compromise government's ability to make decisions to prosecute when the time is right. To a certain extent, the dangers of on-going government-regulatee relationships can be avoided: each of the milestones toward an abatement solution can be formally set out in a licence or Control Order (as in the *Cyanamid* case, at the Ontario M.O.E. level, but formal federal approval of the Ontario actions was missing), special enforcement squads can be created, separate from the negotiators,²⁴¹ and other actions discussed below can be taken.²⁴² Private prosecutions can act as an important check on relations becoming too cosy. The difficulty is, how can an outsider to the process determine when a prosecution is appropriate? The technical and non-public nature of these relations raise suspicions and present major obstacles to private prosecutions.²⁴³

Evident in all three of the case studies were the tremendous informational, technical and financial resources necessary to secure convictions for pollution offence violations. The fact that in all three cases the accused raised due diligence defences is indicative of a particularly difficult obstacle facing the private prosecutor. In all three cases, the actions of government officials seemed to be on trial as much as those of the accused. Usually, only government officials will be in a position to refute arguments by the accused that government acquiesced with company plans. Yet if government does not intervene and conduct the pros-

²⁴¹Such separate enforcement staff exist in several jurisdictions, including Ontario, Quebec, B.C. and Alberta.

²⁴²Most notably, the creation of enforcement and compliance policies.

²⁴³On move toward technical environmentalism, see R. Paelhke, "Democracy and Environmentalism: Opening a Door to the Administrative State" in Paelhke & Torgerson, eds, *supra*, note 92, 35 at 45.

ecution, there is the possibility that the due diligence defence will succeed, thus potentially estopping other actions.²⁴⁴

The impression left by all three of the case studies is that the citizen has been left “out in the cold” — outside of the pollution control process. But the private prosecutions succeeded in pointing a very powerful spotlight on the actions of government, and in many cases found them wanting: they exposed unstructured enforcement discretion as well as loose and informal arrangements between government agencies. Taken together, it is no wonder that citizens have become suspicious and have engaged in such actions. Some might contend that the situation has changed since these prosecutions took place. This is undoubtedly true. As we have seen, new legislation has been put into place in some jurisdictions, and is contemplated in others. Enforcement units have been established in many provinces.²⁴⁵ Approaches toward enforcement have changed in some jurisdictions. But the type of reforms discussed in the following pages have not been put into place. Until such reforms are made, private prosecutions are likely to continue to be viewed by government and industry as a problem, rather than a useful adjunct to government enforcement.

IV. Making it Work

A. *Wanted: A Structured Approach to Enforcement*

All three case studies squarely raise the issue of prosecutorial discretion: most particularly its ambit, effect and what can be done about it. Some might argue that private prosecutions affect the certainty, predictability and evenhandedness of enforcement. The cases show, so the argument would go, that where on-going relations between government and regulatee are common, where technological solutions to problems must be invoked, and where inter-governmental arrangements are in place, a private prosecution is a “wild card” that simply gets in the way of the “experts.” To address this contention, it is necessary to examine the nature of the discretion and the possibilities for its effective structuring.

Unlike some other Western legal systems,²⁴⁶ Canada follows the English lead in not subjecting government enforcement authorities (*i.e.*, the police, or a

²⁴⁴As was discussed in part III. C. above.

²⁴⁵In Ontario, Quebec, Newfoundland, Nova Scotia, Manitoba, British Columbia and Alberta.

²⁴⁶Glanville Williams, in his article “Discretion in Prosecuting” (1956) *Crim. L. Rev.* 222 at 222 states:

It is completely wrong to suppose (as is sometimes done) that the institution of prosecutions is an automatic or mechanical matter. This is, indeed, the theory in some Continental countries, such as Germany, where the rule is that the public prosecutor must take proceedings for all crimes that come to his notice for which there is sufficient evidence, unless they fall within an exception for petty offences, in respect of which he is given a discretion.

department charged with the administration of a statute) to a general duty to prosecute for all cases which come to their attention.²⁴⁷ Instead, these officials or departments characteristically exercise a broad discretion as to when a prosecution is warranted. Parker J., in the English Queen's Bench decision of *James and Son Ltd. v. Sme*²⁴⁸ describes prosecutorial discretion in the following language:

Where legislation ... throws a wide net it is important that only those should be charged who either deserve punishment or in whose case it can be said that punishment would tend to induce them to keep themselves and their organization up to the mark ...²⁴⁹

