

***SUBMISSION TO THE COMMISSION FOR ENVIRONMENTAL  
COOPERATION***

***PURSUANT TO ARTICLE 14,  
NORTH AMERICAN AGREEMENT  
ON ENVIRONMENTAL COOPERATION***

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*Legislation and regulation are only as good as their enforcement.*

*Canada's Compliance and Enforcement Policy for Wildlife<sup>1</sup>*

*Wildlife and its habitat are very important to Canadians. They are reflected in the image Canadians have of themselves and of their country. They have great aesthetic value and provide recreation and relaxation benefits. They are an integral part of the cultural heritage of aboriginal peoples and are a resource of significant economic value. For these and other reasons, Canadians are determined to conserve their wildlife heritage. In order to protect wildlife and its habitat, to maintain and restore biological processes and biodiversity, and to ensure that all uses of wildlife are sustainable, Canadians have taken on local, national, and international obligations.*

*Canada's Compliance and Enforcement Policy for Wildlife<sup>2</sup>*

## **I. SUMMARY**

In this submission, we identify the failure of the Canadian Government to effectively enforce subsection 6(a) of the *Migratory Birds Regulations*<sup>3</sup> against the logging industry in Ontario. We rely on Article 14 of the *North American Agreement on Environmental Cooperation* to assert that a response from Canada is merited for the failure to enforce this environmental law.

Subs. 6(a) of this regulation makes it an offence to disturb, destroy or take a nest or egg of a migratory bird. The regulation was made under the *Migratory Birds Convention Act, 1994*.<sup>4</sup> This Act is the successor of Canadian legislation first passed over 80 years ago to implement an international treaty to protect migratory birds.

Our research, based on statistical data, estimates that in the year 2001 clear-cutting activity in Ontario destroyed over 85,000 migratory bird nests in specified areas.

Environment Canada, through its agency the Canadian Wildlife Service, is primarily responsible for enforcing the Act. Virtually no action has been taken to enforce subs. 6(a) of the regulation against logging companies, logging contractors and independent operators. Indeed, despite the estimated widespread destruction of bird nests, an *Access to Information* request revealed no investigations or charges in Ontario for a violation of subs. 6(a).

The failure to enforce subs. 6(a) compromises crucial public and private interests in protecting migratory birds. In addition to the harmful impact on the migratory bird population itself there are negative consequences for wildlife biodiversity, tourism, respect for the law, fair competition within the logging industry, and healthy wood stocks.

## **II. THE LAW**

### **a. Subsection 6(a) of the *Migratory Birds Regulations***

Subs. 6(a), *Migratory Birds Regulations* ("MBR") is a regulation made under the authority of the *Migratory Birds Convention Act, 1994* ("MBCA"). It says no person shall:

**disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird ... except under authority of a permit therefor.**

### **b. History of the law**

In 1916, the governments of the United Kingdom, on behalf of Canada, and the United States signed a treaty ("the 1916 Convention") to "protect birds that traverse parts of Canada and the US in the course of their annual migration". The 1916 Convention, one of the oldest international agreements for environmental protection, said about migratory birds:

... many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops in both Canada and the United States, but are nevertheless in danger of extermination through

lack of adequate protection during the nesting season or while on their way to and from their breeding grounds...

[The governments] being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects...<sup>5</sup>

In 1917 the government of Canada passed the first *Migratory Birds Convention Act* in order to implement the 1916 Convention. This law was replaced in 1994 by the current statute. The MBCA, among other things, modernized the language of the earlier Act and updated and enhanced certain enforcement provisions.

Subs. 12(1) of the MBCA allows the Government to make regulations to carry out the Act and the Convention, including regulations to prohibit the killing or taking of migratory birds and nests, and for issuing permits for the killing or taking of birds or nests.<sup>6</sup>

In 1999, a protocol between Canada and the United States ("the Protocol") was ratified<sup>7</sup> to amend the 1916 Convention. The Protocol reaffirmed the commitment of both countries to the purposes and objectives of the original convention. It recognized certain rights of aboriginal peoples and amended and updated<sup>8</sup> the 1916 Convention "to enable effective actions to be taken to improve the conservation of migratory birds..." Canada and the U.S.A. declared themselves,

Committed to the long-term conservation of shared species of migratory birds for their nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values through a more comprehensive international framework that involves working together to cooperatively manage their populations, regulate their take, protect the lands and waters on which they depend, and share research and survey information...<sup>9</sup>

### **c. The penalties**

Violations of subs. 6(a), MBR may be prosecuted by way of summary conviction or as an indictable offence. The penalties are significant and reflect the Parliament of Canada's view about the seriousness of these offences.

Section 13, MBCA provides that for a summary conviction offence, a company faces a maximum fine of \$100,000, an individual a maximum \$50,000 fine. Individuals are also liable to jail terms up to 6 months, or a combination of jail and a fine. For indictable offences, the maximum fines are \$250,000 for a company and \$100,000 for an individual. Individuals are also liable to jail terms up to 5 years, or to both a fine and jail sentence. With subsequent offences the maximum fine to which an individual is liable is doubled.

### **d. Subs. 6(a), MBR is an environmental law**

Subs. 6(a) falls within the Article 45(2),<sup>10</sup> *North American Agreement on Environmental Cooperation* ("NAAEC") definition of an environmental law because the MBCA provides for the protection of migratory birds, a type of wild fauna.<sup>11</sup> Subs. 6(a), MBR is an essential aspect of the MBCA as it protects the nests and eggs of migratory birds.

**e. Enforcement agencies**

Subs. 6(1) of the MBCA says,

The Minister may designate any person or class of persons to act as game officers for the purposes of this Act and the regulations, and all members of the Royal Canadian Mounted Police are game officers for the purposes of this Act and the regulations.

The Minister has appointed<sup>12</sup> Environment Canada ("EC"), through its agency the Canadian Wildlife Service ("the Wildlife Service") to enforce the MBCA. The Wildlife Service says: "[t]he conservation of migratory birds is the joint responsibility of the countries they visit during the breeding, migration, and non-breeding seasons. The recognition of this has led to the development of international treaties" such as the MBCA, to protect these birds.<sup>13</sup> The Wildlife Service says it "is responsible for implementing"<sup>14</sup> the MBCA.

**f. Article 5, NAAEC: Canada must effectively enforce environmental laws**

The NAAEC, Article 5, *Government Enforcement Action*,<sup>15</sup> requires that each Party "effectively enforce its environmental laws and regulations through appropriate governmental action". The stated aim is to achieve "high levels of environmental protection and compliance with its environmental laws and regulations".

**g. Article 14, NAAEC: Recourse to the CEC for a failure to enforce**

Article 14<sup>16</sup> provides non-governmental organizations with the opportunity to bring a complaint to the CEC if Canada is failing to effectively enforce its environmental laws.

