

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

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

[And related to Ontario Logging SEM-02-001, dated February 4, 2002]

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APPENDICES

1. ***Compliance and Enforcement Policy for Wildlife***, Environment Canada, from its website at <http://www.ec.gc.ca/enforce/wildpol/English/index.htm>

2. ***Migratory Birds Regulations***, C.R.C., c. 1035.

3. ***Migratory Birds Convention Act***, 1994, S.C., c. 22 including

- a. The *1916 Convention between Canada and the United States* - found at p. 11; and
- b. The *Protocol* between Canada and the U.S. (ratified by Canada in 1999) - found at p. 16.

4. **President Clinton's Statement on the Responsibilities of Federal Agencies to Protect Migratory Birds**: Presidential Documents: Executive Order 13186 of January 10, 2001.

5. **Supplementary Submission to CEC of August 20, 2003, filed in response to Council Resolution of April 22, 2003.**

6. ***Access to Information* request from SLDF to Environment Canada** dated July 13, 2001 respecting enforcement efforts under subs. 6(a), MBCA.

7. ***Access to Information* material from Environment Canada:**

- a. Slide Presentation of S. Wendt, Chief, Migratory Bird Conservation, Environment Canada.
- b. Email from Yvan Lafleur dated April 10, 2001 noting destruction of nests and birds during logging activities.
- c. Exchange of emails dated May 2-22, 2001 relating to Minister's Goodale's office and assurance of no special enforcement action of MBCA against logging industry.
- d. Email from S. Wendt dated February 23, 2001 with minutes of planned forestry workshop on incidental destruction of bird nests and solicitation of comments for workshop content.
- e. Email to S. Wendt dated February 27, 2001 from staff referring to desire to work with industry to maintain bird habitat.
- f. Invitation from S. Wendt dated June 4, 2001 to forestry industry representatives to attend forestry workshop to resolve management issues arising from incidental take of birds (with attached agenda).

8. ***Correspondence with Wildlife Service requesting enforcement action be taken.***

- a. Letter from Wildlands League to Canadian Wildlife Service asking that "Environment Canada take the necessary steps to enforce the regulations".
- b. Response from S. Wendt dated February 13, 2001 asserting there "has been quite a history of compliance measures in this area" but that it would take a few months to collect data.
- c. Reply from Wildlands League dated May 29, 2001 asking that the data respecting enforcement of s. 6 be provided.

9. ***The Annual Report on Forest Management for 1998-99, Minister of Natural Resources of the Province of Ontario.*** The table of contents, executive summary, ch. 1: pp. 1 and 2, ch. 4: p. 13, and ch. 5 are reproduced. The full report is accessible through the MNR website at www.mnr.gov.on.ca

10. ***R. v. Catagas***, 81 D.L.R. (3d) 396, Manitoba Court of Appeal.

11. ***A Silvicultural Guide to Managing Southern Ontario Forests***: Ontario Ministry of Natural Resources, 2000, pp. 382-83.

12. ***Manitoba Naturalists Society Inc. v. Ducks Unlimited Canada***, [1992] 2 W.W.R. 377, Manitoba Queen's Bench.

I. SUMMARY

In this submission, we identify the failure of the Canadian Government to effectively enforce subsection 6(a) of the *Migratory Birds Regulations*¹ ("MBR") against the logging industry in four specific Forest Management Units ("FMUs") in Ontario. These FMUs are (1) Temagami, (2) Wawa, (3) Shiningtree Forest, and (4) Cochrane. We rely on Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC") to assert that a response from Canada is merited for this alleged failure to effectively enforce an environmental law.

Subs. 6(a) of the MBR 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* ("MBCA").² The MBCA is the successor of Canadian legislation first passed over 80 years ago to implement an international treaty to protect migratory birds.

We note at the outset the intimate connection between this submission and a previous submission --- **Ontario Logging SEM-02-001** --- for which the CEC Council ordered a factual record on March 12, 2004 in Resolution 04-03.³ Although the above-noted FMUs were part of the original submission, the Council on March 12 said:

FURTHER RECOGNIZING that information for four forest management units was not available in time to meet the deadline that was established in Council Resolution 03-05 for submitting additional information and therefore was not provided by the submitters;

NOTING that when submitters provide information, the Party is afforded the opportunity to respond to that information; and

FURTHER NOTING that the submitters may, if they wish, submit a new submission with the requisite sufficient information with respect to the four (4) forest management units for which information was not available.

