Secretariat of the Commission for Environmental Cooperation

Notification to the Submitters and to Council regarding a proceeding notified by Canada

Submitter:	Environmental Defence Canada Natural Resources Defense Council (U.S.) John Rigney Don Deranger Daniel T'seleie
Represented by:	Gillian McEachern, Campaigns Director, Environmental Defence Canada
Party:	Canada
Original submission:	14 April 2010
Date of the notification:	14 April 2014
Submission no.:	**SEM-10-002 (*Alberta Tailings Ponds*)**

I. EXECUTIVE SUMMARY

1. On 14 April 2010, Environmental Defence Canada and the Natural Resources Defense Council (U.S.), together with Canadian residents John Rigney, Don Deranger, and Daniel T'seleie (the "Submitters") filed Submission SEM-10-002 (*Alberta Tailings Ponds*) (the "Submission")[1] with the Secretariat of the Commission for Environmental Cooperation (the "Secretariat" of the "CEC"), pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* ("NAAEC" or the "Agreement")[2].

2. Canada responded to the submission on 31 January, 2014. Canada alleged the existence of a "pending judicial proceeding" that, according to Canada, required the Secretariat to proceed no further with the Submission.[3]

3. The Secretariat has assessed Canada's notification of a pending judicial or administrative proceeding and determines that it does not meet the definition in NAAEC Article 45(3).

II. SUMMARY OF THE RESPONSE

4. Canada's Response, dated 31 January 2014, notified the Secretariat of the existence of a "pending judicial proceeding" that, according to Canada, required the Secretariat to proceed no further with the Submission.[4]

[1] Submission SEM-10-002 (13 April 2010) ["Submission"]. See the SEM Registry for Submission SEM-10-002 at http://goo.gl/yJKIy8 for developments in relation to the Submission.

[2] *North American Agreement on Environmental Cooperation*, United States, Canada and Mexico, 14-15 September, 1993, Can TS 1994 No 3, 32 ILM 1480 (entered into force 1 January, 1994) ["NAAEC"], online: CEC <www.cec.org/NAAEC>. Use of the word "Article" in this Notification refers, unless otherwise indicated, to provisions of the NAAEC.

[3] SEM-10-002 (*Alberta Tailings Ponds*) Government of Canada Response in accordance with Article 14(3) (31 January 2014) ["Response"].

5. Canada informed the Secretariat that a private citizen, Mr. Anthony Neil Boschmann,

> swore 'an information,' in accordance with section 504 of the *Criminal Code*, before the Alberta Provincial Court alleging that Suncor Energy Inc., a company operating in the Alberta oil sands region, permitted the deposit of deleterious substances into the Athabasca River, in violation of subsection 36(3) of the *Fisheries Act*. The Court is set to hold a process hearing on the matter on February 27, 2014, in which Government of Canada prosecutors will participate.[5]

In the Response Canada stated that, in accordance with Article 14(3), the subject-matter of the submission "is currently the subject of a pending judicial proceeding," and because "the allegations made by Mr. Boschmann relate directly to the assertions" in the Submission, Canada asked that the Secretariat proceed no further and that the Secretariat promptly notify the Submitters and Council that the Submission is terminated.[6]

6. Canada thus concluded that the case for termination of *the Alberta Tailings Ponds* submission had been made out due to the existence of the proceeding (the "Boschmann Information").

III. ANALYSIS

7. NAAEC Article 14(3)(a) provides as follows:

> The Party shall advise the Secretariat within 30 days … of the [Secretariat's] request [of a response from the Party]:
>
> (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further ….

8. For purposes of Article 14(3), Article 45(3)(a) defines the term "judicial or administrative proceeding" as

> a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order ….