### **III. THE EVIDENCE**

**a. Why migratory birds need protection**

*The Economic Significance of Nature-related Activities*, a Canadian government study, reports:

The enjoyment provided by nature has significant impacts on the national, provincial and territorial economies. At the national level, the \$11.7 billion spent in Canada on nature-related activities by Canadians and U.S. visitors led to contributions of \$17.3 billion to gross business production and \$12.1 billion to Canada's gross domestic product (GDP). These expenditures also led to contributions of \$5.9 billion in personal income generated by the 215,000 jobs that were sustained by this economic activity, and \$5.4 billion in government revenues from taxes.<sup>17</sup>

This 1996 study also estimated that of the \$7.2 billion Canadians spent on outdoor activities in natural areas a full \$1.3 billion was for wildlife viewing.<sup>18</sup> Ontarians spent almost \$2.9 billion on such activities in natural areas of which over \$410 million was for wildlife viewing.<sup>19</sup>

The *North American Bird Conservation Initiative* is overseen by a CEC-sponsored working group and mandated to "improve the conservation of birds and their habitats in North America". Its *Strategy and Action Plan*, says:

Birds constitute a readily recognized component of the biological diversity of North America. Nearly 20% of the world's avifauna inhabits North America. Hundreds of these species are shared among all three nations and many are endemic to North America.

...

Traditional bird conservation efforts have not prevented the slide of more and more species from the “common” category to the “rare” or “overabundant”. After more than a century of rapid environmental degradation (especially habitat loss and fragmentation), without proactive conservation and management measures in place, we will not be able to return to the more normal or healthy state... As birds occupy and are key elements of every ecosystem and habitat on the continent, if we succeed in restoring, managing and maintaining healthy bird populations and their habitats, we will succeed in maintaining a healthy environment for most creatures including humans.<sup>20</sup>

*The Bird Conservation Initiative* also concludes that,

Birds are important natural resources for ecological, economic, and aesthetic reasons. From insect pest control, to plant pollination and seed dispersal, to critical links in the food web, birds are an integral part of dynamic ecosystems. These functions prevent hundreds of millions of dollars in economic losses in agricultural and forest products industries each year. In addition, birds are one of the greatest ecotourism attractions in North America, resulting in billions of dollars of contributions to local and national economies by birdwatchers, hunters, photographers, and others.<sup>21</sup>

In 1997-98 in Ontario, insects destroyed about 8.6 million cubic metres of wood on Crown lands that were eligible for logging.<sup>22</sup> By comparison, 22 million cubic metres of wood were harvested in that area. Migratory birds play a critical role in controlling insect populations in these and other forests.<sup>23</sup> Thus, destroying bird nests and eggs contributes to the destruction of forests.

In a U.S. context, former President Bill Clinton, in directing federal agencies to develop and implement agreements to promote the conservation of migratory birds, said,

Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds.<sup>24</sup>

#### **b. The destruction of migratory bird nests: statistical data and other information**

Our research<sup>25</sup> estimates that over 85,000 nests were destroyed in selected areas of central and northern Ontario by clear-cut logging operations during the year 2001<sup>26</sup> migratory bird-nesting season alone.

This calculation relied firstly on information from *The Canadian Breeding Bird (Mapping) Census Database*<sup>27</sup> for numerical bird densities, including the density of males per 100 hectares, and the number of species for specific ecological regions and, secondly on *Forest Management*

*Plan*<sup>28</sup> data for selected forestry management units in Ontario to determine how many hectares of trees were harvested by clear-cutting. In an area that is clear-cut, by definition practically<sup>29</sup> or literally all the trees are felled. Scientific data leads us to expect a certain number of nests in the trees of that area. The clear-cutting would necessarily destroy those nests.

The *Forest Management Plans* in this calculation include the following forest areas in Ontario:

Algoma Forest	Iroquois Falls Forest	Romeo Malette Forest
Armstrong Forest	Kapuskasing	Sapawe Forest
Auden Forest	Kenogami Forest	Shiningtree Forest
Bancroft and Minden Forest	Kenora	Smooth Rock Falls Forest
Big Pic Forest	Kiashke Forest	Spanish River
Black River Forest	Lac Seul Forest	Spruce River Forest
Black Sturgeon Forest	Lake Nipigon Forest	Sudbury Forest
Brightsand Forest	Lakehead Forest	Superior Forest
Caribou Forest	Mazinaw-Lanark Forest	Temagami
Cochrane	Magpie Forest	Temiskaming
Dog River-Matawin Forest	Moose River	Timmins
Driftwood Forest	Nagagami Forest	Timmins Forest
Dryden Forest	Nakina North Forest	Trout Lake Forest
Elk Lake Forest	Nipissing Forest	Upper Spanish Forest
English River Forest	Northshore Forest	Wabigoon Forest
Flanders Fort Frances Forest	Ogoki Forest	Watabeag
French-Severn Forest	Ottawa Valley Forest	Wawa Forest
Gordon Cosens Forest	Pic River Ojibway Forest	Whiskey Jack Forest
Hearst Forest	Pineland-Martel Forest	White River Forest
Highrock Forest	Red Lake Forest	

This research model further estimates that about 415,000 migratory bird nests will be destroyed during the operative terms (normally five years) of all listed *Forest Management Plans* above.

Finally, EC itself acknowledges that migratory bird nests are destroyed during logging operations. Wildlife Service officials call this "incidental" kill. The evidence comes directly from officials of EC, through an *Access to Information* request:

Many migratory birds are killed during regular forestry activities. Nests are destroyed and birds are killed. We have never looked at this issue in the past but now the NGOs are pushing us to take action. As a first step it has been decided to do a survey of provincial code of practice or regulation dealing with forestry activities...<sup>30</sup>

### **c. Lack of federal input to Ontario *Forest Management Plans***

A *Forest Management Plan* is an Ontario document that guides forestry companies on how much and where logging may be carried out. A typical Plan covers a twenty-year period, divided into five-year segments. These segments are broken down into specific annual work schedules.

The Ontario Ministry of Natural Resources ("MNR") is responsible for ensuring that *Forest Management Plans* are prepared in accordance with the Ontario *Forest Management Planning*

*Manual and Crown Forest Sustainability Act*. While the Manual has provisions to protect several migratory birds, including raptors, herons and waterfowl, it does not include specific conservation measures for most migratory birds that are known to nest in Canada.<sup>31</sup> The Manual does not require any measures to be taken to ensure compliance with the MBCA.

Given that *Forest Management Plans* are prepared in accordance with provincial standards the absence of concern for migratory birds is unremarkable. Presumably the MNR and Ontario Ministry of the Environment ("MOE") take the position that it is not their responsibility to enforce the MBCA, a federal act. What is remarkable, however, given the important federal areas of concern affected by logging, is that the federal authorities are not required to play a role in the development, approval or supervision of the *Forest Management Plans*.<sup>32</sup>

#### **d. The U.S. experience**

On November 19, 1999 various organizations asked the CEC to review the U.S. Wildlife Service's failure to enforce American laws similar to the MBCA. Their submission asserted:

Logging operations directly take or kill a staggering number of migratory birds, through road building, staging of heavy equipment, cutting and bulldozing and burning, activities which all result in the downing of trees and the direct destruction of birds and their nests and eggs. One study found that 666 nests containing juvenile birds or eggs of seven migratory bird species would be destroyed as a direct result of just four timber sales in Arkansas. Another study estimated that up to 9,000 young migratory songbirds would be killed as a direct result of logging a mere seven timber sales during the nesting season in the Chattahoochee National Forest in Georgia.<sup>33</sup>

#### **e. Environment Canada is not enforcing subs. 6(a)**

In 2001, we made an *Access to Information*<sup>34</sup> request of EC seeking:

... all documents related to enforcement initiatives taken by Environment Canada and the Canadian Wildlife Service with respect logging operators, forestry companies or logging operations. More specifically, I would like documents regarding enforcement or efforts to bring about compliance with section 6(a) of the Migratory Birds Regulations ...