The Council thus ordered a factual record for the year 2001 (as requested by the Submitters) for the 49 other FMUs,⁴ excluding the four units for which the Submitters could not --- despite their best efforts⁵ --- obtain information.

We appreciate that the factual record ordered by the Council in March 2004 will shed considerable light on whether the government of Canada is indeed failing to effectively enforce subs. 6(a) of the MBR on a widespread basis. Indeed, it could be argued that the current submission is unnecessary despite the Council's invitation to the Submitters to make such an additional submission.⁶ On the other hand, and more importantly, we believe it would be unfortunate for four FMUs to escape scrutiny simply because the record keeping for those units -- that is to say, the reports from logging companies and their MNR overseers--- are of a lower standard than for the FMUs for which a factual record has been ordered.⁷

The current submission therefore provides the previously lacking information for the four FMUs excluded from the Council's Resolution of March 2004. The actual harvest data information was obtained as it became available from industry or government sources in the period between April and October 1, 2004. In the case of the fourth unit --- Shiningtree Forest -- harvest data was not

made available, despite our persistent inquiries⁸, until October 1, 2004⁹: almost three years since extraction activities took place in this part of the public forest!¹⁰

II. BACKGROUND

Environment Canada (EC), through its agency the Canadian Wildlife Service, is primarily responsible for enforcing the MBCA. 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 on July 13, 2001 revealed no investigations or charges in Ontario for a violation of subs. 6(a). Since that original request, no information has come to light in any government response, media reports, meetings with government, access to information requests, or other information to cast doubt on the Submitters' original assertion that no charges were ever laid or investigations conducted --- or other effective action taken, for that matter --- against logging companies in any FMU in Ontario, including the four FMUs at issue in this submission.

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.

The protection of migratory birds provides numerous tangible and intangible benefits to Canadians. For instance, *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.¹¹

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.¹² Ontarians spent almost \$2.9 billion on such activities in natural areas, of which over \$410 million was for wildlife viewing.¹³

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.¹⁴

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.¹⁵

In 1997-98 in Ontario, insects destroyed about 8.6 million cubic metres of wood on Crown lands that were eligible for logging.¹⁶ 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.¹⁷ 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.¹⁸

III. THE LAW

a. Subs. 6(a) of the Migratory Birds Regulations

Subs. 6(a), MBR is a regulation made under the authority of the 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...¹⁹

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.²⁰

In 1999, a protocol between Canada and the United States ("the Protocol") was ratified²¹ 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 updated²² 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...²³

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.²⁴

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

Subs. 6(a) falls within the Article 45(2), NAAEC definition of an environmental law because the MBCA provides for the protection of migratory birds, a type of wild fauna.²⁵ 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 appointed²⁶ EC, through its agency 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.²⁷ The Wildlife Service says it "is responsible for implementing"²⁸ the MBCA.

IV. THE EVIDENCE ON NEST DESTRUCTION

a. Temagami, Wawa, Shiningtree Forest, and Cochrane Forest Management Units

Our calculations²⁹ to determine the number of destroyed nests in the Temagami, Wawa, Shiningtree Forest, and Cochrane FMUs relied firstly on information from *The Canadian Breeding Bird (Mapping) Census Database*³⁰ 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*³¹ data for the relevant FMUs to determine how many hectares of trees were harvested by clear-cutting. By definition, in an area that is clear-cut practically³² or literally all trees are felled. Scientific data leads us to expect a certain number of nests in the trees of that area; clear-cutting would necessarily destroy those nests.

Our research model estimates that 1,270 migratory bird nests were destroyed in 2001 in the four relevant FMUs, as shown in the table below.³³ Calculations estimating the number of bird nests destroyed were performed in the same manner as in our Supplementary Submission of August 20, 2003.³⁴ In our original submission, we relied on planned clear-cut harvest area data because this was the only information then available. In our Supplementary Submission, which responded to the Council decision of April 22, 2003,³⁵ we were able to provide actual harvest data.