Canadian courts have tended to adopt a similar approach. Thus, for example, in the 1977 decision of *R. v. Catagas*,²⁵⁰ the Manitoba Court of Appeal held that an alleged policy to not enforce the *Migratory Birds Convention Act*²⁵¹ against native Indians was illegal; the Crown could not by Executive action dispense with laws. The Court then confirmed the existence of prosecutorial discretion in the following language:

Not every infraction of the law, as everybody knows, results in the institution of criminal proceedings. A wise discretion may be exercised against the setting in motion of the criminal process. A policeman, confronting a motorist who had been driving slightly in excess of the speed limit, may elect to give him a warning rather than a ticket. An Attorney-General, faced with circumstances indicating only technical guilt of a serious offence but actual guilt of a less serious offence, may decide to prosecute on the latter and not on the former. ... But in all these instances the prosecutorial discretion is exercised in relation to a specific case. It is the particular facts of a given case that call that discretion into play.²⁵²

That there are many possible justifications for a pollution prosecution not being undertaken by the Crown is beyond question; for example, there are a host of other viable enforcement options which could be more appropriate to the situation (for example, inspector orders, Ministerial orders, ticketing), or there might be insufficient evidence to support a legal action, or a different government agency might be in the process of conducting an investigation concerning the same incident, with a view to prosecution. Each of these may very well have merit.

²⁴⁷*Ibid.* Williams' statement of the extent of prosecutorial discretion in England appears to be equally applicable to the Canadian situation. See, e.g., Burns, *supra*, note 5 at 293, and cases discussed in part III, above.

²⁴⁸(1954), [1955] 1 Q.B. 78, [1954] 3 All E.R. 273 [hereinafter cited to Q.B.] .

²⁴⁹*Ibid.* at 93.

²⁵⁰(1977) 38 C.C.C. (2d) 296, 81 D.L.R. (3d) 396 (Man. C.A.) [hereinafter *Catagas* cited to C.C.C.].

²⁵¹R.S.C. 1970, c. M-12.

²⁵²*Supra*, note 250 at 301.

The point is, however, that at the present time there is rarely a formal, coordinated and systematic approach to the treatment of detected pollution incidents, and no regularized communication of that approach to interested parties. Contrary to the claim that private prosecutions interfere with the proper exercise of enforcement discretion, the reality is that private prosecutions clearly illuminate the incoherence and unfairness of current enforcement activities. In fact, private prosecutions, such as those set out in the case studies above, are symptomatic of the problem, but are not the problem themselves.

Feasibility of a structured approach can perhaps most clearly be demonstrated through an examination of first, some key provisions in *C.E.P.A.*, and second, its accompanying *Enforcement and Compliance Policy*.²⁵³ *C.E.P.A.* does not contemplate the type of on-going industry-specific emissions control response which is associated with the *Fisheries Act* or provincial emissions control legislation. However, the techniques used in *C.E.P.A.* to address the question of effective public input in enforcement, and inter-governmental overlap of responsibilities are directly relevant to discussion here. Apart from general obligations in *C.E.P.A.* requiring the Minister to fully inform the public and encourage its participation,²⁵⁴ several other specific provisions directly address aspects of the "structuring discretion" question.

According to ss 108 through 110 of *C.E.P.A.*, any two persons resident in Canada who are of the opinion that an offence has been committed may apply to the Minister for an investigation of the alleged offence. The Minister is obligated to conduct an investigation and report back in writing and/or send evidence to the Attorney General for such action as the Attorney General may wish to take. These provisions have the effect of providing an option short of private prosecutions to concerned citizens. They do not bar private prosecutions, but, arguably, they may either deviate the need to undertake such actions, or supply further evidence in support of private actions. At the same time, they may be an effective accountability method allowing citizens both to ascertain whether government is "doing its job," and to goad officials to do so. Reports on the operation of these provisions to date suggest that they have been useful in bringing problems to the attention of government,²⁵⁵ and have not become a major and unworkable diversion of administrative resources.²⁵⁶

²⁵³*Supra*, note 20.

²⁵⁴*E.g.*, *C.E.P.A.*, ss 2(d), (e) & (g).