The information provided did not reveal a single investigation or charge against Ontario's logging industry for a violation of subs. 6(a) of the MBR on any of the approximately 210,000<sup>35</sup> hectares of forest that are annually harvested in Ontario.

We recognize that enforcement does not only mean prosecution of violations.<sup>36</sup> Our *Access to Information* letter therefore specifically asked EC for documents related to all enforcement activity. In response we did **not** receive, in respect of Ontario's logging industry, a single warning letter, a single written voluntary compliance agreement, a single direction to comply, a single documented investigation, a single public release of non-compliance information, a single inspection report, or a single bulletin on enforcement procedures or the promotion of environmental audits.

We did receive a copy of a slide presentation for industry about relevant laws, but education alone is only a first step of an enforcement strategy. Education about the law with no risk of enforcement assumes compliance automatically follows knowledge --- an assumption the law rarely if ever makes. Finally, given the scope of logging and our calculation of the magnitude of nest destruction, the absence of documented enforcement activity is quite telling.

The Wildlife Service indirectly admits that it does not actively enforce the MBCA. Although it says that the destruction of nests is "incidental" to logging activity and illegal, at the same time it appears to use the notion of "incidental" to justify its non-enforcement of the law.

An exchange by way of email<sup>37</sup> between Mr. S. Wendt, Chief, Migratory Birds Conservation, EC and other EC officials of the national office between May 2 and 22, 2001 is instructive:

From: Mclean, Robert [NCR] ...  
Subject: Minister Goodale's<sup>38</sup> Office  
To: ... Wendt, Steve ...

I spoke this afternoon with Dan Wiklem(?) of Goodale's office. He indicated that forest companies are concerned that CWS is planning to increase its enforcement effort this spring in areas where logging is occurring.

I advised that this is not the case (Ivan, I assume there are no special efforts planned anywhere in Canada that I haven't heard of. If I'm wrong, could you let me know?)

I explained our regulations (incidental take, etc) and noted that if there are compliants [sic], we do have to respond. I noted that our preference is to work cooperatively with forest companies to sustain habitat for birds over the long term rather than focus on the loss of individual nests/eggs. I mentioned that ENGOs are active and let him know about events in the US -- perhaps forest companies are hearing about these activities.

Finally, I mentioned that Steve has been meeting with resource sectors including forest companies to explain our preferred approach. [sic]

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From: Wendt, Steve ...  
To: Mclean, Robert [etc] ...

The forestry industry groups I met with knew there was no planned redirection of resources to enforcement for incidental take of birds in forestry this spring. It sounds as though they may just looking [sic] for political insurance.

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From: Lafleur, Yvan [NCR]...  
Cc: Wendt, Steve ...  
Subject: FW: Boreal forest RE: Minister Goodale's Office  
Importance: High

... I have met with a representative of the Pulp and Paper industry. We had an open discussion about the impact of the lumber operations on migratory birds and express clearly that we were

not planning any enforcement operations to charge the industry. I also said that we are concerned and that we would like to work with them and Steve Wendt to better understand the situation and support positive actions taken by the companies.

We are presently trying to gather the regulations applying to these activities in each of the province [sic] and any other code of practice, guideline or information which could help reduce the incidental kill...

Also instructive on this point is the noted slide presentation<sup>39</sup> entitled *Migratory Birds Regulations: The disturbance, destruction, and take of migratory birds incidental to other activities* given by Mr. Wendt on May 25, 2000 to mining industry "stakeholders." The context of the presentation makes it clear that it also applies to the forestry sector.<sup>40</sup> He confirms that "Incidental take", defined as "unintentional take, incidental to some other activity" is prohibited by the MBCA<sup>41</sup> but later explains that "A common-sense approach has had wide application."<sup>42</sup> "Common-sense" is not defined but it appears that EC takes these notions of incidental and common sense to justify its non-enforcement stance.

The message to industry is implicit but clear. "The destruction of bird nests is illegal. We cannot officially authorize you to break the law. On the other hand, we take a common sense approach that allows you to go about this important economic activity without undue interference." That this is the message is confirmed by the almost complete absence of enforcement action despite the evidence of large-scale destruction of bird nests.

The term "incidental" is not a recognized justification under the MBCA or MBR for destroying bird nests or eggs. While it is clear that the Wildlife Service is concerned about the issue, as reflected in its monitoring and conservation initiatives, it is also clear that it effectively rules out enforcement. An internal draft of a "Forestry Workshop" by EC reflects this thinking:

-There are strong pressures both in Canada and in the US for governments to enforce their regulations protecting nests and individuals.

-Such enforcement should be guided by conservation; an arbitrary approach could be disruptive for the forest industry in many areas of the country, could be strenuous to manage and would not necessarily address the real conservation issues.<sup>43</sup> [Their underlining]

The "arbitrary approach" must mean enforcement action by way of charges. The workshop draft continues by noting that one of its objectives is to develop solutions that benefit birds "in working forest landscapes: that achieve the conservation objectives of the Convention ... more effectively than a single-minded application"<sup>44</sup> of the regulations and prohibitions. [Their underlining]

Firstly, there is no evidence that the existing vague strategy of the Wildlife Service is effective compared to a more proactive strategy.

Secondly, Wildlife Service officials appear to be making a choice about priorities, without any authority to do so. Their primary role is not to facilitate logging for industry as their clients but rather to protect wildlife. To classify the destruction of birds as "incidental" to logging suggests a misapprehension of its role. The Wildlife Service's self-imposed prohibition against using enforcement action may be the result of this misapprehension.

Laws to protect the environment are part of a larger body of laws called public welfare laws. The Supreme Court of Canada has described the MBCA as a "regulatory statute enacted by the Parliament of Canada for the general welfare of the Canadian public ..."<sup>45</sup> Public welfare laws protect a broad range of interests from the safety of workers to the preservation of clean air and water. When these laws are infringed it is often the result of unintentional, not wilful, conduct.<sup>46</sup>

Almost by definition the impact of the logging industry on migratory bird nests would be "incidental" to its logging. It is difficult to conceive of an economic benefit for logging companies from intentionally destroying bird nests.

