

ENVIRONMENTAL RIGHTS IN ALBERTA: A RIGHT TO A HEALTHY ENVIRONMENT

Module 3: Private Enforcement for Environmental Quality

A publication of the Environmental Law Centre's Environmental Rights Program



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The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) is Alberta's oldest and most active public interest environmental law organization and believes that law is the most powerful tool to protect the environment. Since it was founded in 1982, the ELC has been and continues to be Alberta's only registered charity dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment.

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Executive Summary

Enforcement of environmental laws in Canada (and Alberta) and action to protect the environment more generally is typically undertaken by government. There are opportunities to provide citizens with enforcement powers which do not currently exist in Alberta.

This environmental rights module canvasses the question of who can enforce environmental laws in Alberta and what types of enforcement mechanisms are available to them. The module also canvasses examples of various citizen based enforcement actions from several other jurisdictions, including Ontario, Quebec, Yukon Territory and the NWT and Nunavut. Citizen suit provisions in U.S. federal environmental law are also considered.

The ELC concludes that citizen enforcement of environmental laws in Alberta relies primarily on the use of private prosecutions and the ability to request an investigation of an alleged violation of environmental law. Successful private prosecutions are undermined by a criminal burden of proof and the related barriers facing a private prosecutor in gathering evidence. Further, the ability to question or challenge government decisions around how they choose to administer and enforce environmental legislation is lacking.

In those Canadian jurisdictions where citizen based enforcement options have been legislated there has been minimal use of these tools. This is particularly the case when compared to the use of citizen suits in the United States.

The ELC recommends, in adopting citizen enforcement tools, that legislation should **avoid** the pitfalls of other jurisdictions, including:

- Requiring additional proof of direct harm resulting from an alleged violation or novel nature of harm;
- Limitations on the temporal aspect of the violation (excluding existing limitation periods); and
- Unduly limiting initiation or continuation of a citizen action based on unduly narrow standing tests or other preconditions to a suit, including excessive security for costs.

Expanding citizen based enforcement options should consider some of the core approaches taken in the US to citizen suits, including:

- Adopting a civil standard of proof;
- Coverage of legal costs where suits are successful;
- Enabling transparent and open access to monitoring and reporting information;
- The ability to bring actions against the Crown to require government compliance with legislative obligations and responsibilities; and
- Limiting remedies to orders to restore the environment and financial penalties.

The ELC recommends adopting additional citizen based enforcement tools in legislation to bolster enforcement capacity for environmental laws and to ensure accountability around the administration and application of environmental regulatory instruments.

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INTRODUCTION: Private Enforcement for Environmental Quality

When it comes to protecting the environment Albertans and Canadians typically rely on government to manage the environmental footprint we leave. Whether it is limiting pollution or managing lands which support biodiversity, we rely heavily and sometimes exclusively on the federal and provincial Crowns. This includes monitoring air, land and water quality, making decisions on what regulated activities to authorize, and enforcing and ensuring compliance with legal requirements.

This module looks at the use of private enforcement as a means to ensure a healthy environment. Private enforcement is one approach to engage public oversight in compliance and enforcement of environmental laws. Other approaches include negotiated rule making and third party oversight (dealt with in another ELC module).

While private rights to enforce laws have existed in Canada for many years under the *Criminal Code*, we generally rely heavily on the government to monitor and prosecute transgressions of environmental laws.¹ These rights are often extended or altered in Environmental Bills of Rights (EBR) by providing individual rights to directly sue violators of the law or to pursue actions that force government responses and/or actions. The ideas of civil environmental law enforcement, embraced in the US, are founded on the premise that government may need prompting to enforce the law and that an alternative enforcement mechanism should be provided.²

In Canada, if there is provable harm to an individual or private property, we certainly have the opportunity to pursue a civil action to sue for compensation or to have the impugning activity stopped (by way of an injunction). There is also the ability to pursue a private prosecution of a violation of our environmental laws and to challenge government decisions through judicial review.³ Neither of these approaches can be viewed as analogous to citizen suits in the United States.

¹ Section 504 of the *Criminal Code of Canada*, R.S.C. 1985 c. C-46. "Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information".

² See Karl S. Coplan "Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law" 25 *Colo. Nat. Resources, Energy Evtl. law Review* 61 (2014) and Carie Goodman McKinney "Statute of Limitations for Citizens Suits Under the Clean Water Act" (1986) *Cornell Law Review* Issue 1, Vol: 72, online: Cornell University Law Library <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3300&context=clr>>.

³ Discussed further *infra*.

David Mossop, of the Environmental Defender's Office in Sydney Australia, has commented on why a country may be hesitant to adopt citizen suits, noting:⁴

First, the prospect of citizen suits gives real enforcement "teeth" to public law. Public law creates and regulates public rights. While the public at large benefit from the enforcement of public rights there are private interests that will not. In the environmental field this conflict is obvious. The private interests opposing the expansion of public rights and the elements of the executive that support those interests, are hostile to citizen suits.

Second, citizen suits create a form of accountability that has been lacking from the process of government administration. Why is this so? It is because citizen suits empower ordinary citizens to enforce the law, so that environmental decision making is government by the rule of law and not the rule of bureaucrats and Ministers.

Public participation in enforcement may also be viewed as an important tool to ameliorate agency capture (i.e., minimize risks that regulators become biased in favour of the industry they regulate).⁵ Objectivity and accountability in enforcement of our laws requires transparency.⁶ Public participation in the enforcement process can lead to increased transparency by allowing for public input into the creation of enforcement priorities and public reporting and oversight in how enforcement budgets are allocated.⁷ From a regulator's perspective however, transparency may on occasion fail to provide increased legitimacy in decisions, as it may illustrate shortcomings in knowledge and authority or fail to overcome public concern over contentious issues.⁸

⁴ See David Mossop *Citizen Suits – Tools for Improving Compliance with Environmental Laws*, online: Australian Institute of Criminology, http://www.aic.gov.au/media_library/publications/proceedings/26/mossop.pdf See also <http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/26.html> Alberta would likely make an interesting case study of the cultural and sociological underpinnings of environmental laws and their enforcement.