9. In order to give full effect to the Submissions process and in particular, to promote transparency, public participation and understanding of environmental law enforcement,[7] the

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[4] Response at 1.
[5] *Ibid*. An "information" is a sworn allegation of crime.
[6] *Ibid*.
[7] On the subject of the Secretariat's power to interpret the NAAEC, in SEM-07-005 (*Drilling Waste in Cunduacan*) Article 14(3) Determination (8 April 2009) at para 23 the Secretariat wrote: "That the Secretariat may interpret its constitutive instruments is supported by the doctrine of 'effectiveness' in public international law, which has been described in a recent international arbitral award as follows:

> [I]nternational organisations have regularly approached the interpretation of their constituent instruments […] by way of the concept of institutional "effectiveness." Even though the governing text may not explicitly empower the organization to act in a particular manner, international law authorizes, indeed requires, the organization, should it find it necessary, if it is to discharge all its functions effectively, to

Secretariat has always assessed notifications by a Party of pending judicial or administrative proceedings.[8] The Secretariat thus analyzes whether a proceeding is "pursued by the Party," in a timely fashion (considering the procedural rules in the relevant jurisdiction), and whether the subject-matter of the submission in terms of effective enforcement is also the subject of the proceeding. In particular:

> In view of the commitment to the principle of transparency pervading the NAAEC, *the Secretariat cannot construe the Agreement as permitting it to base its determination whether it has before it a situation contemplated by Article 14(3)(a), and that it should proceed no further with a submission, on the mere assertion of a Party to that effect*. For example, the Secretariat determined in one case that it should give no further consideration to a submission *based on an analysis of the Party's detailed explanation* of the identity between the matter that was the subject of the submission and the matter that was the subject of the related international dispute, as supported by the arbitration notice for that dispute.[9]

10. The Secretariat thus considers whether the "matter" of the Submission is the subject of the Boschmann Information, whether the Boschmann Information constitutes a "pending judicial or administrative proceeding," and whether it is "pursued" by Canada.

i) Whether the matter of the submission is the subject of a judicial or administrative proceeding

11. The assertions in the *Alberta Tailings Ponds* Submission concern Canada's alleged failure to effectively enforce subsection 36(3) of the *Fisheries Act* respecting leakage of tailings ponds process waters "into surface waters frequented by fish, or through groundwater and the surrounding soil into surface waters frequented by fish."[10]

12. The Boschmann Information, which is attached to Canada's Response, does not include any reference to tailings ponds. It alleges violations of subsection 36(3) but, unlike the Submission, it does not include any particulars about alleged locations of such violations, or about how the alleged offences occurred. Canada's Response does not allow the Secretariat

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interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have in mind. The same is true of international judicial organs [Eritrea-Ethiopia Boundary Commission, Statement of 27 November 2006, UN Security Council Doc. S/2006/992, 15 December 2006, 9-34 at 14]"[citing Territorial Dispute (Libyan Arab Jamahiriya/Chad) Judgment, ICJ Reports 1994, pp 6 and 25].

[8] See, for example: SEM-96-003 (*Oldman River I*); SEM-97-001 (*BC Hydro*); SEM-99-001 (*Methanex*); SEM-00-002 (Neste Canada); SEM-98-004 (*BC Mining*); SEM-00-004 (*BC Logging*); SEM-00-006 (*Tarahumara*); SEM-01-001 (*Cytrar II*); SEM-02-003 (*Pulp and Paper*); SEM-03-003 (*Lake Chapala II*); SEM-04-002 (*Environmental Pollution in Hermosillo*); SEM-04-005 (*Coal-fired Power Plants*); SEM-05-002 (*Coronado Islands*); SEM-05-003 (*Environmental Pollution in Hermosillo II*); Consolidated submissions SEM-06-003 and SEM-06-004 (*Ex Hacienda El Hospital II* and *Ex Hacienda El Hospital III*); SEM-06-005 (*Species at Risk*); SEM-06-006 (*Los Remedios National Park*); SEM-07-005 (*Drilling Waste in Cunduacán*); SEM-07-001 (*Minera San Xavier*); SEM-08-001 (*La Ciudadela Project*); SEM-09-003 (*Los Remedios National Park II*); SEM-09-002 (*Wetlands in Manzanillo*); SEM-10-004 (*Bicentennial Bridge*); and SEM-11-002 (*Sumidero Canyon II*).

[9] SEM-01-001 (*Cytrar II*) Article 14(3) Determination (13 June 2001) at 5 [emphasis added]. The example mentioned in this quotation is from SEM-99-001 (*Methanex*) Article 14(3) Determination (30 June 2000) [emphasis added].