Table 1: Estimated Migratory Bird Nest Destruction in Four FMUs (2001)

Forest Management Unit	Discounted density of breeding males per 100 hectares ³⁶	Actual 2001-02 Clear-cut Area (ha) ³⁷	Estimated number of nests destroyed ³⁸
Cochrane	689	1341	495
Shiningtree Forest	351	2360.7	444
Temagami	351	1077	203
Wawa Forest	351	679	128
Total (4 FMUs)			1,270

As in our original submission, we note that 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...³⁹

b. 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 ("OMNR") 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.⁴⁰ 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 OMNR 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*.⁴¹

c. Environment Canada is not enforcing subs. 6(a)

In 2001, we made an *Access to Information*⁴² 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 210,000⁴³ hectares of forest that are annually harvested in Ontario.

We recognize that enforcement does not only mean prosecution of violations.⁴⁴ 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.

A subsequent *Access to Information* request of EC provided documentation that simply confirmed the earlier conclusion of a failure to enforce.⁴⁵

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 email⁴⁶ 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's⁴⁷ 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]

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.

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 presentation⁴⁸ 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.⁴⁹ He confirms

that "incidental take", defined as "unintentional take, incidental to some other activity" is prohibited by the MBCA⁵⁰ but later explains that, "A common-sense approach has had wide application."⁵¹ "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.⁵² [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"⁵³ 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 ..."⁵⁴ 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.⁵⁵

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.⁵⁶ 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.

V. 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." 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*⁵⁷ 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..."⁵⁸ supported this position. Manitoba officials had advised their own staff of this policy. The Wildlife Service letter was intended to overcome the *Daniels*⁵⁹ 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.⁶⁰ [Our emphasis]

As a result, the court entered a conviction because the dispensation was "void and of no effect".⁶¹

The logging industry appears to enjoy a similar "blanket dispensation" from prosecution for violations of subs. 6(a) of the MBR. 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 concern⁶²

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 CEC⁶³ 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.⁶⁴ In such cases, Canadian courts have exacted stiff penalties⁶⁵ 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.

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.⁶⁶ 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 OMNR 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.⁶⁷

As well, the OMNR'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.⁶⁸

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 alone are inadequate to provide for their protection and do not obviate the need for a response to this submission.⁶⁹

d. Canada does not follow its own Wildlife Enforcement Policy

EC's *Compliance and Enforcement Policy for Wildlife Legislation*⁷⁰ guides "overall implementation"⁷¹ 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".⁷² "Compliance and enforcement activities must be securely founded in law and must be fair, predictable, and consistent across Canada."⁷³

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,⁷⁴ while 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".⁷⁵ 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".

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

Article 14, s. 1, NAAEC says the Secretariat may consider a submission, which asserts a Party is failing to effectively enforce a law, provided the submission meets certain criteria. We believe these requirements have been met. Three of these criteria, namely: the submission is in a language designated by Canada; the submitters are properly identified; and the petition is filed by organizations residing in Canada or the U.S. requires no further elaboration. In the case of the remaining requirements we note:

- **The information provided is sufficient**

We provide detailed evidence in this submission.

- **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.

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

Our concern has been communicated to the Canadian government.⁷⁶ 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), MBR enforcement. The following internal email 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.⁷⁷

VI. REQUIREMENTS OF Art. 14: IS A CANADIAN RESPONSE MERITED?

Article 14, s. 2 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. 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...⁷⁸

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 trade⁷⁹ 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 diminished 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 submission⁸⁰ 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), MBR 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*⁸¹ 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 MBR⁸² 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 ...⁸³

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".⁸⁴

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 ..."⁸⁵

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 evidence of an estimated 1,270 destroyed nests in the Temagami, Wawa, Shiningtree Forest, and Cochrane FMUs warrants a government response, particularly in the context of the Council's order for a factual record respecting the estimated 43,692 destroyed nests in other Ontario FMUs.

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

¹ [Appendix 2: Migratory Birds Regulations](#), CRC, c. 1035.

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

³ See Council Order 04-03 at http://www.cec.org/files/pdf/sem/02-1-Res04-03_en.pdf

⁴ Including five that were amalgamated with other units.

⁵ As outlined in our supplementary submission of August 20, 2003: see [Appendix 5](#) or http://www.cec.org/files/pdf/sem/02-1-supplementary%20information_en.pdf

⁶ Of course the Council's invitation to submit a new petition does not actually afford the Submitters any additional right. Any party may submit such a petition with or without Council authorization given that the four FMUs are part of a subject matter upon which the Council has made no decision.

⁷ The Council suggestion that an additional submission was needed for these FMUs to allow the Government of Canada to respond overlooks the fact that the Government of Canada's response in the original matter made no attempt to deal with any of the allegations respecting individual FMUs.