The logging industry was important to Canada when the 1916 Convention was signed. The industry remained important to Canada when the new MBCA came into force in 1994 and when the Protocol was signed and then ratified in 1999. In 1997, for instance, the forestry industry contributed to Ontario's economy with shipments of more than \$15.0 billion.<sup>47</sup> The Canadian government, however, did not exempt the logging industry from laws to protect migratory birds or their nests. The Wildlife Service cannot undermine Parliament's intention by arbitrarily failing to enforce the MBCA.

#### **IV. ENFORCEMENT ISSUES**

##### **a. The failure to enforce is not a reasonable exercise of prosecutorial discretion**

Article 45 of the NAAEC says a Party has not failed to "effectively enforce its environmental law" if the action or inaction "reflects a reasonable exercise of discretion in respect of investigatory, prosecutorial, regulatory or compliance matters."<sup>48</sup> The failure to enforce subs. 6(a), however, cannot be considered a reasonable exercise of prosecutorial discretion because the Wildlife Service has made a sweeping policy decision, not a case-by-case judgement associated with prosecutorial discretion.

The case of *R. v. Catagas*<sup>49</sup> is instructive. In that case the accused, a member of a First Nations community, was charged with possession of a migratory bird contrary to s. 6 of the MBCA, 1970. In his defence, he argued that the prosecution was an abuse of process because the Crown had a policy of not prosecuting First Nations for such violations. A letter from the Director of the Wildlife Service to his provincial counterpart "that no charges be laid against Indians hunting for food..."<sup>50</sup> supported this position. Manitoba officials had advised their own staff of this policy. The Wildlife Service letter was intended to overcome the *Daniels*<sup>51</sup> decision where the Supreme Court of Canada decided that First Nations were in fact subject to the MBCA.

The Manitoba Court of Appeal agreed that the Crown could use prosecutorial discretion "in relation to a specific case" but concluded,

It is the particular facts of a given case that call that discretion into play. But that is a far different thing from the granting of a blanket dispensation in favour of a particular group... Our laws cannot be so treated. **The Crown may not by Executive action dispense with laws.** The matter is as simple as that, and nearly three centuries of legal and constitutional history stand as the foundation for that principle.<sup>52</sup> [Our emphasis]

As a result, the court entered a conviction because the dispensation was "void and of no effect".<sup>53</sup>

The logging industry appears to enjoy a similar "blanket dispensation" from prosecution for violations of subs. 6(a) of the MBCA. Canadian caselaw would not support such a policy.

EC, in its slide presentation, summarizes the "federal prosecution guidelines" as follows:

"Not the rule that all offences for which there is sufficient evidence must be prosecuted"  
-Evidential criteria  
-Public Interest  
-seriousness, mitigating circumstances, degree of responsibility, alternatives to prosecution, would the prosecution be counter-productive, prevalence of the offense, public concern<sup>54</sup>

The absence of any prosecutions in Ontario leads to the conclusion that EC has applied the above "guidelines" to the industry as a whole instead of merely providing guidance to enforcement officials in individual cases.

A systematic failure to enforce against an entire industry known to engage in practices that violate the MBCA cannot be a legitimate exercise of discretion. This is a "widespread pattern of ineffectual enforcement" similar to that identified by the CEC<sup>55</sup> in the U.S. submission on migratory birds, and as such is a "particularly strong candidate for Article 14 consideration". The extent to which EC has gone to enforce violations of other sections of the MBR supports this argument.<sup>56</sup> In such cases, Canadian courts have exacted stiff penalties<sup>57</sup> even for minor violations.

**b. The failure to enforce is not justifiable as a *bona fide* allocation of resources**

The failure to enforce subs. 6(a), MBR against logging companies, contractors and individual operators is not a *bona fide* decision to allocate resources to the enforcement of other environmental matters that have higher priority pursuant to Article 45, NAAEC.<sup>58</sup>

Firstly, despite their legal jurisdiction to do so, EC has failed to conduct an environmental assessment of a single *Forest Management Plan* or proposed logging operation for the threat to migratory birds.<sup>59</sup> A reasonable exercise of enforcement discretion presupposes some assessment of the relative costs associated with each option. Since EC has not conducted such an assessment, it can hardly say it has made an informed or reasonable decision about the allocation of scarce enforcement resources to areas of more pressing concern.

Secondly, the cost of enforcing subs. 6(a), MBR need not have a significant impact on EC's enforcement budget. There are four reasons:

- (a) The logging industry is very competitive and its members are likely to be responsive to enforcement actions since such actions would quickly raise awareness of subs. 6(a).
- (b) The MBCA's requirements can also be given greater prominence by EC working with the MNR to include those requirements in the *Forest Management Planning Manual*.
- (c) When surveying an area, logging companies and operators in Ontario are already required to search for and identify nests belonging to, for instance, Bald Eagles, Osprey and Herons as well as certain endangered species. Once a nest is identified, the company must provide protection in the form of a buffer zone as set out in the guidelines. By emphasizing to the logging industry the necessity of training their tree markers to identify all migratory bird nests and to refrain from disturbing or destroying them would not represent a significant expense to EC. While this cost of doing business may be significant to a particular logging company it will be roughly similar for other companies.
- (d) Scheduling logging operations in a way that reduces their impact during the nesting season is an alternative that would minimally effect EC's enforcement budget but that would ensure greater compliance with subs. 6(a), MBR. Such an approach accords with the MBCA's stated purpose and with the 1916 Convention, which, in its preamble, expressed its concern for "the lack of adequate protection during the nesting season..."

The authority for creating a closed season for logging exists in subs. 12(1), MBCA, which allows regulations to be made "for prohibiting the killing, capturing, injuring, taking or disturbing of migratory birds or the damaging, destroying, removing or disturbing of nests." Restrictions on logging during the migratory bird-nesting season are therefore within EC's jurisdiction.<sup>60</sup>

As well, the MNR's guide for managing private woodlots in Southern Ontario (which is outside the scope of this submission), in dealing with harvest scheduling, says that to minimize damage to wildlife species one should:

Avoid harvesting during breeding/nesting season, preferably from March 1 to August 1, especially if birds that are dependent on undisturbed forest interior habitat ...are known to use the woodlot.<sup>61</sup>

Similar restrictions could be placed on forestry operations in the areas covered by this submission (i.e. central and northern Ontario).

### **c. Non-enforcement initiatives do not negate the need for enforcement**

The Wildlife Service has undertaken certain monitoring and conservation initiatives for migratory birds and their habitat. We support these initiatives, but they do not relieve the

Wildlife Service from enforcing subs. 6(a), MBR. These initiatives increase our knowledge and understanding of migratory birds but are alone inadequate to provide for their protection and do not obviate the need for a response to this submission.<sup>62</sup>

**d. Canada does not follow its own Wildlife Enforcement Policy**

EC's *Compliance and Enforcement Policy for Wildlife Legislation*<sup>63</sup> guides "overall implementation"<sup>64</sup> of the MBCA and two other wildlife acts. The policy's aim is to apply the provisions of the MBCA in "a consistent and fair manner".<sup>65</sup> "Compliance and enforcement activities must be securely founded in law and must be fair, predictable, and consistent across Canada."<sup>66</sup>

Our calculation of bird nest destruction suggests the compliance and enforcement activities are not "efficient". There is no evidence that the present reliance on cooperation with the logging industry and educational presentations are effective. In addition, the actual practice of enforcing some of the law and only against some parties<sup>67</sup>, but excluding the logging industry for subs. 6(a) violations, is hardly "fair or consistent". EC is not following its own policy.