²⁵⁵According to Mr. Brian Neville, of Conservation and Protection Branch, Environment Canada, there were ten applications under s. 108 received during the period June 30, 1988 to June 30, 1990. Of that number, "several" were found to be matters related to the enforcement of provincial statutes and not covered by *C.E.P.A.*; these files were all referred to the applicable province. One was related to employee harassment after a report of an alleged release of a regulated substance. The individual's union dealt with the matter. One led to substantiation of an offence. A warning was issued for violation of the Storage of P.C.B. Wastes Interim Order.

²⁵⁶Some provincial officials have expressed concern about the extent of resources which could be spent reacting to such citizen requests for investigations were similar provisions to be included in provincial legislation. They contend that provincial environmental legislation covers a consid-

Second, with respect to the federal-provincial overlap problem, the Act allows for non-application of certain *C.E.P.A.* regulations in a province where the federal Minister and the government of the province agree in writing that there are provincial laws in force which are equivalent to the federal regulations in question and the provincial laws include provisions similar to the citizen investigation sections discussed above.²⁵⁷ The agreement is made by order of the Governor in Council, on the recommendation of the Minister, and must be made public.²⁵⁸ As such, unlike the old federal-provincial "Accord" approach,²⁵⁹ these agreements appear to be legally binding. The agreements can be terminated on six months notice.²⁶⁰ The Minister is required to include in the annual report a report on the administration of such agreements.²⁶¹ Criteria in the *Enforcement Policy* elaborate more fully on the factors pursuant to which the standard of equivalency will be measured. One such factor is that there be "comparable enforcement policies and procedures that are consistent with this Enforcement and Compliance Policy."²⁶²

To be sure, there are weaknesses with this system:

- the legal foundation of *C.E.P.A.*'s equivalency provisions has been questioned by some;²⁶³
- such federal-provincial arrangements are not expressly subject to public notice, comment and consultation (and should be);

erably broader scope of activities. Three responses to these concerns are possible: first, while it is true that *C.E.P.A.* has not been fully "operationalized" through, *e.g.*, extensive toxic substances regulations, there are other offence contraventions possible under the Act (most notably for Ocean Dumping (Part VI) and nutrients (Part III)). The fact that these provisions did not provoke significant use of the investigation provisions is indicative of moderation in their use. Second, arguably, such investigations are good value for money in the sense that they may lead to early detection and enforcement actions by government, and avoid the necessity of private prosecutions. Third, should the provisions prove unworkable, they can be changed. They should be given a fair test first.

²⁵⁷*C.E.P.A.* ss 34(5)-(10); ss 63(3)-(7). Hereinafter, only the s. 34 provisions will be cited, but s. 63 is for all intents and purposes identical. See also s. 98, a general provision authorizing the Minister, with the approval of the Governor in Council, to enter into agreements with the provinces with respect to the administration of the Act, and requiring that the agreements be made public, and reported on in the Annual Report.

²⁵⁸*C.E.P.A.*, ss 34(6)-(7).

²⁵⁹Courts have held the federal-provincial Accords to be non-binding in nature and lacking any legal foundation: see, *R. v. Canadian Industries Ltd.* (1980), 2 F.P.R. 304 (N.B.C.A.). For discussion of the accord approach, see *Industrial Water Pollution*, *supra*, note 153 at 173-99.

²⁶⁰*C.E.P.A.*, s. 34(8).

²⁶¹*Ibid.*, s. 34(10).

²⁶²*Supra*, note 20 at 15.

²⁶³On problems with "equivalency" and anticipated difficulties in use of such provisions, see A.R. Lucas, "Jurisdictional Disputes: Is "Equivalency" A Workable Solution?" in D. Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre, 1990) 25.

- the *Enforcement Policy* is not a law and therefore is not legally binding²⁶⁴ so its equivalency criteria merely provide guidance;
- there is no definition of “equivalent” or “similar” in the Act, and no definition of “comparable” in the *Policy*; and
- the factors listed in the *Policy* stop short of requiring that there be comparable enforcement.

Still, the statute and *Policy* offer the most practical approach to resolving the federal-provincial jurisdictional overlap problem that this author has seen. Indeed, such an approach, if applied to address federal-provincial emissions control, would be a vast improvement over the current informal and ad hoc practices currently in place.