⁸ Summary of communication between Sierra Legal Defence Fund with MNR and logging company officials to obtain required information (in addition to earlier inquiries leading to the supplementary submission of August 2003):

April 5, 2004: Email to Robert Mears (MNR) of April 5, 2004

April 6, 2004: Email from R. Mears advising that Shiningtree date was still not available.

April 13, 2004: Email to R. Mears asking when data will be available.

April 16, 2004: Email from R. Mears advising that data should be available in one to two weeks.

May 19, 2004: Additional inquiry to R. Mears asking when data will be available.

May 26, 2004: R. Mears advises that data still not available.

July 9, 2004: Telephone inquiry of G. Ballak, MNR Area Forester, re availability of data.

September 20, 2004: New inquiry about availability of data to R. Mears and G. Ballak.

September 22, 2004: Left phone message with Tom McLean, Plan Author, Domtar

September 30, 2004: Message to P. Fantin, Management Forester, Timiskaming Forest Alliance Inc.

October 1, 2004: Message from P. Fantin providing unofficial final statistics.

⁹ Our inquiries of the MNR suggest the delay is attributable to the inability of the MNR and the logging company in question to agree on actual figures. The information that was ultimately provided was noted as not being final but the official who provided it was reasonably confident that the number would not change.

¹⁰ Indeed CEC scrutiny of these FMUs would be more rather than less justified given the apparent lack of transparency or accountability to the public by the logging companies and their overseers about the fate of public resources. One might argue that to excuse these FMUs would be akin to a police investigation being terminated until such time as a burglary victim is able, through his or her own investigation, to provide a more detailed description of the intruder.

¹¹ *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.)

¹² *Ibid.*, at p. iii.

¹³ *Ibid.*, at p. 26.

¹⁴ *North American Bird Conservation Initiative: Strategy and Action Plan, Context*. From the website at www.bsc-ecoc.org/nabci.html

¹⁵ *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 ..."

¹⁶ [Appendix 9: 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.

¹⁷ 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.)

¹⁸ [Appendix 4: Responsibilities of Federal Agencies to protect Migratory Bird](#), Executive Order 13186 of January 10, 2001.

¹⁹ [Appendix 3](#): See the preamble to the 1916 Convention found at p. 11 of the MBCA.

²⁰ 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;

²¹ [Appendix 3](#): at p. 16 of the Protocol. Canada and the U.S. signed the Protocol on December 14, 1995.

²² 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].

²³ [Appendix 3](#): From the Preamble of the Convention found at p. 11 of the MBCA.

²⁴ 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.

²⁵ 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)

²⁶ 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.

²⁷ From its website at www.cws-scf.ec.gc.ca/trends/mbirds.html (last updated March 15, 2001)

²⁸ Ibid.

²⁹ This calculation was done in the same manner as outlined in our original and supplementary submissions, albeit in the latter we had the benefit of actual harvest data that was not previously available. In the earlier submission we used planned harvest data.

³⁰ 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

³¹ *Forest Management Plans* are more fully discussed in the next section of this submission.

³² 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.

³³ The estimated number of nests destroyed in the four additional FMUs together with the estimated number of nests destroyed in the 49 units included in the Supplementary Submission of August 20, 2003, brings the estimate of total nests destroyed in all FMUs in Ontario during the 2001 nesting season to 44,962.

³⁴ See http://www.cec.org/files/pdf/sem/02-1-supplementary%20information_en.pdf

³⁵ The Council decision of April 22, 2003 deferred a decision on our original petition pending the provision of additional information. See <http://www.cec.org/files/pdf/sem/02-1-RES-E.pdf>

³⁶ The *Breeding Bird Mapping Census Database* was used to determine breeding bird densities in the FMUs. The density data was discounted by 18% to account for birds that are included in the census database but do not breed in forest habitat and birds that are not covered by the *Migratory Birds Convention Act*. Appendix 6 of the Submitters petition to the CEC of February 4, 2002 (SEM-02-001) provides additional explanation.

³⁷ Provided by Robert Mears (except Shiningtree FMU), Forest Management Planning Specialist, Ontario Ministry of Natural Resources via e-mail April 6, 2004. Paul Fantin, R.P.F., Management Forester, Timiskaming Forest Alliance Inc provided the information for Shiningtree FMU, via e-mail on October 1, 2004.