In the wildlife policy, "compliance" is defined as "conformity with the law".<sup>68</sup> Compliance is secured through "promotion and enforcement". EC believes "compliance can best be achieved by promoting widespread awareness of legislative requirements". The policy goes on to define enforcement as embodying those activities that "compel adherence to legal requirements". These activities are listed as including inspection and monitoring, investigation of violations, issuance of notices and tickets for improper practices, seizure of wildlife as evidence, and prosecution. A margin summary in this section confirms EC understands that education is only one part of an effective strategy. "Legislation and regulation are only as good as their enforcement", it says.

The EC's policy view that effective enforcement includes the investigation and prosecution of MBCA violations is consistent with our submission. Prosecution need not be the option of first choice but it remains a critical tool of general deterrence. The message itself is twofold: (a) there are consequences for breaking the law and (b) obeying the law will not put you at a competitive disadvantage because of extra costs thereby incurred. In view of our calculations showing continued widespread violations of the MBCA, the present EC conduct of failing to "compel adherence" to the MBCA, cannot be considered to be "effective enforcement".

**V. ARTICLE 14: IS THIS A SUBMISSION THE CEC "MAY CONSIDER"?**

Article 14, section 1, NAAEC<sup>69</sup> says the Secretariat may consider a submission, which asserts a Party is failing to effectively enforce a law, provided the submission meets certain criteria.

**a. The submission is in a language designated by Canada**

English is a language designated by Canada.

**b. The submitting organizations are properly identified**

The Submitters are non-governmental organizations identified above.

**c. The information provided is sufficient**

Our submission provides detailed evidence of the lack of effective enforcement.

**d. This submission promotes enforcement of Canadian law**

This submission is aimed at protecting migratory birds by protecting bird nests and eggs. This is the clearly stated goal of existing Canadian law. We simply ask that subs. 6(a) of the MBR, a law of long-standing, be enforced. Our objective is fully consistent with the "promotion" aspect of paragraph 14(d).

**e. The matter has been communicated to the relevant Canadian authority.**

Our concern has been communicated to the Canadian government.<sup>70</sup> On January 16, 2001, a representative of the Submitters, the Wildlands League, wrote to Stephen Wendt, Chief, Migratory Birds Conservation, EC about the lack of enforcement of s. 6, MBR:

I understand that s. 6 of the regulations protects against disturbance, destruction or taking of migratory bird nest and eggs. We are unaware of any government measures that have been undertaken to ensure compliance with the regulations.

We therefore request that Environment Canada take the necessary steps to enforce the regulations.

Mr. Wendt, in his response of February 13, 2001, wrote:

The kind of detailed information that Lara requested is not compiled in one place. I am however undertaking to compile some related information for other purposes and may be able to help answer some of your questions from such sources in a few months.

The Canadian Wildlife Service deals with the protection of birds from incidental take caused by activities such as logging on a case-by-case basis. Contrary to Lara's assertion, there has been quite a history of compliance measures in this area, although as I indicated, the information has never been compiled.

The Wildlands League replied by asking that the information about compliance be sent to them. No response to this letter was ever received. EC is clearly aware of our concern about the lack of subs. 6(a), MBCA enforcement. The following email exchange between their officials also confirms the point:

Many migratory birds are killed during regular forestry activities. Nests are destroyed and birds are killed. We have never looked at this issue in the past but now the NGOs are pushing us to take action.<sup>71</sup>

**f. The submission is filed by North American organizations**

The submission is filed by organizations residing and established in Canada and the U.S.A.

**VI. REQUIREMENTS OF ARTICLE 14: IS A RESPONSE FROM CANADA MERITED?**

Article 14, section 2<sup>72</sup> provides that if the criteria of the first part are met then, "the Secretariat shall determine whether the submission merits requesting a response from the Party" based on specified considerations we now address.

**a. There is harm to the submitting organizations**

The Submitters represent many outdoor enthusiasts, birders and conservationists. Since birds are an integral part of the sounds, sights, and diversity of the natural landscape, a failure to protect them ultimately diminishes the splendour of the outdoors for enthusiasts and birders. The destruction of migratory bird nests and eggs harms conservationists by destroying the subject of their study and by damaging the delicate balance in the ecosystem. Moreover, birds have their own intrinsic value regardless of human benefit. All of this harm is beyond monetary calculation. The failure to enforce subs. 6(a), MBR is the direct cause of the harm suffered by these groups.

Furthermore, the CEC has recognized that while,

the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceeding in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14...<sup>73</sup>

The great importance of migratory birds also brings this submission within the spirit and intent of Article 14. Migratory birds disperse seeds, provide food to individuals, and give direct economic benefits to local economies through recreation, hunting, and bird watching. Both the agricultural and logging industries benefit from the critical role played by birds in controlling insect populations, which cause considerable damage.

A blanket absence of enforcement against the logging industry may result in lower costs for timber harvests but higher costs to our environment because of the harm to migratory birds. This failure to enforce environmental law may thereby distort the significant trade<sup>74</sup> in wood products between the parties, contrary to Article 1(e), by permitting some producers to externalise environmental costs.

The public's trust in elected officials is harmed when laws enacted for the public good are not enforced. International agreements must also be enforced with particular vigour because they carry Canada's reputation into the global arena.

Finally, a failure to protect migratory birds today prejudices future generations of Canadians.

**b. Further study of the matters raised will advance the goals of the NAAEC**

The CEC has already asked for the production of a factual record pursuant to a submission<sup>75</sup> in the U.S. relating to the non-enforcement of a similar law for the protection of migratory birds. Studying both this submission and the earlier U.S. one avoids the creation of trade distortions that might result from inconsistent application of the law. (Article 1(e))

This submission seeks to enhance the enforcement of laws that are based on an environmental treaty between Canada and the U.S. and that affect timber harvesting, which is the subject of substantial trade between the parties. (Article 1(g))

The enforcement of subs. 6(a), MBCA promotes the conservation of shared bird populations and thus fosters the protection of the environment for present and future generations. (Article 1(a))

We recognize that our calculation of the destruction of bird nests may under or overestimate the actual problem. We are not aware of any previous scientific study by Canada or other groups that has attempted to determine the exact scope of the destruction. A factual record therefore would further our scientific knowledge of the impact of logging on migratory birds and thereby promote and facilitate appropriate government action to better protect this resource for future generations.

### **c. The Problem with private remedies under Canadian law**

Canadian caselaw demonstrates the difficulty of pursuing private remedies for MBCA violations.