In its own right, the *Enforcement Policy* is an important step toward creation of a fair and effectively structured enforcement discretion. The policy was subject to extensive public consultation prior to its promulgation. It specifically obliges the government to apply the Act throughout Canada in a “fair, predictable and consistent” manner.²⁶⁵ It starts from the express premise that compliance with the Act is mandatory.²⁶⁶

The *Policy* sets out detailed criteria which enforcement officials are to apply when deciding between enforcement options.²⁶⁷ Explanations are provided concerning each of the enforcement options, outlining when they may be used, upon what criteria, and consequences of their use. The response options are integrated and arranged in order of severity.²⁶⁸

The final and most serious responses listed in the *Policy* are prosecutions and civil actions. Mandatory language is employed to describe when these options will be invoked. They are tempered by several qualifications, but not in such a manner as to render the policy completely devoid of force and effect. Thus, for example, with respect to prosecutions, two sets of mandatory stipulations are set out. First, it is stated that charges will be laid for every violation except where a warning, a ticket, or a Ministerial order is the most appropriate enforcement action.²⁶⁹ This is followed by a more assertive position: prosecutions “will *always* be pursued when ... there is death of or bodily harm to a person; ... there is serious harm or risk to the environment, human life or health;”

²⁶⁴It may, however, have legal implications. See below at 823-24.

²⁶⁵*Enforcement Policy*, *supra*, note 20 at 9.

²⁶⁶*Ibid.*

²⁶⁷*Ibid.* at 43-44. The three main criteria heads are “Nature of the violation,” “Effectiveness in achieving the desired result with the violator,” and “Consistency in enforcement” (*supra*).

²⁶⁸For illustration, see discussion of *Enforcement Policy* provisions regarding prosecutions below.

²⁶⁹*Enforcement Policy*, *supra*, note 20 at 50.

the alleged violator intentionally supplied false or misleading information; there is obstruction, interference, concealment; or when "all reasonable measures to comply with" other enforcement measures were not taken.²⁷⁰

The *Enforcement Policy* is not without its problems, some of which were discussed already.²⁷¹ The failure of the *Policy* to specifically discuss the role of private prosecutions, and to articulate an official position toward such actions is a serious flaw. Another problem may be that policies written in mandatory language will be considered an improper fetter of discretion.²⁷² However, the *Policy*, plus the investigation and equivalency provisions in the Act itself, represent the most advanced effort of a Canadian government to effectively and openly structure its environmental protection discretion. A similar Enforcement and Compliance Policy for the environmental provisions of the federal *Fisheries Act* is currently being drafted.²⁷³ The Ontario Ministry of Environment has had in place a "Development, Compliance and Enforcement" policy for its major environmental legislation since 1981,²⁷⁴ although it lacks many of the features of the *Enforcement Policy*.²⁷⁵ The *Enforcement Policy* is ample demonstration that it is possible to structure discretion without sacrificing flexibility.

On several levels, the *C.E.P.A.* approach should help to placate those who fear that private prosecutions will interfere with government prosecutorial discretion. First, as discussed above, the citizen investigation prosecutions would appear to provide a useful alternative or supplement to private prosecutions,

²⁷⁰*Ibid.* at 51.

²⁷¹Others include the *Policy's* lack of recognition of judicial accountability for government actions in addition to Parliamentary accountability (*ibid.* at 19), lack of clarity concerning who initiates government actions (*e.g.*, does inspector lay charges upon detection of incident? (*supra* at 50), or does inspector recommend charges to the Attorney General (hinted at *supra* at 21) and compare with s. 110 of *C.E.P.A.*), lack of discussion of private prosecutions, and no obligation to publish quarterly compliance reports.

²⁷²In *Catagas, supra*, note 250, the Court considered illegal a policy which *suspended* the enforcement of a statute, because this was an improper fettering of discretion by the "Executive." But *quaere* whether a policy stipulating mandatory prosecution upon detection might not also amount to an improper fetter, in that there is no room to examine the case on its own merits. The key point would be whether the Attorney General has fettered his or her ultimate discretion over prosecutions, or whether it is only the Department of Environment (not the ultimate authority) which has done so. Note that in the *Enforcement Policy*, there is the express statement that the policy was developed "in cooperation with the Department of Justice" (*supra*, note 20 at 1), but there is also the statement that "the ultimate decision on whether to proceed with prosecution of the charges rests with the Attorney General" (*supra* at 21).

²⁷³Telephone conversation with John MacLachy, Chief, Enforcement, Conservation and Protection, Environment Canada, September, 1990.

²⁷⁴Ontario, Ministry of Environment, *Pollution Abatement Program: Development, Compliance and Enforcement* (Policy manual no. 05-02-01) (February 9, 1981).