³⁸ The calculation of the number of nests destroyed is done by multiplying the discounted breeding bird density per hectare by the number of hectares actually clear-cut in 2001-2002, multiplied by a factor of 0.0536 to account for the seasonal variation in the logging rate and a nesting period of one month. For further explanation of this calculation method please refer to the Supplementary Submission to the Commission for Cooperation (SEM-02-001) submitted on August 20, 2003 found in [Appendix 5](#).

³⁹ [Appendix 7: Tab \(b\)](#). Email from Yvan Lafleur [NCR] to Kelly Marsden [NCR] dated April 10, 2001 re "Forestry-Incidental kills".

⁴⁰ 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."

⁴¹ 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). 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.

⁴² See [Appendix 6](#).

⁴³ [Appendix 9: 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).

⁴⁴ 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.

⁴⁵ The ATIP inquiry was filed on April 28, 2003. It requested:

All information whether in paper or electronic or other form including correspondence, letters, emails, memoranda, reports, notes, and notes or minutes of meetings or conversations, etc. respecting CEC submission *SEM-02-001: Ontario Logging* at Environment Canada, including the offices of Minister David Anderson or his CEC alternate Norine Smith, or Rita Cerutti, Americas Branch, International Relations Directorate or any other official, agent, or representative of Environment Canada or the Minister's Office.

⁴⁶ [Appendix 7: Tab \(c\)](#).

⁴⁷ The then Minister of Natural Resources Canada, Ralph Goodale.

⁴⁸ [Appendix 7: Tab \(a\)](#).

⁴⁹ [Appendix 7: 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."

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- ⁵⁰ [Appendix 7](#): 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.
- ⁵¹ *Ibid.*, Tab (a): at p. "68" of the *Access* documents, see also Mr. Wendt's letter of February 13, 2001 in [Appendix 9](#).
- ⁵² [Appendix 7](#): Tab (d), p. "18" of the *Access* documents.
- ⁵³ *Ibid.*
- ⁵⁴ Justice Dickson in *R. v. Chapin* [1979] 2 S.C.R. 121.
- ⁵⁵ 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.
- ⁵⁶ [Appendix 9](#): *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.
- ⁵⁷ [Appendix 10](#): 81 D.L.R. (3d) 396, Manitoba Court of Appeal.
- ⁵⁸ At p. 400.
- ⁵⁹ *Daniels v. The Queen*, [1968] S.C.R. 517.
- ⁶⁰ At p. 401.
- ⁶¹ At p. 403.
- ⁶² See [Appendix 7](#): Tab (a). Slide 20 or page "86" of the *Access to Information* documents.
- ⁶³ *Secretariat's Determination*, A14/SEM/99-002/03/14(2), (December 23, 1999): at p. 5.
- ⁶⁴ 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.
- ⁶⁵ 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.
- ⁶⁶ 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.
- ⁶⁷ 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.
- ⁶⁸ [Appendix 11](#): *A Silvicultural Guide to Managing Southern Ontario Forests*, Technical Series, MNR, 2000 at pp. 382-83.
- ⁶⁹ 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.
- ⁷⁰ [Appendix 1](#). Canada's *Compliance and Enforcement Policy for Wildlife*.
- ⁷¹ *Ibid.*, from the Introduction.
- ⁷² *Ibid.*, from the "Goals" section.

⁷³ Ibid., from the "Principles" section, namely principle II.

⁷⁴ See footnotes 44 and 45 for examples of cases prosecuted under the MBCA.

⁷⁵ Appendix 1: *Compliance and Enforcement Policy*, in the "Definitions" section.

⁷⁶ Appendix 8 contains all of the correspondence related to this exchange.

⁷⁷ Appendix 7, Email from Yvan Lafleur [NCR] to Kelly Marsden [NCR] dated April 10, 2001, re "Forestry-Incidental kills".

⁷⁸ *Secretariat's Notification to Council* (Article 15(1)), SEM-96-001, June 7, 1996 at Section IV(B).

⁷⁹ 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>.

⁸⁰ A14/SEM-99-002/01/SUB

⁸¹ Appendix 12: [1992] 2 W.W.R. 377, Manitoba Queen's Bench.

⁸² The language of the subsection was identical to the present subsection.

⁸³ At p. 380.

⁸⁴ 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.

⁸⁵ 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.