In *Manitoba Naturalists Society Inc. v. Ducks Unlimited Canada*<sup>76</sup> a private organization sought to enforce the provisions of a public statute, namely the MBCA, 1985. The Manitoba Naturalists Society applied for a declaration that the respondent's construction at a marsh of an office complex without a permit under subs. 6(a) of the MBR<sup>77</sup> contravened the MBCA. The applicant also applied for a permanent injunction restraining the respondent from the construction project.

In dismissing the application the court said,

The law is clear that, generally speaking, a private individual or organization has no status to sue in his or its own name in respect of a public right without the consent of the Attorney General unless it can be shown that he or it faces the infringement of some personal or private right or that he or it will suffer special and personal damages ...<sup>78</sup>

The Court reached this conclusion despite acknowledging that the applicant as an organization had a "special interest" in protecting wildlife and habitat in the area but found that there was no evidence the applicant "will suffer any prejudice peculiar to itself".<sup>79</sup>

Finally, the Court said the applicant was not entitled to and could not obtain injunctive or declaratory relief because only "the Attorney General may apply to the civil courts for injunctive relief against contraventions of a statute which create an offence --- a public wrong ..."<sup>80</sup>

Beyond such civil remedies, charges sworn by private individuals are arguably an alternative. There are both significant barriers to this approach and good public policy reasons militating against it.

Firstly, logging activity is carried out in areas that are not easily accessible to the public. Citizens are not as likely to witness a contravention of subs. 6(a) by chance, as they might, for instance, see a drunk-driving or robbery offence in an urban area.

Secondly, the use of heavy equipment in logging makes investigations by the public potentially hazardous both to those citizens and to the loggers themselves. As well, presumably for these reasons, the Crown can and, in our experience, does exclude the public from active logging sites.

Thirdly, in the absence of Crown intervention, a citizen usually does not have the expertise or financial resources to prosecute a charge in court. Although non-profit organizations with legal expertise, such as SLDF, could assist, the scale of logging and the widespread nature of infractions would quickly deplete the organization's resources and detract from all other work.

Fourthly, in any private prosecution, the Crown may intervene to withdraw or stay the charge.

Finally, prosecutions are important for general and specific deterrence but they do not remedy the harm done. Proactive enforcement and compliance activities by EC, which are within its authority and not that of private citizens, are needed to reduce the occurrence of violations.

#### **d. The submission is primarily based upon our research**

The submission is based primarily on our research and an *Access to Information* request.

### **VII. CONCLUSION**

Since 1917 when the *Migratory Birds Convention Act* was enacted, Canadian law has recognized the importance of migratory birds. Eighty years later, this recognition is undiminished.

The conduct of Canadian officials mandated with enforcing laws to protect migratory birds fails to reflect this recognition. The estimated 85,000 nests destroyed in Ontario in a single year is evidence of this failure. We recognize the significant economic contribution of the logging industry to Canadians, through jobs, wood products, and government revenues. The logging industry, however, has not been exempted from the law. *The Migratory Birds Convention Act*, together with other laws enacted for the protection of Canadians and their environment, is the legal context within which this economic activity is to be carried out. An improved enforcement approach by Environment Canada can at the same time sustain logging industry activity while minimizing violations of the Act and its regulations.

We therefore ask the Commission to request a response from Canada for its failure to effectively enforce our environmental laws.

### **Endnotes**

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<sup>1</sup> See [Appendix 1: Compliance and Enforcement Policy for Wildlife](#), Environment Canada, from the margin summary in the definition section of "Compliance and Enforcement".

<sup>2</sup> [Appendix 1](#). Ibid., from the Introduction.

<sup>3</sup> [Appendix 2: Migratory Birds Regulations](#), CRC, c. 1035.

<sup>4</sup> [Appendix 3: Migratory Birds Convention Act, 1994](#), chapter 22.

<sup>5</sup> [Appendix 3](#): See the preamble to the 1916 Convention found at p. 11 of the MBCA.

<sup>6</sup> The relevant portions of the regulation are:

- (a) providing for the periods during which, and the areas in which,
  - (i) migratory birds may be killed, captured or taken,
  - (ii) nests may be endangered, destroyed, removed or disturbed, or ...

- (f) respecting the issuance, renewal, revocation and suspension of permits; ... [and]
- (h) for prohibiting the killing, capturing, injuring, taking or disturbing of migratory birds or the damaging, destroying, removing or disturbing of nests;

<sup>7</sup> [Appendix 3](#): at p. 16 of the Protocol. Canada and the U.S. signed the Protocol on December 14, 1995.

<sup>8</sup> Article II of the Protocol updated and replaced the original Article II to ensure the long-term conservation of migratory birds, by managing these populations in accord with specific conservation principles, namely,

- To manage migratory birds internationally;
- To ensure a variety of sustainable uses;
- To sustain healthy migratory bird populations for harvesting needs;
- To provide for and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

The means to pursue these principles include "monitoring, regulation, enforcement and compliance" and "Protection of incubating birds".

Article V of The Protocol updated and replaced the original article. It now provides:

- The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific, educational, propagating or other specific purposes consistent with the principles of this Convention under such laws or regulations as the [parties] may severally deem appropriate, [or as provided for in sections dealing with aboriginal rights].

<sup>9</sup> [Appendix 3](#): From the Preamble of the Convention found at p. 11 of the MBCA.

<sup>10</sup> [Appendix 5](#) contains the full text of Article 45 (2) of the NAAEC.

<sup>11</sup> This assertion is consistent with the Secretariat's Determination under article 14(1) and 14(2) (23 December 1999): A14/SEM/99-002/03/14(2) at p. 3. (U.S. Migratory Birds submission: SEM-99-002)

<sup>12</sup> Although the RCMP states on its website (<http://web.ctsolutions.com/rcmp-grc/engframe.htm>) that one of the "primary enforcement responsibilities" of its Federal Enforcement Program is the MBCA they play practically no independent role in enforcing the MBCA against licensed logging companies.

<sup>13</sup> From its website at [www.cws-scf.ec.gc.ca/trends/mbirds.html](http://www.cws-scf.ec.gc.ca/trends/mbirds.html) (last updated March 15, 2001)

<sup>14</sup> Ibid.

<sup>15</sup> [Appendix 5](#) contains the full text of Article 5.

<sup>16</sup> [Appendix 5](#) contains the full text of Article 14.

<sup>17</sup> *The Economic Significance of Nature-related Activities*, Environment Canada, Executive Summary, p. iv. (This document is accessible through the EC website.) The U.S. component of the \$11.7 billion total spent in Canada equals \$700 million and is based on U.S. Fish and Wildlife Service data for two nature-related activities, namely, wildlife viewing and recreational fishing. "The total figure would be even higher if it were to include spending by U.S. visitors in Canada for other nature-related activities, such as sightseeing, camping, boating or hiking." (At p. iii.)

<sup>18</sup> Ibid., at p. iii.

<sup>19</sup> Ibid., at p. 26.