²⁷⁵For example, it does not address federal-provincial overlap, was not subject to public notice and comment in draft form, is available only in Ministry offices and other government outlets, and does not set out criteria for enforcement to the extent of the *C.E.P.A.* policy examined here.

while still acting as an accountability mechanism. Second, the equivalency provisions authorize a considerably more open, formal, and accountable federal-provincial administrative sharing arrangement than is currently available. Their public and binding nature increase the likelihood that they will be followed, thus avoiding the necessity for private prosecutions to take place. Third, because input from environmental groups concerning *C.E.P.A.* enforcement was solicited prior to the *Policy* being put into place, there is a considerably greater likelihood that the public will agree with the subsequent enforcement actions or inaction. At the very least, the public knows what that policy is, and thus what to expect. This may help to reduce some of the well-founded distrust and suspicion which currently exists — distrust which flows at least in part from past use of unwritten or at least unpublished policies. If the federal Department of Environment keeps its word as set out in the *Policy*, there will then be a decreased need for private prosecutions. In addition, such policies also provide *regulatees* with greater certainty and predictability with respect to enforcement so that they can plan their affairs. Such policies give them greater confidence in predicting Departmental actions, and those of the public.

Apart from these purely practical benefits flowing from use of enforcement and compliance policies, some commentators have suggested that policies of this nature may also be legally required in order for Departments to withstand *Charter* challenges of unfair or unequal enforcement under ss 7 and 15.²⁷⁶ The basic position taken by these commentators is that courts will only assume enforcement actions are compatible with *Charter* values of fairness and equality in enforcement where enforcement policies exist; where they have been drafted with full public input; where the policy has been approved by the Minister; and where the individual enforcement action in question is in consonance with the terms of the policy.²⁷⁷

This position necessitates that judges take a considerably more aggressive stance toward reviewing prosecutorial discretion than they have demonstrated to date.²⁷⁸ Certainly, the existence of such policies should assist the courts in assessing the propriety of government enforcement actions.²⁷⁹

²⁷⁶Finkle & Cameron, *supra*, note 50.

²⁷⁷*Ibid.*, especially at 55-57.

²⁷⁸Cases such as *Campbell* and *Osiwoy*, discussed above, suggest that courts would only interfere where there was evidence of "flagrant impropriety" or it could be shown that the Attorney General acted with bias or had abused the law. An argument could be made that failure to establish such compliance and enforcement policies amounts to a "flagrant impropriety." The notion of inequality of treatment, per s. 15(1) of the *Charter*, has also received a comparatively narrow interpretation to date: see, e.g., *R. v. Turpin*, [1989] 1 S.C.R. 1296, 96 N.R. 115. For a more pessimistic assessment of the potential for the *Charter* to address the question of lack of uniform national standards of enforcement, see Lucas, *supra*, note 263 at 31-32.

²⁷⁹For an optimistic assessment of its possibilities, see Finkle & Cameron, *supra*, note 50 at 57.

A more proactive approach, and one which is in keeping with the values set out in the *Charter* and the general movement toward open and public administration in environmental protection, would be for government to take the initiative by statutorily requiring that Ministers establish Enforcement and Compliance Policies that are subject to notice and comment and reviewed every two years. The existence of such policies should assist governments in their own actions, aid regulatees in organizing their affairs and inform the public and the courts.

The foregoing analysis suggests that viewing private prosecutions as interferences with the proper working of government is a classic example of shooting the messenger. The problem lies not with private prosecutions, but with the legislation and practices of government which permit an unstructured approach toward emissions control administration and enforcement.

B. Improving Private Prosecutions

In light of this discussion, what future lies ahead for private prosecutions? What can be done to improve their functioning? Obviously, bringing citizens into the pollution-control decision-making process as early as possible, making inter- and intra-governmental administrative arrangements formal and public, providing citizen request-for-investigation provisions such as in *C.E.P.A.*, and creating public, effective enforcement policies, are all improvements likely to reduce the need for private prosecutions.