⁵ See Margaret H. Lemos "Accountability and Independence in Public Enforcement" Draft March 2016. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748720. Lemos notes, in the US, as in Canada, that judicial review is not overly effective mechanism for the public to ensure enforcement accountability in the regulator. These tools may include judicial review, transparency in enforcement policy and administration, and limits on lobbying around enforcement.

⁶ See Lemos at 46.

⁷ *Ibid.*

⁸ See Jennifer Nash and Daniel E. Walters "Public Engagement and Transparency in Regulation: A Field Guide to Regulatory Excellence. Research Paper Prepared for Penn Program on Regulation's Best-in-Class Regulator Initiative, June, 2015. <https://www.law.upenn.edu/live/files/4709-nashwalters-ppr-researchpaper062015.pdf>

The importance of transparency has also been identified in the Alberta context. Cary Coglianese and Shari Shapiro, in investigating regulatory excellence in the province, observed that institutional transparency (and concerns of regulatory/agency capture), procedural and decision transparency were all relevant.⁹

Citizen suits and citizen enforcement of laws remain contentious. Some argue that these suits can undermine or subvert the valid administrative role of government in assessing and weighing public policy reasons in enforcement of regulatory laws.¹⁰

However, the ELC views citizen enforcement and citizen suits as a valid mechanism to assist in compliance efforts, to broaden citizen engagement in monitoring and enforcement, and to prompt government action which may otherwise be unduly constrained.

The legislative framing of private enforcement mechanisms may deal with the following matters:

1. Standing

Standing refers to the right to bring a specific action (as defined in statutory or common law). For the purpose of this report we will focus on legal provisions that enable the general public, that is to say any citizen or resident of a jurisdiction, to bring an action. There may also be instances where standing is limited to private individuals who have suffered harm by someone violating an environmental statute.¹¹ Both can be viewed as valuable approaches to engage the public in the enforcement of environmental laws.

2. Standard of proof

The standard of proof refers to the level of proof needed to be successful in a legal action. Prosecutions under environmental statutes typically require proof of the elements of an offence “beyond a reasonable doubt” as they are typically considered quasi-criminal in nature and can

⁹ See Penn Program on Regulation, *Summary Report: Alberta Dialogue on Regulatory Excellence*, Rapporteur’s report from the Pen Program on Regulation, Alberta Dialogue on Regulatory Excellence, April 12-14, 2015, Calgary Alberta.

<https://www.law.upenn.edu/live/files/4705-0412-1415-alberta-dialogue-summary-report.pdf>

¹⁰ See for instance Patrick S. Cawley “Diminished Need for Citizens Suits to Enforce the Clean Water Act” (2015) *Journal of Legislation* 5:2, online: University of Notre Dame Law School

<http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1190&context=jleg>.

¹¹ See discussion of EPEA below.

result (although very rarely do) in incarceration of the accused. Civil law suits have a lower standard of proof, referred to a “balance of probabilities” or the “preponderance of evidence” (in the US), which basically means that one side’s evidence is sufficient to allow the judge to come to factual conclusions about the case.¹²

3. Onus of proof

The onus of proof refers to which party must prove what. For instance, in a prosecution of most environmental laws the Crown (or private prosecutor) has to prove the elements of the offence beyond a reasonable doubt, once proven, the defence must show, on a balance of probabilities that it took all reasonable steps to avoid committing the offence. For civil law suits the onus of proof is on the person claiming they were harmed by a specific action of the defendant.

Sometimes the “traditional” onus of proof is switched in some circumstances, referred to as a reverse onus.¹³

4. Defences

The types of defences that may be mounted vary with the type of action, i.e. prosecution versus civil action. These defences are outlined in the law and may include things like a statutory authorization and due diligence.

5. Remedies (orders/injunctions & damages)

The remedies for infringements of a right to a healthy environment will typically be in two broad categories, damages (which may include fines and/or costs for restoration) and court orders to stop, remediate the harm and restore the environment.

6. Costs of bringing private enforcement

¹² See David L Schwartz and Christopher B. Seaman “Standards of Proof in Civil Litigation: An Experiment From Patent Law (2013) *Harvard Journal of Law & Technology* 26:2 , online: Harvard Journal of Law & Technology <<http://jolt.law.harvard.edu/articles/pdf/v26/26HarvJLTech429.pdf>>.

¹³ An example of reverse onus is outline, *infra*.

Bringing private enforcement actions can be expensive as often lawyers and experts must be hired. These costs are typically borne by the private enforcement party. The laws in the United States provide for the payment of costs of attorney's fees which enables citizen participation.

In some instances the party bringing an enforcement action may be required to cover some of costs defending an alleged violation. Statutes may also require the posting of security for costs for some types of actions.

A. Private enforcement opportunities in Alberta

Albertans do have opportunities to pursue enforcement of environmental laws (both federal and provincial). These opportunities are often limited in scope or have a variety of other barriers to them. Specifically Albertans may pursue private prosecutions, initiate investigations, undertake judicial reviews, and pursue civil actions in certain instances. Judicial review of other decisions made pursuant to environmental laws are not so narrowly prescribed as those related to enforcement.