[10] Article 14(1) and (2) Determination at para 2.

to conclude that "the matter [of the Submission] is the subject" of the purported pending proceeding in accordance with Article 14(3)(a).

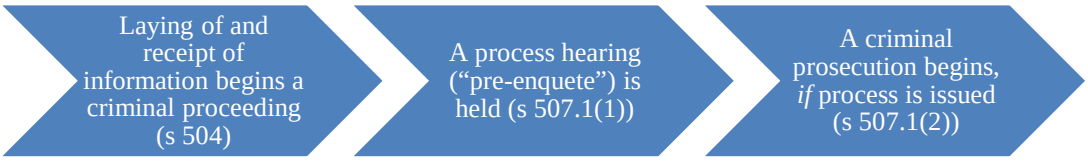
ii) Whether the Boschmann Information meets the definition in Article 45(3)

13. Article 45(3) provides that a "'judicial or administrative proceeding' means … a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law."

14. Section 507.1 of the *Criminal Code*[11] of Canada governs the procedure to be followed after a private informant lays an information, and after it has been received by a justice of the peace.[12] Because Canada's letter refers to the informant Mr. Boschmann as "a private citizen,"[13] the Secretariat considers that the referral of his information to a judge for a process hearing was pursuant to section 507.1, rather than pursuant to section 507 which applies where an information is laid by a peace officer.

15. In the following paragraphs the Secretariat describes the procedure set out in section 507.1 of the *Code*. The procedure, as clarified by the case law, is summarized below in Figure 1.

Figure 1: Laying of an information by a private informant leading to commencement of a criminal prosecution (*Criminal Code*)



16. Subsection 507.1(1) directs the justice of the peace, after receiving the information, to refer the information to a provincial court judge, "to *consider* whether to compel the appearance of the accused on the information."[14] The hearing before the provincial court judge is the "process hearing" (also known as a "pre-enquete" in the case-law, but not given any particular any name in the *Code*).

17. Subsection 507.1(2) requires the judge at the process hearing to "issue either a summons or warrant for the arrest of the accused … to answer to the charge", only if the judge "considers that a case for doing so is made out."

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[11] RSC 1985, c C-46, as amended ("*Code*").
[12] Canada refers in its Response to section 504 of the *Criminal Code*. Section 504 describes the process by which any person may lay an information before a justice. That the Boschmann information met the threshold for an information to be received, is evidenced by the 12 September, 2013 endorsement of Justice of the Peace Trinda Cooper at the bottom of the information [Response at 5].
[13] Response at 1.
[14] Emphasis added.

18. In addition to being satisfied that a "case [has been] made out" for issuing process, subsection 507.1(3) sets out that the justice must also: (a) have "heard and considered the allegations of the informant and the evidence of witnesses;" (b) be "satisfied that the Attorney General has received a copy of the information;" (c) be "satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and" have (d) "given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing."

19. "A pre-enquete is usually an *ex parte* proceeding held *in camera*;"[15] it does not include the accused. However, the Attorney General – which includes the federal Crown, by operation of subsection 507.1(11) – may appear at the pre-enquete under subsection 507.1(4). This is consistent with Canada's statement in its Response that "Government of Canada prosecutors will participate" in the 27 February process hearing (but as will be seen below, does not mean that an "action" is being "pursued by the Party" in accordance with Article 45(3)).

20. It is only once process (that is, a summons or a warrant for the arrest of the named person) has been issued that a "criminal prosecution" can be said to begin. As the Ontario Court of Appeal put it in *R* v *McHale*:

> An information is a sworn allegation of crime. But it does not compel the person named as the accused to attend court to answer to the charge. Although the person named in the information is "charged with an offence" for the purposes of s. 11 of the *Canadian Charter of Rights and Freedoms*, *we distinguish between the commencement of criminal proceedings and the commencement of a criminal prosecution*. This distinction coincides with the dual functions of the justice. The *ministerial act* of receiving the information coincides with the institution of proceedings, and the *judicial act* of issuing process signals the *commencement of the prosecution*.[16]