But there are many other factors which all tend to prevent private prosecutions from assuming a vigorous role as a check on government enforcement or lack thereof. Generally, the prohibitively expensive nature of environmental prosecutions — from lab costs, to expert fees, lawyer fees, and court processing charges — represents a major barrier to most citizen prosecutors. The limited ability of the courts to award costs to private prosecutors and the fact that certain costs can be awarded against them represent major impediments to such actions, and should be amended.²⁸⁰

A series of informational obstacles lie in the path of any person planning to initiate a private prosecution. Citizen actions are dependent on three different information-related tasks:

(1) collection of raw evidence upon which a charge can be based — detection of the existence of a violation is in itself often extremely difficult;

²⁸⁰See generally, Burns, *supra*, note 5 at 287 and Law Reform Commission of Canada, *Criminal Procedure: Control of the Process* (Working Paper 15) (1975) at 50. There is also the somewhat remote likelihood that a private prosecutor could be sued in a civil action for malicious prosecution. Even though likely to be unsuccessful, the possibility of such actions, while acting as a check on improperly motivated prosecutions, could also have a chilling effect on some citizens.

(2) evidence analysis — laboratory confirmation that a substance is harmful, or exceeds standards;

(3) court presentation of the evidence — the credibility of the prosecutor's case can normally be greatly enhanced through the use of expert witnesses, often from government. Also, an effective rebuttal of a due diligence defence usually requires that the prosecutor possess a complete understanding of the technical and financial aspects of the accused's operations.

While it is possible for a private citizen to complete all three of these tasks without government assistance, it is usually less expensive and more practical to make use of available government services. Indeed, from the private prosecutor's standpoint, the assistance of government officials in virtually every stage of a prosecution is all but essential: government has the information, expertise, and facilities in which to analyze raw data.

The natural reliance which private prosecutors have on government raises a number of tricky questions for enforcement agencies. One key issue is impartiality. While environment departments are usually cooperative and try to assist members of the public, in the context of private prosecutions, the question must be asked, why, if the citizen has a good case, shouldn't government conduct the prosecution itself, and if Environment officials do not wish to prosecute, should they nevertheless support the private action through technical assistance? While the author would take an affirmative position, on the basis of the need to encourage citizen participation, the point is that environment agencies must address this question directly and explicitly so that citizens are made aware of the general policy before embarking upon any particular action.

The *Crown Zellerbach* and *Suncor* cases are examples of citizen-initiated actions where the federal government assumed responsibility for conduct of the actual prosecution. This relieved the private citizens from the heavy burden of securing expert witnesses, and gaining access to pollution-related information concerning the accused (not to mention the expense of conducting the trial). In *Cyanamid*, no Crown intervention took place. On what basis are Crown decisions to intervene and conduct prosecutions based? Could this not be stated in advance in a publicly disseminated document?

In the *Cyanamid* case, the private prosecutor conducted the trial without the intervention of the Attorney General, but employees of the provincial Ministry of Environment appeared as expert witnesses for both the private prosecutor and the accused, while the federal Department of Environment provided the private prosecutor with advice. The problems associated with any government department attempting to straddle both sides of the fence need no further elaboration. An express, publicly disseminated department position on such situations would be sensible.

A related issue is citizen use of government testing facilities (if any exist). Arguably, it is in the government's best interest to encourage citizens to bring in samples for testing, since the results supplement the government's own monitoring efforts. On the other hand, testing can be expensive, and facilities limited: who should get priority? A final problem is information disclosure — from government-regulatee correspondence to monitoring reports supplied by the regulatee and inspector reports.²⁸¹ Are these readily available? Where do environment agencies stand on this issue?

Quite apart from technical and informational assistance, governments can and do provide financial aid to private litigators. That they should do so flows naturally from their statutory commitments to "encourage the participation of the people of Canada in the making of decisions that affect the environment"²⁸² and the thrust of the *Charter*. Arrangements such as the *Penalties and Forfeitures Regulations*²⁸³ under the federal *Fisheries Act* represent recognition of the contribution made by private parties who initiate or conduct prosecutions, but the actual amounts provided are dependent upon conviction and the size of the fine. Furthermore, these regulations only apply to the federal *Fisheries Act*. Consistent, agency-wide funding arrangements would make more sense. These could be adjusted if and when court rules regarding awarding of costs are changed.

It seems readily apparent that governments should develop a policy concerning private prosecutions. Such a policy should address such issues as the following:

(1) *In what circumstances will a government decision not to prosecute be disclosed?* In the recently completed British Columbia *Discretion to Prosecute Inquiry*²⁸⁴ it was recommended that where a decision not to prosecute has been made, and the public is not aware of the investigation, there should be no public disclosure (in the interests of the formerly suspected accused). But where the public, a victim or other significantly interested person is aware of the investigation, that party should be given adequate reasons for the non-prosecution.²⁸⁵ A statement to this effect in a private prosecution policy would be useful.