I. Private prosecutions

The Environmental Law Centre published *Enforcing Environmental Law: A guide to private prosecutions* in 2004, and it describes a private prosecution as:¹⁴

A private prosecution is a legal action commenced in the criminal courts by an individual (other than a government official) to enforce the law.¹⁵ The right to launch a private prosecution was inherited from the English common law and is recognized in Canada by statute.¹⁶ In essence, the right ensures that every citizen is able to lay an information (also known as a "charge") regarding an alleged offence before a Provincial Court Judge or Justice of the Peace. The right is subject to statutory restrictions, and has been narrowly interpreted by our courts.

¹⁴ James Mallet, (2nd ed.) (Edmonton: Environmental Law Centre, 2004).

¹⁵ Although the individual may represent a group or association, a private prosecution may only be commenced by an individual who swears an information.

¹⁶ *Criminal Code*, *supra* note 1, s. 504.

Private prosecutions have a long and distinguished history, but play a very different role today than in the past (see below, *A brief history of private prosecution*). The great majority of private prosecutions relate to offences against the person and property, such as assault or theft. In the environmental context, private prosecutions have been used to bring attention to and halt illegal activity, to highlight failings in government enforcement, and to hold government and government officials accountable for environmental offences or other unlawful actions.

The historical right to commence a private prosecution continues to be an important function of the criminal justice system.¹⁷

Private prosecutions are possible under both federal and provincial environmental laws. Past private prosecutions have been initiated (but rarely completed) under the federal *Fisheries Act* and the *Migratory Birds Convention Act*.

Some jurisdictions have adopted the private prosecution approach directly into their environmental laws. For example, the Yukon *Environment Act* states:

19(1) An adult person resident in the Yukon may commence a private prosecution in respect of an offence under this Act or a regulation under this Act or under a schedule 1 enactment or a regulation under a schedule 1 enactment.

(2) When a private prosecution under subsection (1) results in a conviction, the court may order at the time that sentence is imposed that all or a portion of the fine imposed, when collected, shall be paid to the person commencing the private prosecution to assist in defraying the expenses incurred by the person in respect of the private prosecution.

The effectiveness of private prosecutions may be compromised due to evidentiary challenges, including the need to prove all elements of the offence beyond a reasonable doubt, the need for resources to hire relevant scientific experts and lawyers, and a lack of statutory investigation (and

¹⁷ Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 3.

search and seizure) powers. Furthermore, judicial review of the administration of enforcement provisions of legislation is very limited (see below).

II. Judicial review of enforcement and compliance decisions

Canadian courts retain discretion to oversee administration of our laws. The ability to have the courts review administrative decision is fundamental in ensuring a level of accountability. Foundational to this judicial review power is the need for decision makers to provide reasons for their decisions and the ability to access relevant information used to make the decision.

Notwithstanding this ability to review decisions, our courts have been very deferential towards decisions of the government when it comes deciding whether to enforce our laws in a given instance.¹⁸ For example, in the case of *Kostuch vs. Kowalski* the court held that the discretion of the Attorney General to either lift a stay (and conversely issue a stay) of proceeding by the Crown is nearly absolute.¹⁹ Dr. Martha Kostuch had sworn an information alleging violation of the federal *Fisheries Act* by the province in the construction of the Oldman River Dam. The test set out in this case for lifting a stay of proceeding was that of “flagrant impropriety on the part of the Attorney General”.²⁰ The court observed that such a test requires proof bordering “on corruption by the Crown, violation of the law, bias against a particular offence or prejudice against the accused”.²¹

The Crown discretion to intervene (and subsequently stay) a private prosecution has also been confirmed.²²

¹⁸ *Kostuch v. Kowalski*, [1991] 6 WWR 160; 81 Alta LR (2d) 214, 1991 CanLII 5874 (AB QB). *Ochapowace First Nation v. Canada (Attorney General)*, [2008] 3 FCR 571; Upheld by the Federal Court of Appeal; Leave to the Supreme Court of Canada was subsequently denied.

Ochapowace First Nation (Indian Band No. 71) v. Canada (Attorney General), 2009 CanLII 57571 (SCC).

¹⁹ *Kostuch v. Kowalski*, [1991] 6 WWR 160; 81 Alta LR (2d) 214, 1991 CanLII 5874 (AB QB). *Ochapowace First Nation v. Canada (Attorney General)*, [2008] 3 FCR 571; Upheld by the Federal Court of Appeal; Leave to the Supreme Court of Canada was subsequently denied.

²⁰ *Ibid.* at para 4.

²¹ *Ibid.* at para 13.

²² *Kostuch v. Alberta (Attorney General)*, 1993 CanLII 7136 (AB QB), <<http://canlii.ca/t/28pov>>.

III. Requesting an investigation

Environmental rights may include the ability for citizens to initiate a compliance and/or enforcement response by government. An option that exists under the provincial *Environmental Protection and Enhancement Act* for 2 people (who are residents of Alberta) to formally request an investigation into an alleged violation of the law.²³ Upon such a request the Director must investigate matters considered relevant to the alleged offence and provide a report to those requesting the investigation.²⁴

Government has broad discretion in carrying out the investigation and in deciding whether any compliance and enforcement arising from the investigation should be pursued.

IV. Civil causes of action

Legislation may provide a statutory cause of action for harm resulting from the violation of the Act. For instance, Alberta's *Environmental Protection and Enhancement Act* states that anyone suffering "loss or damage as a result of the conduct that constitute the offence" may sue for an amount equal to their loss.²⁵ This provision only applies where there has been a conviction in relation to the conduct.

B. Environmental enforcement in Bills of Rights

There are multiple potential approaches to enabling public enforcement and compliance with environmental laws. The central approach taken in Environmental Bills of Rights (and related proposed legislation) can be categorized as enabling:

1. Civil causes of action for violation of legislation;
2. Civil causes of action for harm to public and/or environmental resources or public land; and
3. Actions against government in relation to administration of laws.

The nature and scope of such actions differs from jurisdiction to jurisdiction.