<sup>20</sup> *North American Bird Conservation Initiative: Strategy and Action Plan, Context*. From the website at [www.bsc-eoc.org/nabci.html](http://www.bsc-eoc.org/nabci.html)

<sup>21</sup> Ibid., *Annex 2, Guiding Principles, Issues and Challenges*. See the first paragraph. This section also notes that, "More than 1,100 species [of birds] are found in Mexico, 700 in the United States and 600 in Canada. Hundreds of these species are shared among all three nations ..."

<sup>22</sup> [Appendix 10: Annual Report on Forest Management for 1998-99](#): Ontario MNR, at pp. 21 and 25-27. In 1996-97, by comparison, insects are estimated to have consumed 10.6 million cubic metres of wood while 21.4 million cubic metres of wood were harvested. About 5.4 million cubic metres of wood were destroyed by disease on these lands in each of 1996-97 and 1997-98.

<sup>23</sup> See Dajoz, R. et al., *Insects and Forests: the role and diversity of insects in the forest environment*. Paris: Intercept Ltd., 2000 85. (Trans. by G-M. de Rougemont.) and Marquis R., Whelan C., *Insectivorous birds increase growth of white oak through consumption of leaf chewing insects* (1994, *Ecology*, 75: 2,007-2,014.)

<sup>24</sup> [Appendix 4: Responsibilities of Federal Agencies to protect Migratory Bird](#), Executive Order 13186 of January 10, 2001.

<sup>25</sup> [Appendix 6: Migratory Bird Nest Destruction in Ontario](#) by Kim Mandzy and Dr. Elaine MacDonald.

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<sup>26</sup> For the Upper Spanish Forest the estimated number of nests destroyed is based on year 2000 data.

<sup>27</sup> J.A. Kennedy, Pam Dilworth-Christie and A.J. Erskine, 1999: *The Canadian Breeding Bird (Mapping) Census Database, Technical Report Series No. 342*, Canadian Wildlife Service, Ontario

<sup>28</sup> *Forest Management Plans* are more fully discussed in the next section of this submission.

<sup>29</sup> In some clear-cut areas a small number of trees will remain. For instance, if woodpeckers, a migratory bird identified under the provincial timber environmental assessment as requiring protection, are identified then that tree and several surrounding ones should not be cut. It is thus conceivable that such nests of migratory birds will be spared. Therefore, the assumption that all nests will be destroyed in a clear-cut area will overestimate the damage. On the other hand, the calculation does not include nests destroyed in selective and shelterwood cut areas. Thus, this latter factor will likely more than compensate for the overestimation mentioned above.

<sup>30</sup> [Appendix 8: Tab \(b\)](#). Email from Yvan Lafleur [NCR] to Kelly Marsden [NCR] dated April 10, 2001 re "Forestry-Incidental kills".

<sup>31</sup> The manual requires only that the "current status of the preferred habitat for selected wildlife species" be summarised as "an indicator of forest sustainability that is used to help describe the forest condition."

<sup>32</sup> During the preparation of *Forest Management Plans*, EC can be contacted for input. In fact, EC has produced a non-binding guideline for such instances (*Environmental assessment guideline for forest habitat of migratory birds*, which is available at: [www.cws-scf.ec.gc.ca/publications/eval/forest/intro\\_e.cfm](http://www.cws-scf.ec.gc.ca/publications/eval/forest/intro_e.cfm)). It is noteworthy that this guideline states: "Activities should be avoided during critical periods of the migratory birds' lifecycles (e.g., nesting or staging" and that "to maintain migratory bird habitat in forests...a FMP...must...time activities to reduce disturbance during critical periods of life cycles of migratory birds (e.g., nesting)." However, EC fails to take enforcement activities to ensure that this requirement (which parallels subs. 6(a), MBR) is adhered to.

<sup>33</sup> Submission ID: A14/SEM-99-002/01/SUB. at p. 7

<sup>34</sup> See [Appendix 7](#).

<sup>35</sup> [Appendix 10: Annual Report on Forest Management for 1998-99](#), MNR, reports that 222,198 hectares of forest were harvested in Ontario in 1997-98 (at p.iii).

<sup>36</sup> On April 27, 1998, the Secretariat in a *Notification to Counsel* (SEM 97-001), a case involving Canada, said it: is mindful of the varied principles and approaches that can be applied to a definition or application of the term "effective enforcement". For example, under certain circumstances, other enforcement measures may be deemed more effective in securing compliance than an exclusive reliance on prosecutions. In that regard, it is not clear how Canada selects its enforcement responses to secure compliance with environmental law.

<sup>37</sup> [Appendix 8: Tab \(c\)](#).

<sup>38</sup> The then Minister of Natural Resources Canada, Ralph Goodale.

<sup>39</sup> [Appendix 8: Tab \(a\)](#).

<sup>40</sup> [Appendix 8: Tab \(f\)](#). In a letter dated June 4, 2001 Mr. Wendt invites forestry industry representatives, provincial authorities, and others to *Seeing the Forest for the Birds: a workshop on Forest Bird Conservation and Forest Management*. The purpose of the workshop is "to begin resolving the management issues that arise from the incidental take of migratory birds during forestry operations." As well, in an email dated February 23, 2001 to EC staff Mr. Wendt, in summarizing the minutes of the *Partners in Flight National Working Group* for the proposed workshop writes, "Migratory Birds Conservation Act regulations prohibit destruction of birds and their nests, but this occurs incidentally to forestry practices."

<sup>41</sup> [Appendix 8: Tab \(a\)](#), the second slide. One of the concluding slides, at p. "67" of the *Access* documents then says:

- there is no solid basis to provide an exemption to the Convention's prohibitions in the case of incidental take

- if facts indicate a situation equivalent to what the judge reviewed in *Cheviot*, we can not give the proponents a priori assurance that they will not be subject to prosecution under s. 35.

<sup>42</sup> *Ibid.*, Tab (a): at p. "68" of the *Access* documents, see also Mr. Wendt's letter of February 13, 2001 in [Appendix 9](#).

<sup>43</sup> [Appendix 8: Tab \(d\)](#), p. "18" of the *Access* documents.

<sup>44</sup> *Ibid.*

<sup>45</sup> Justice Dickson in *R. v. Chapin* [1979] 2 S.C.R. 121.

<sup>46</sup> For example, a steel factory in the course of its operations, illegally emits a toxic substance into the air thereby threatening people's health. The discharge is unintentional. To justify the toxic discharge as "incidental" to its

operations does not justify a failure by the regulating agency to investigate or charge the violator, nor does it constitute a legal defence for the violator. Furthermore, to justify the emission as "incidental" to an economic activity is to put the economic value above environmental and health values, protected by the Canadian Parliament through laws made for the benefit of all Canadians. If the agency charged with enforcing the environmental law refuses to use the enforcement tool, then it is failing to fully carry out its mandate.

<sup>47</sup> [Appendix 10](#): *The Annual Report on Forest Management for 1998-99*, MNR., also notes (at p. 13) that:

In 1997 the forest industry contributed significantly to the economy of Ontario with shipments of more than \$15.0 billion. Employment within the forest industry was 165,000. Included in this figure are direct, indirect, and induced jobs.

<sup>48</sup> [Appendix 5](#) contains the full text of NAAEC, Article 45, the definitions section.