(2) *What information will be supplied concerning a government decision not to prosecute?* Since the early 1980s, the Ontario M.O.E. has had in place a policy which requires that, where the M.O.E. decides against a prosecution, informa-

²⁸¹For a more comprehensive treatment of information availability in the environmental context, see M. Rankin, "Information and the Environment: the Struggle for Access" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 285.

²⁸²*C.E.P.A.*, s. 2(d).

²⁸³*Supra*, note 152.

²⁸⁴Owen, *supra*, note 28.

²⁸⁵*Ibid.* at 118.

tion regarding the incident will be available upon request, subject to informational constraints imposed by legislation.²⁸⁶ This policy has always seemed suspect, because it was never clear how a non-prosecution decision would become known. However, if coupled with the policies contained in point one, plus point four below, there is some reasonable opportunity to make the M.O.E. policy meaningful. Certainly, the thrust of the M.O.E. policy — that information will be supplied — is one which should be included in a private prosecution policy. The “constraints” imposed by legislation should be spelled out in the policy.

(3) *How will the Attorney General treat private prosecutions?* In some jurisdictions, it is the policy of the Attorney General to intervene and conduct all prosecutions.²⁸⁷ What is not clear, however, is on what basis decisions to stay or to intervene are made. Some general criteria would be highly useful, although of course the discretion of the Attorney General must not be improperly fettered. Additionally, although historically courts have stated that the Attorney General is not under an obligation to supply reasons for a decision to stay,²⁸⁸ in the interests of fairness and openness, such reasons should be provided. The policies of the Attorney General on these matters should be explicitly stated in a private prosecution policy.

(4) *What on-going compliance or non-compliance reports should be regularly published?* In British Columbia, the Ministry of Environment has recently begun publication of a quarterly “Non-compliance Pollution List.”²⁸⁹ The list includes a description of how the Ministry measures the environmental impact of waste management permits, the names and locations of permit-holders considered to be in “significant non-compliance,” the nature of waste discharge, and further comments. A second part lists sites that are a “pollution concern” to the Ministry. In each case where there is non-compliance, the Ministry is requiring the permit holder to undertake remedial action to comply with the conditions of their permit.²⁹⁰ It seems self-evident that such lists can become the basis for citizen requests for further information, and possibly citizen actions. In addition, the publication of such lists make limitation periods on prosecutions which commence from the time of *government* detection considerably fairer.²⁹¹

(5) *What further information will be made available to citizens?* Requests pursuant to freedom of information are useful measures of last resort, but an explicit and upfront position on the disclosure of monitoring information, corre-

²⁸⁶*Supra*, note 275, s. 3.2.3.

²⁸⁷*E.g.*, this is the case in Alberta and British Columbia.

²⁸⁸See, *e.g.* *Controlling Criminal Prosecutions*, *supra*, note 32 at 4.

²⁸⁹*E.g.*, British Columbia, Ministry of Environment Release, “Reynolds Releases Non-Compliance/Pollution List” (13 July 1990).

²⁹⁰*Ibid.* at 2.

²⁹¹An example of such provision is contained in the Manitoba *Environment Act*, discussed *supra*, note 114 and accompanying text.

spondence and inspector reports would be considerably more straightforward and sensible.

(6) *Will government officials conduct tests on samples supplied by citizens?* The value of government positions on this matter should be obvious, both to government and to the public.

(7) *What technical assistance will be provided to private prosecutors?* Government officials need to know whether or not the advice they are providing to potential private prosecutors should be considered "off the record," as something wrong, or whether it is part of serving the public. The public needs to know this as well. In addition, the availability of government experts as court witnesses could be discussed.

(8) *What financial assistance will be provided to private prosecutors?* The financial costs of engaging in such actions are potentially enormous. A rational approach would be to establish an agency-wide program which would contribute assistance in relation to expenses incurred.

Such private prosecution policies should be circulated in draft form to all interested parties for comment, appropriate changes made, and then published as part of Enforcement and Compliance Policies. They should be reviewed at least every two years to ensure their accuracy and appropriateness.