²³ R.S.A. 2000, c. E-12 at s.196 and 197.

²⁴ *Ibid.* at s.197.

²⁵ *Ibid.*

I. Current and proposed Canadian approaches

Several Canadian jurisdictions have enabled various types of actions for harm to the environment.

i. Ontario

Section 84 of Ontario's *Environmental Bill of Rights* enables a right of action where "a person has contravened or will imminently contravene an Act, regulation or instrument" which "has caused or will imminently cause significant harm to a public resource of Ontario".²⁶ This action is limited to instances where the plaintiff has applied for an investigation (requested by 2 residents of Ontario) and it has not received a response in a reasonable time or where the response itself is not reasonable.²⁷ The potential action is also limited in relation to harms resulting from farming activities.²⁸

Possible defences for these actions include proving that due diligence was exercised, the alleged contravention is otherwise authorized provincially or federally, and that the defendant reasonably interpreted the instrument that was the subject of the alleged contravention.²⁹

Remedies include the ability of the court to grant an injunction, order a negotiated restoration plan, grant declaratory relief and make any other order appropriate in the circumstances, including an order of costs.³⁰

Additional provisions allow for:

- The dismissal of an action where the court finds it is in the "public interest",³¹
- The ability to request an investigation;³²
- The awarding of costs;³³ and
- Time limitations on the bringing of actions.³⁴

²⁶ S.O. 1993, c.28.

²⁷ *Ibid.* at s.84(2).

²⁸ *Ibid.* at s.84(4&5).

²⁹ *Ibid.* at s.85.

³⁰ *Ibid.* at s.93.

³¹ *Ibid.* at s.90.

³² *Ibid.* at Part V.

³³ *Ibid.* at s.100.

ii. Yukon Territory

The Yukon Environment Act provides that any resident, who has “reasonable grounds to believe that a person has impaired or is likely to impair the environment... may commence an action in the Supreme Court”.³⁵ Similarly, any resident who has “reasonable grounds to believe that...the government has failed to meet its responsibilities as trustee of the public trusts to protect the natural environment from actual or likely impairment may” also commence an action.³⁶

Defences to such an action include that the activity was authorized, “the activity has not caused and is not likely to cause material impairment of the natural environment”, that there is “no feasible or prudent alternative to the activity”, or where the impairment does not cross the boundaries of private property.³⁷

The Act further provides clarity around actions for what may otherwise be considered public nuisance actions at common law, by providing that an action need not show greater or different types and levels of harm than any other persons or a pecuniary or proprietary interest.³⁸

Yukon legislation also has a reverse onus provision related to the causal link between the defendant and the impairment of the environment.³⁹ Specifically, where it is proven that “the release of a contaminant has impaired” the environment and that the defendant released a contaminant of that type (and the relevant time) then the onus on the defendant to prove that they did not cause impairment.⁴⁰

Remedies for these actions include injunctions (i.e. directive orders of the court), declarations, damages (paid to the Minister but with limits on disbursement of said funds), costs, and any other remedy deemed appropriate.⁴¹ Additional monitoring and restoration actions may also be ordered.⁴²

³⁴ *Ibid.* at s.102.

³⁵ Yukon *Environment Act* R.S.Y. 2002, c.76.s.8.

³⁶ *Ibid.*

³⁷ *Ibid.* s.8

³⁸ *Ibid.* at s.10.

³⁹ *Ibid.* at s.11.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at s.12.

⁴² *Ibid.*

iii. North West Territories (NWT) and Nunavut

The legislation of NWT and Nunavut enables actions against persons responsible for releases as well as the ability to prosecute an offence (under listed legislation).⁴³ The Act does not apply to authorized activities.⁴⁴ There are also limits where contaminant release is contained to property owned by the defendant or where owner consents to release and where the release does not or will not “materially impair the quality of the environment”.⁴⁵

Courts may grant interim or permanent injunction, order a defendant to remedy any damage caused, or order payment of compensation for loss or damage to a person with an interest in property adversely affected, and the Minister.⁴⁶

Other aspects of note include:

- Residents also have the ability to request an investigation into releases.⁴⁷
- A person need not show additional or different harm or a pecuniary right.⁴⁸
- Whistle blower protection.⁴⁹

iv. Quebec

Quebec has embedded its right to a healthy environment in the *Environmental Quality Act*.⁵⁰ The approach to enforcement and scope of remedies is quite narrow compared to other relevant jurisdictions. Enforcing the right to a healthy environment is by way of applying to the courts to issue

⁴³ *North West Territories and Nunavut Environmental Rights Act*, RSNWT 1988, c 83 (Supp), <<http://canlii.ca/t/527hc>> Ss.5 & 6

⁴⁴ *Ibid.* at s.2(2).

⁴⁵ *Ibid.* at s.6(5).

⁴⁶ *Ibid.* at s.6(4) Money received by the Crown must be used for dealing with the contamination or other environmental enhancements.

⁴⁷ *Ibid.* at s.4. Two residents are required to initiate an investigation.