<sup>49</sup> [Appendix 11](#): 81 D.L.R. (3d) 396, Manitoba Court of Appeal.

<sup>50</sup> At p. 400.

<sup>51</sup> *Daniels v. The Queen*, [1968] S.C.R. 517.

<sup>52</sup> At p. 401.

<sup>53</sup> At p. 403.

<sup>54</sup> See [Appendix 8](#): Tab (a). Slide 20 or page "86" of the *Access to Information* documents.

<sup>55</sup> *Secretariat's Determination*, A14/SEM/99-002/03/14(2), (December 23, 1999): at p. 5.

<sup>56</sup> In *R. v. Sala* [1994] M.J. No. 127, *R. v. Sala*, [1994] M.J. No. 127, Man. Prov. Ct., Crim. Div. a complex sting operation involving undercover officers was pursued to enforce ss. 12 and 30 of the MBR. The accused, a taxidermist, was alleged to have accepted two migratory birds for the purpose of preservation or mounting, and offered to sell the carcasses of five others. Similarly, in *R. v. Ford* [1996] N.J. No. 174, Nfld. Prov. Ct., an undercover sting operation was used to prevent the sale of migratory birds from a person who had legitimately hunted and possessed them but was prohibited under the MBR from selling them.

<sup>57</sup> See for example, *R v. Neptune Bulk Terminals (Canada) Ltd.* [2001] B.C.J. No. 798 (\$5,000 fine, sixteen birds killed), *R. v. Bayer* - File 000033 Ont. P.C., May 31, 2000 (\$40,000 fine, eight ducks killed), *R. v. Vancouver Wharves Ltd.*, Unreported Decision, June 8, 1992 (North Vancouver, Prov. Ct. of B.C.) (\$50,000 fine), and *R. v. West Coast Reduction Ltd.*, Unreported Decision October 1, 1998 (Prov. Ct. of B.C.) - File No. C35883-01 (\$22,500 fine, 350 migratory birds killed). In *R v. Neptune Bulk Terminals (Canada) Ltd.*, the Court ordered that in addition to the \$5,000 fine, the company was to pay \$25,000 to Environment Canada for the protection of migratory birds.

<sup>58</sup> [Appendix 5](#) has the full text of the Article 14.

<sup>59</sup> At the provincial level, forestry is covered by a class environmental assessment, which requires no specific measures to ensure that the MBR are followed. The province has only initiated one individual environmental assessment for a Forest Management Plan, but abandoned that process before it was completed.

<sup>60</sup> In *Hamilton-Wentworth (Regional Municipality) v. Canada* [2001] F.C.J. No. 627, Fed. Ct. –T.D., Environment Canada's Environment Control Branch stated that "The MBCA does not provide the legal authority to prevent or take action concerning the loss, degradation or disruption of migratory bird habitat, including nesting and breeding habitat, if this occurs outside of the nesting season." By implication, Environment Canada can provide such protection during the nesting season and, according to the MBCA, 1994, they can certainly do it for the purposes of preventing violations of its regulations.

<sup>61</sup> [Appendix 12](#): *A Silvicultural Guide to Managing Southern Ontario Forests*, Technical Series, MNR, 2000 at pp. 382-83.

<sup>62</sup> This assertion is supported by the Secretariat's *Notification to the Council* under Article 15(1), (December 15, 2000), Submission ID: A14/SEM/99-002/11/ADV, p. 12.

<sup>63</sup> [Appendix 1](#). Canada's *Compliance and Enforcement Policy for Wildlife*.

<sup>64</sup> *Ibid.*, from the Introduction.

<sup>65</sup> *Ibid.*, from the "Goals" section.

<sup>66</sup> *Ibid.*, from the "Principles" section, namely principle II.

<sup>67</sup> See [footnotes 56 and 57](#) for examples of cases prosecuted under the MBCA.

<sup>68</sup> [Appendix 1](#): *Compliance and Enforcement Policy*, in the "Definitions" section.

<sup>69</sup> [Appendix 5](#) contains the full text of Article 14 (1).

<sup>70</sup> [Appendix 9](#) contains all of the correspondence related to this exchange.

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<sup>71</sup> [Appendix 8](#), Email from Yvan Lafleur [NCR] to Kelly Marsden [NCR] dated April 10, 2001, re "Forestry-Incidental kills".

<sup>72</sup> [Appendix 5](#) contains the full text of Article 14(2).

<sup>73</sup> *Secretariat's Notification to Council* (Article 15(1)), SEM-96-001, June 7, 1996 at Section IV(B).

<sup>74</sup> In 1998 Canada exported U.S.\$9.6 billion of wood products to the U.S. At the same time, Canada imported U.S.\$1.5 billion of wood products from the U.S. Source: *Wood Circular*, <http://www.fas.usda.gov/ffpd/wool-circulars/apr99/toc.htm>.

<sup>75</sup> A14/SEM-99-002/01/SUB

<sup>76</sup> [Appendix 13](#): [1992] 2 W.W.R. 377, Manitoba Queen's Bench.

<sup>77</sup> The language of the subsection was identical to the present subsection.

<sup>78</sup> At p. 380.

<sup>79</sup> At p. 382. The full quote reads as follows:

In spite of the special interest of the applicant as an organization with the objective of preventing habitat/wildlife abuses, this is not a case in which ... the court should exercise its discretion to grant standing to the applicant. I have reached this conclusion because the applicant has not shown that it has or will suffer any prejudice peculiar to itself by reason of the alleged failure of the respondent to obtain the permit in question, and this is not a case where the validity of a federal or provincial statute is involved, nor is it a case which challenges the jurisdiction or statutory authority for administrative actions, instances in which standing has been granted by the courts. It is simply a case where a private organization seeks to enforce the provisions of a public statute.

<sup>80</sup> The Court, at pp. 383-4, said there were several reasons for the reluctance to give injunctive relief where a statute creates an offence and provides a penalty.

First, violation of an injunction constitutes contempt and heavy fines or imprisonment can result. The effect of granting an injunction, then, may be to impose a penalty of a fine or imprisonment which is or may be greater than the maximum penalty which Parliament or the Legislature has seen fit to prescribe... Second, a party accused of having committed an offence has "a constitutional right to have his guilt established by reference to the criminal standard of proof" ... This is particularly true where, as here, the respondent denies having committed any offence under the Act. To grant an injunction would be tantamount to a decision, based on a civil standard of proof, that the respondent has committed an offence under the Act.

*Manitoba Naturalists Society Inc.* was followed in *Society for the Preservation of the Englishman River v. Nanaimo (Regional District)*, [1999] B.C.J. No. 370, B.C.S.C. The Court held that,

... the doctrine of public interest standing is generally not available to private parties seeking to enforce statutes of general application. [...] The Minister, or the Attorney General, is uniquely suited, as representative of the public interest, to make this decision. There can be no doubt that either is more effectively able to bring the issue before the court than the petitioner. A decision made in good faith not to enforce or prosecute militates heavily against exercising my discretion in favour of the petitioner.