Conclusions

At the beginning of this article, the tension between two competing positions, one viewing private prosecutions as meddling, and the other as indicative of government ineptitude, was noted. In the pages which followed, an attempt has been made to demonstrate why this tension exists, and how it could be alleviated. It has been shown that while public participation is generally encouraged in democratic countries, the representative democratic systems elevate certain individuals to the position of elected representatives, and leave the rest of the public outside of effective decision-making except by indirect methods. The need for supplemental administrative and procedural mechanisms to ensure citizen input in the processes of governing is self-evident if the representativeness of the governors is to be ensured. Where such avenues of citizen input are not provided, the public support needed to implement laws may be missing, leading to suspicion and distrust surrounding government enforcement actions or inaction.

The current approach to political accountability for prosecutorial decisions was also examined, and it was found to exacerbate the inherent tension between the governors and the governed. Because of party solidarity, the uncertain nature of relief provided through question period, and the inherent conflict of interest of the Attorney General, the extent of effective political accountability is lim-

ited. There are also systemic problems with political accountability: while Crown decisions to prosecute are visible, and thus there is some possibility of political accountability, decisions not to prosecute are not visible unless the event in question has somehow become public knowledge. Private prosecutions are a method of forcing Crown decisions not to prosecute to the surface: one way or the other, the Attorney General must react to a private prosecution.

Historical examination revealed that private prosecutions for public wrongs were extremely common until the nineteenth century, when the industrial revolution sparked increased regulation and the need for permanent full time administrators. The necessity of on-going relations between government and regulatees, and the increasingly technical nature of government-regulatee negotiations decreased the ability of citizens to view and thus effectively participate in decisions concerning them. With the growth of governments, administration of emission regimes became spread over several agencies at several levels of government, usually inter-connected by informal agreements. This shadowy web of administrative arrangements presents another impediment to the concerned citizens attempting to understand how laws are being implemented.

The technical nature of the proof process in environmental matters, and the development of the strict liability offence, with its defence of due diligence, further removed the possibility of private prosecutions from the hands of most citizens. To succeed in obtaining a conviction now requires that the prosecutor not only know all of the actions or inactions of the accused, but also those of government.

Gradually, in recognition of the tremendous potential for the bureaucrat to be compromised in his ability to administer such laws fairly, there have been increasing attempts by governments to open up the process, through policies and recently through statutory commitments to inform the public, and encourage participation. These reforms are definite improvements, but they are only a first step.

As the case studies demonstrate, what is needed is a structured approach to environment agency administration and enforcement. First, citizen request-for-investigation provisions similar to those contained in *C.E.P.A.* should be included in all emission control legislation. These request-for-investigation provisions offer a quicker and more practical way for citizens to find out the status of enforcement action concerning a particular incident, and yet also perform the needed "check" function on government action. Once in place, it is doubtful that most citizens will feel the need to attempt private prosecutions unless requests for investigation fail to produce results.

Second, federal-provincial administrative arrangements should be formalized through legally binding agreements, subject to notice and comment in draft

form, and ultimately approved by orders in council. To be effective, these agreements must directly address the issue of enforcement. To do so, there should be requirements that the agreements include citizen request-for-investigation provisions as in *C.E.P.A.*, and that Ministers promulgate Enforcement and Compliance Policies for their jurisdiction which have been subject to public review and comment and the approval of the sharing jurisdiction.

Enforcement and Compliance Policies are essential to the effective structuring of government administration and enforcement. These must set out how the legislation will be implemented in imperative language so as to ensure certainty, consistency and predictability in enforcement, while still allowing for administrative flexibility to address individual situations. The *C.E.P.A.* policy, though flawed, is a good start. It must be supplemented by commitments to publish regular non-compliance reports, position statements concerning information availability in the event of decisions not to prosecute (including reasons why government action has not taken place), a statement of the criteria upon which Attorney General decisions to stay or conduct privately initiated prosecutions are made, and finally a description of government's position regarding access to lab testing for citizen supplied samples as well as availability of government officials to assist with private prosecutions.

Private prosecutions today are symptoms of a lack of trust in government. Historically, they were useful adjuncts to enforcement by public officials. For private prosecutions to regain their historical role, governments must win back the confidence of the public. This means abandoning unstructured administration and enforcement in favour of a formal and open approach to governing. In keeping with the *Charter* focus on fundamental justice and equality, government action should be certain, consistent, and predictable, and the participation of the public should be welcomed. Until this happens, citizens taking matters into their own hands will continue to be viewed by some as part of the problem rather than part of the solution to today's environmental crises.