⁴⁸ *Ibid.* at s.6(2). This distinguishes the statutory approach from a common law public nuisance action where specific harm or special damages above the general public is required. See, in obiter, *Paron v. Alberta (Minister of Alberta Environmental Protection)*, 2000 ABQB 464 (CanLII)

⁴⁹ *Ibid.* at s.7

⁵⁰ *Environment Quality Act*, CQLR c Q-2.

an injunction. A judge may grant an injunction to prohibit the action which interferes with a right to a healthy environment.⁵¹ Security for costs is limited to \$500 for an injunction.⁵²

Recent use of this provision has seen variable success. An interlocutory injunction was successfully obtained under the *Environmental Quality Act* to halt work related to the Energy East Pipeline and potential impacts on beluga whales.⁵³ The court in this case also suspended the effect of a certificate of authorization for the work issued by the environment department.⁵⁴ Similarly, an injunction was issued to stop work in relation to disturbance of wetlands and watercourses.⁵⁵ Another application for an injunction related to the beluga whale was unsuccessful.⁵⁶

II. Success of existing approaches

Notable about all these provisions is the general lack of use. There are likely several reasons for this. In Ontario for instance, a review conducted in 2004 by the Canadian Environmental Law Association (CELA) observed that only a couple of actions were initiated and none went to trial.⁵⁷ CELA notes that the limitations on the actions, including the preconditions to an action, narrow definitions, the need to prove “significant harm”, nature of defences, and costs all contribute to undermine the legislation’s application.⁵⁸

i. Proposed approaches

There have been several failed attempts to pass Bills protecting environmental rights both federally and provincially. While these proposed statutes arose from opposition parties, they provide examples of potential approaches albeit ones which have not stood the test of application.

⁵¹ *Ibid.* at s.19.2

⁵² *Ibid.* at s.19.4

⁵³ *Centre québécois du droit de l'environnement c. Oléoduc Énergie Est ltée*, 2014 QCCS 4398 (CanLII), <<http://canlii.ca/t/gfrqhq>>

⁵⁴ *Ibid.*

⁵⁵ *St-Cuthbert (Municipalité de) c. Gestion DGNE inc.* [10] *Centre québécois du droit de l'environnement c. Oléoduc Énergie Est ltée*, 2014 QCCS 4398, 2016 QCCS 5059 (CanLII), <<http://canlii.ca/t/gv7sq>>

⁵⁶ *Centre québécois du droit de l'environnement c. Oléoduc Énergie Est ltée*, 2014 QCCS 4147 (CanLII),

⁵⁷ See Richard Lindgren, *The Environmental Bill of Rights Turns 10 Years-Old: Congratulations or Condolences?*, Prepared for Environmental Commissioner’s EBR Law Reform Workshop June 16, 2004, CELA Publication #474. online:

http://www.cela.ca/sites/cela.ca/files/uploads/474EBR_turns_10.pdf This is not necessarily indicative of failure unto itself, as many citizen suits in the US are resolved prior to the need to proceed with a formal action. In the Ontario example however there were multiple barriers that appear to have undermined the actions.

⁵⁸ *Ibid.*

Proposed Canadian Environmental Bill of Rights

The federal private member's Canadian Environmental Bill of Rights (Bill C-634) was tabled in 2014 but not passed.⁵⁹ The bill created the ability for residents of Canada to bring an "environmental protection action".⁶⁰ This action is possible against a government or individual.⁶¹

An action lies against the government for failing to meet "its duties as trustee of the environment, "failing to enforce an environmental law", or "violating the right to a healthy and ecologically balanced environment."⁶² Legal actions are feasible for government action or inaction that has resulted or is likely to result in "significant environmental harm".⁶³ Authorizing an activity that may result in the harm is not a defence.⁶⁴

An action against an individual lies in instances where a person who has contravened or is likely to contravene an "Act of Parliament or other statutory instrument that has resulted or is likely to result in significant harm."⁶⁵ The Bill prescribes a reverse onus once a plaintiff has demonstrated a "*prima facie* case of significant environmental harm" resulting in a shift of the burden of proof to the defendant that their "actions or inactions will not result in significant harm".⁶⁶ In this way the bill attempts to deal with some of the difficult evidentiary issues faced by private actions of this nature.

An authorization does not provide a defence to these actions unless the harm is shown to be inevitable and there is no reasonable or prudent alternative to avoid the harm.⁶⁷ Additional aspects of the bill include:

- Setting the burden of proof at a civil standard (balance of probabilities);

⁵⁹ An Act to establish a Canadian Environmental Bill of Rights, 41st Parliament, 2nd Session (C-634)
<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6746697&File=77#16>

⁶⁰ http://www.cela.ca/sites/cela.ca/files/uploads/474EBR_turns_10.pdf

⁶¹ *Supra* note 59 at ss.17 & 18.

⁶² *Ibid.* At s.17.

⁶³ *Ibid.* at s.17(2). Such a provision could be used to challenge inaction on climate change. For examples of such litigation see Kelsey Cascadia Rose Juliana, *et al.* v. United States of America Case No. 6:15-cv-01517-TC, D. Ore, 2016, online: <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5824e85e6a49638292ddd1c9/1478813795912/Order+MT+D.Aiken.pdf>

⁶⁴ *Ibid.* at s.17(3).

⁶⁵ *Ibid.* at s.18.

⁶⁶ *Ibid.* at s.18(2).

⁶⁷ *Ibid.* at s.18(3).

- Limits on plaintiff's liability to pay damages at \$1000 resulting from the granting of an interim order;
- The ability to seek and courts to issue interim orders to avoid harm.
- Remedies including injunctions and a variety of restoration and remedial orders, and the ability to require financial security, to suspend or cancel authorizations or to make other payments focused on restoring or enhancing the environment.⁶⁸

Finally, the Bill also deals with costs of the action and limits a plaintiff's liability for costs to frivolous, vexatious or harassing actions and enables the awarding of "counsel fees" to the plaintiff (regardless of whether they are represented by counsel).⁶⁹ An advance award of costs may be granted by a court as well.⁷⁰

Previously proposed Alberta Bill -Bill 302 (1992) and Bill 213 (1978)

Opposition parties previously tabled Environmental Bill of Rights legislation; including in 1992 and 1978(attempts were also made in 1991 and 1980). A summary of the citizen actions and remedies is summarized in table 1 below.

TABLE 1: PAST EFFORTS AT ENVIRONMENT ENFORCEMENT APPROACHES IN ALBERTA BILLS.

<i>Provision</i>	<i>Bill 302 (1992)</i>	<i>Bill 213 (1978)</i>
Right of Action against person responsible for a release	<p>A person may commence an action where an "activity" contaminated or degraded the environment or is likely to". (s.5) (No need to establish that infringement of an approval or permit).</p> <p>Judicial review may be pursued in relation to the exercise or non-exercise of any powers or the fulfilment or non-fulfilment of any statutory duty imposed on a Minister.</p> <p>Enables civil suits – where reasonable grounds that prescribed acts or</p>	<p>An action is enabled for releases on Crown or municipal land (i.e. an action for releases on public land) against any person who</p> <p>(A)released the pollutant or allowed it to escape, or</p> <p>(B) had a duty to prevent the release or escape of the pollutant and failed therein if</p> <p>"that environment or the public trust therein is thereby destroyed or its quality significantly decreased, or if such release or escape if continued or repeated is likely to destroy or</p>

⁶⁸ *Ibid.* at s.19 -24

⁶⁹ *Ibid.* at s.25.

⁷⁰ *Ibid.* (special circumstances such as test cases and novelty of points of law are to be considered in a costs decision).

<i>Provision</i>	<i>Bill 302 (1992)</i>	<i>Bill 213 (1978)</i>
	regulations have been violated. (s.6)	significantly decrease the quality of the environment or the public trust therein." (s.3)
Right of action against violator of act	Any person "on reasonable ground to believe" a person is in violation of any act may commence an action. S.6 (not available if Ministry is diligently pursuing enforcement action).	Provides for private prosecutions (s.2).
Security of for costs	Security for costs limited to \$1000.	Security for costs (s.4) (not in excess \$5000).
Onus and Defences	<p>Once plaintiff establishes likely effect from activity the onus is on the defence that there is no feasible and prudent alternative to the activity and that such activity is in the best interest of the public. (s.9)</p> <p>Defence exists if the activity is authorized except where it is shown (on a balance of probabilities) that the activity will result in severe or irreparable contamination or degradation of the environment.</p> <p>It is not a defence that the defendant is not the sole cause of the alleged or potential contamination or degradation; or that causation cannot be established, (i.e. enough that contaminant was released and is of a nature to cause an effect). s.9(3)</p>	<p>When plaintiff has shown conduct and likely harm the onus is on the defendant to show that it is legally authorized or that there is no feasible or prudent alternative and the conduct is in the best interest of the province. S.5</p>
Remedies	<p>Remedies – order, injunctions, damages, conditions or make such other order. (s.10)</p> <p>Damages arising from citizen suit are to be paid to the Crown. (s.6)</p>	Interim or permanent injunction, order restoration, award damages, impose conditions or make any other order necessary to protect the interest of the plaintiff, the environment or the public trust. (s.6)
Other	Court may appoint experts.	Court may appoint an inspector (to

Provision	Bill 302 (1992)	Bill 213 (1978)
	Court may refer questions to the Board. And the board shall make recommendations to the Court.	undertake technical aspects). S.9 Minister may issues a Control order for one year.s.10 (which allows the exceedance)

III. The US experience with citizen suits

Citizen suits are common in various federal environmental laws in the United States. This includes the *Clean Water Act*⁷¹, the *Endangered Species Act*⁷², the *Clean Air Act*⁷³, and the *Resource Conservation and Recovery Act*.⁷⁴

i. What is a citizen suit?

A citizen suit, as enabled in federal environmental legislation in the United States, enables citizens to sue violators of various environmental laws. The citizen must pass a “standing” test and if successful may seek injunctive or monetary remedies. A citizen suit may also be brought against government agencies for failure to comply with their enabling statutes.⁷⁵

⁷¹ 33 U.S.C. 1251 at. §1365

⁷² 16 U.S.C. Ch. 35 at §1540(g).

⁷³ 42 U.S.C. Ch. 85, § 7604.

⁷⁴ 42 U.S.C. §6901. Several other federal environmental laws contain citizen suits.

⁷⁵ *Supra* note 71 at. §1365(a)(2).

ii. Who has standing to bring a citizen suit?

The standing to bring a citizen suit is dictated by statute. For example, under the *Clean Air Act*, “any person” can bring a suit against any person however the nature of suits are limited to violations of “emissions standards or limitations” under the Act or violations of orders.⁷⁶

Notwithstanding the phrase “any person” the courts have interpreted that a level of interest or connection to an alleged violation to be able to bring a suit.⁷⁷ For organizations there is a need to show injury (i.e. “an invasion of legally protected interests” either to it or one of its members).⁷⁸ In addition the injury must be traceable (i.e. causation must be established), and be of a kind that is likely to be remedied by a court decision.⁷⁹ This test, some have argued, may be applied in an overly narrow way, undermining the apparent intent of *Clean Water Act* citizen suit provisions.⁸⁰

iii. What is the standard of proof in these suits?

In Canada, enforcement against violators of laws typically takes the form of (i) administrative orders and penalties or (ii) a prosecution. Many federal environmental statutes in the US provide an additional option of government or citizens pursuing a civil suit or civil action.⁸¹

The burden of proof in a civil action can be contrasted to the criminal burden of proof of bringing a private prosecution in Canada, where the Crown or private prosecutor, must prove all elements of the offence “beyond a reasonable doubt”. A civil standard of proof is usually characterized as the “preponderance of evidence” or a “balance of probabilities” both of which basically indicate that the decision maker must be satisfied that the accused more likely than not was in violation of a provision.

⁷⁶ *Ibid.*

⁷⁷ See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000).

⁷⁸ Christine Azzaro “Friends of the Earth v. Crown Central Petroleum: A Standing Attack Undermines Environmental Protection” (2000) *St. John's Law Review* 74:4.

⁷⁹ This test is derived from Article III of the U.S. Constitution and was discussed directly in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

⁸⁰ *Ibid.*

⁸¹ For example under the Clean Air Act, see 42 U.S. Code §7413(b) which provides the ability for government to proceed with civil injunctions and civil penalties.

iv. What is the result of a successful citizen suit?

Typically citizen suits result in injunctive relief or monetary fines. Prior to this occurring however, the suits may promote regulatory agency action where a violation has occurred.⁸² Many suits are settled out of court with the alleged violator undertaking to remedy the violation or the government undertaking to regulate or enforce against the polluter.

Adler notes that most citizen suit provisions allow for injunctive relief aimed at remedying the illegal act and for the coverage of legal costs.⁸³ The *Clean Water Act* also allows for the issuance of fines payable to the treasury.⁸⁴

v. How are costs of bringing a citizen suit covered?

The costs of a citizen suit are typically recoverable where they are successful but the awarding of costs is at the discretion of the court. Legal costs in the United States are typically tied to achieving success on the merits of the suit but on occasion courts have limited cost awards to only those instances where the “citizen plaintiff has served the public interest by bringing suit”.⁸⁵

This includes legal fees and other costs of bringing the suit. If monetary fines result from the citizen suit, these are paid to government rather than the citizen plaintiff. As a matter of principle, citizen suits are to be for public interest aims of protecting the environment and should not get a windfall from the suit.⁸⁶ That being said, those pursuing citizen suits may benefit indirectly through settlements or through fostering philanthropic giving.

⁸² Supra note 75 at § 1365 (b).

⁸³ Jonathan Adler, “Stand or Deliver: citizen suits, Standing and Environmental Protection”(2001) *Duke Environmental Law & Policy Reform* 12:39 at 47.

⁸⁴ *Ibid.* also see 33 U.S. Code § 1319. Process is dealt with through 33 U.S. Code § 1365

⁸⁵ See Matthew Burrows, “The Clean Air Act: Citizen Suits, Attorney’s Fees and the Separate Public Interest Requirement” (2009) *Boston College Envrtl. Aff. L. Rev* 36:103.

<http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1002&context=ealr> it is further noted that some statutes require a higher level of success, for example the Clean Water Act allows for costs to be provided to “any prevailing or substantially prevailing party” at 105.

⁸⁶ *Ibid.* at 45. Attorney’s fees and litigation costs by me recovered and, under the *Clean Water Act*, suits may produce fines payable to the treasury, but “at least in theory” there is no direct payment to the group bringing the suit

vi. When might a citizen suit not proceed?

There are various reasons why a citizen suit may not proceed. A key reason arises when a government agency takes on the role of pursuing compliance. This is often accompanied by a requirement that the government “has commenced and is diligently prosecuting a civil action in a court...to require compliance”.⁸⁷ Even then the legislation may grant a citizen the right to intervene.⁸⁸ There is also jurisprudence in the US that citizen suits are not meant to go after one-off past infractions, rather that there must be either continuing or likely recurring infractions.⁸⁹ This jurisprudence has created a barrier to the use of citizen suits.⁹⁰

Evidentiary burdens on citizen suits can also be a barrier.⁹¹

vii. Perspectives on citizen suits

Citizen suits in the United States have garnered both fervent supporters and detractors. Citizen suits have been referred to as “sustenance to a starving agency” and the “essential backbone” of environmental regulation”.⁹² In the context of the *Clean Water Act*, citizen suits have been cited as being important in bringing harmful activities under the federal regulatory structure.⁹³ Adler notes that agencies have failings due to resources scarcity, “limited information, and political pressure”.⁹⁴ In this way citizen suits represent a mechanism for enforcement accountability, and a means to “[fill] the void” that is left by government enforcement, by “deputizing countless private citizens and activist groups to act as private attorneys generally without any public oversight.”⁹⁵

⁸⁷ *Supra* note 75 at §1365.

⁸⁸ *Ibid.*

⁸⁹ See *Chesapeake Bay Foundation Inc. v. Gwaltney of Smithfield Ltd.* 484 US 98 L. Ed 2d 306, 108 S. Ct. 376 (1987).-

⁹⁰ Ann Powers, “Gwaltney of Smithfield Revisited” (1999) *Wm. & Mary Env'tl. L. & Pol'y Rev.* 23:557, online: William and Mary Law School Scholarship Repository <<http://scholarship.law.wm.edu/wmelpr/vol23/iss2/5>>

⁹¹ <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/10644/Howard.pdf?sequence=1>

⁹² George Van Cleve, Congressional Power to Confer Broad Citizen Standing in Environmental Cases, 29 *ENVTL. L. REP.* 10028, 10028 (1999) as cited in Will Reisinger, Trent A Dougherty and Nolan Moser “Environmental Enforcement and the limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick up the Slack” (2010) *Duke Environmental Law & Policy Forum* Vol. 20:1.

⁹³ See Karl S. Coplan “Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law” (2014) *Colo. Nat. Resources, Energy & Env'tl. L. Rev.* 25:1, online:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423918

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* at 43.

On the other hand citizen suits have been criticized as not meeting their intended purpose of enabling local citizens to take action nor increased environmental protection.⁹⁶ In practice, large national non-government organizations (NGOs) have been the primary user of the provisions.⁹⁷ It has also been noted that private industry has been subjected to the suits far more frequently than agriculture or municipalities notwithstanding the fact that those sectors have significant impacts on surface waters.⁹⁸ It is also alleged that suits may be used to create motivation for settlements to avoid the suits and this may be used to attain funding by some NGO's for other environmental purposes.⁹⁹

The polarization of the suits even spills over into educational institutions and environmental law clinics, where law students are engaged in assisting in bringing citizen suits.¹⁰⁰ Efforts to shutter or defund such law student clinics illustrate the extent of the animosity.¹⁰¹ This animosity may be a reflection of the success or efficacy of these suits.

The California Water Boards undertook a "snapshot" of citizen suits under the Clean Water Act in the state that occurred between March 2009 and June 2010.¹⁰² Notable observations from the snapshot include:

- The vast majority of the suits were brought by environmental non-governmental organizations;¹⁰³
- The enforcement was not generally at odds with the states regulatory bodies and "addresses violations that the regional boards cannot pursue due to resource constraints";
- Many of the suits are settled with a focus on having specific violations remedies while monetary penalties were more limited recognizing that these funds go the government;

⁹⁶ *Ibid.*

⁹⁷ See Jonathan Adler, "Stand or Deliver: citizen suits, Standing and Environmental Protection"(2001) *Duke Environmental Law & Policy Reform* 12:39 at 48, citing Michael S. Greve, "The Private Enforcement of Environmental Law" (1990) *Tul. L. Rev.* 65:339 at 341.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Hope M. Babcock "How Judicial Hostility Toward Environmental Claims and Intimidation Tactics by Lawyers Have formed the Perfect Storm Against Environmental Clinics: What's the Big Deal About Students and Chickens Anyway?" (2010) 25 *J. Envrtl. L & Litig.* 249, online: Georgetown Law School Scholarship, <<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1943&context=facpub>>.

¹⁰¹ *Ibid.*

¹⁰² California Water Boards, *Citizen Suit Enforcement Under The Federal Clean Water Act A Snapshot of the California Experience Based on Notices of Intent to Sue March 2009 through June 2010*, May 2011, online: http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/citizen_suits/citizen_suit_report.pdf

¹⁰³ *Ibid.* at 4.

- Regulatory agencies may come to rely on these suits to enforce compliance which may be an issue.¹⁰⁴

Other reviews of citizen suits have noted that suits have resulted in an increase out of court settlements by the regulators.¹⁰⁵ Further, “the vast majority of settlements result in forcing a decision, rather than substantive regulation.”¹⁰⁶

IV. Is there anything to prevent Canada from having citizen suits?

Why have citizen suits not been adopted in Canada? Among several reasons governments may feel threatened by the ability to be held to account for failing to enforce the strict letter of environmental laws (as noted by Mossop *supra*). Political and administrative constraints aside, are there legal barriers to their use in Canada?

Assuming that a citizen suit provision is pursued in a manner that requires a lower onus of proof to establish a violation, it is likely there would be limitations on the extent of remedies due to the operation of the *Canadian Charter of Rights and Freedoms*. Specifically, it may be argued that citizen suits remedy should exclude chances of imprisonment and thus be reflective of what is otherwise an “absolute liability offence”, in contrast to environmental prosecutions which are typically of “strict liability” in nature.¹⁰⁷ Specifically, if penalties arising from citizen suits can be construed as unduly limited freedom then such a provision may fall being unconstitutional. The most obvious example is that incarceration would not be feasible if a citizen had a burden of proof lower than that required in a quasi-criminal or criminal proceeding (i.e. beyond a reasonable doubt).

In this regard, citizen suits would reflect a departure from a typical burden of proof associated with enforcement of our environmental laws in Canada (and Alberta).

¹⁰⁴ *Ibid.* at 7.

¹⁰⁵ See Ben Tyson, “an Empirical Analysis of Sue-and-settle in Environmental Litigation” (2014) *Virginia Law Review*, Vol 100: 1545. Also see Stephen M. Johnson, “Sue and Settle: Demonizing the Environmental Citizen Suit” (2014) *Seattle University Law Review* Vol 37:891

¹⁰⁶ *Ibid.*

¹⁰⁷ See *R. v. Raham*, 2010 ONCA 206, 99 OR (3d) 241 and *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299. Absolute liability offences are those where, if the Crown proves that the accused did specific unlawful acts, then a conviction may occur (barring limited defences). Strict liability offences are those where once the Crown has proven that the accused did specific unlawful acts the accused may prove that they were duly diligent, i.e. took all reasonable steps to avoid commission of an offence, and thereby avoid regulatory liability.

Even with citizen laws suits many of Alberta's statutes would need revision to make the suits more useful from an agency obligation perspective. Few obligations are created in our statutes and many are discretionary. Faced with a less activist judiciary in Canada these discretionary decisions would likely be largely immune to challenge by citizen suit as courts to defer to government decision makers.

CONCLUSION

Private enforcement of environmental laws is constrained under current approaches in Alberta and Canada. In Alberta enforcement of environmental laws focuses on private prosecutions and the ability to request an investigation. Successful private prosecutions are undermined by a criminal burden of proof and the related barriers facing a private prosecutor in gathering evidence. Similarly, the ability to question or challenge government decisions around how they choose to administer and enforce environmental legislation is lacking.

Canadian jurisdictions where private enforcement options have been put in place have seen limited use particularly when compared to approaches in the United States. Citizen suits in the United States have been quite successful and there is much that can be learned from this approach.

Legislation supporting a private environmental enforcement options should **avoid** observed pitfalls of other jurisdictions, including:

- Requiring additional proof of harm or novel nature of harm;
- Limitations on the temporal aspect of the violation (excluding existing limitation periods); and
- Unduly limiting initiation or continuation of a citizen action based on unduly narrow standing tests or other preconditions to a suit, including excessive security for costs.

Expanding private enforcement options should consider some of the core approaches taken in the US to citizen suits, including:

- Adopting a civil standard of proof;
- Coverage of legal costs where successful;
- Enabling transparent and open access to monitoring and reporting information;
- The ability to hold government accountable to legislative obligations and responsibilities; and
- Limiting remedies to orders to restore the environment and financial penalties.