21. In *R* v *Dowson*, a 1983 Supreme Court of Canada case, the Court said that "prior to that determination by [a justice to proceed with the charges by issuing process], there being no summons or warrant issued, one could say that the process is not yet put into operation."[17]

22. In *Southam*, a case dealing with the question of which proceedings should be exempted from the general rule of public access, Krever JA of the Ontario Court of Appeal stated in 1990:

> It is true that the discretion that the justice of the peace must exercise is one that must be exercised judicially and that, in that limited sense, the proceeding is a judicial proceeding. Authority for this statement is to be found in the judgment of this court in *Regina v. Allen* (1974), 20 C.C.C. (2d) 447, at p.448. I stress, however, that it is a judicial proceeding in a very limited sense. It cannot affect liability. Its sole purpose is to determine whether there should be a prosecution. As Mr. Justice Lamer pointed out in *Dowson v. The Queen, supra*, the prosecution has not yet begun. Indeed, the result of the hearing may be that a

[15] *R* v *McHale* 2010 ONCA 361 at para 48, 261 OAC 354; leave to appeal to SCC refused 413 NR 393 (available on WL Can) ("*R* v *McHale*"). See also *R* v *Ambrosi*, 2012 BCSC 1261 at para 93, where the Supreme Court of British Columbia found that "holding the s 507.1 hearing in public was contrary to the established jurisprudence."

[16] *McHale*, at para 44 (emphasis added). The Court here refers to *R* v *Dowson*, [1983] 2 SCR 144 (SCC), at 150, 155 and 157; *Southam Inc.* v *Ontario* (1990), 75 OR (2d) 1 (OCA), at 6-7 ("*Southam*").

[17] *R* v *Dowson*, [1983] 2 SCR 144 (SCC), at 154-155.

> prosecution may not begin. In *Regina v. Allen, supra*, Arnup J.A. explained how limited the purpose of the process was. At p.448 he said:
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> > In our view the determination which is made by the Justice under s.455.3(1) [now s.507(1)] is a determination, to be made judicially, whether on the evidence which is placed before him upon that hearing a case for the issue of a summons has been made out. *It has no further effect*. ... (Emphasis added [by Krever JA])
>
> Moreover, the pre-inquiry is devoid of some of the attributes of a normal judicial proceeding. The standard rule in judicial proceedings is *audi alteram partem*. The proceeding with which s.507(1) of the *Code* is concerned is *ex parte*. The person named in the information has no opportunity to make full answer and defence because, there being no prosecution in existence, there is nothing to answer or defend.[18]

23. In its Response, Canada notes that a process hearing on the Boschmann Information was scheduled for 27 February 2014. The Secretariat has learned that process was not issued at the process hearing. The Secretariat was also advised of a publication ban in relation to the proceeding, and a ban on public access to the contents of the court file, facts that, in keeping with the need to protect a person not yet accused of committing an offence, are consistent with process hearings being held both *in camera* (excluding public access) and *ex parte* (in the absence of the not-formally-accused person).[19]

24. For the purpose of determining whether the matter of the Submission is the subject of a "judicial … action" as contemplated by Article 45(3)(a), the Secretariat considers that in light of the procedures for process hearings laid by private informants, the relevant considerations are whether process is issued, and whether a criminal prosecution is thus underway. Because process was not issued in relation to the Boschmann Information and a criminal prosecution has thus not commenced, there is no "action" as contemplated in Article 45(3).

25. In further support of the notion that no criminal prosecution or "action" exists in Canadian law where no process is issued following a process hearing, is the fact that the *Code* contemplates situations where, six months after the process hearing has been held, the information is "deemed never to have been laid."[20]

iii) Whether the proceeding is pursued by Canada

26. Article 45(3)(a) defines "judicial or administrative proceeding" as an action "pursued by the Party." The Secretariat has determined that "where a government is actively engaged in pursuing enforcement-related measures against one or more actors implicated in an Article 14 submission, the Secretariat is obliged to terminate its examination of the allegations of non-enforcement."[21]

27. Process not having been issued in relation to the Boschmann Information, no proceeding is pending. In the absence of a pending proceeding, the Party cannot be said to be "pursuing" it. As any future proceedings related to the Boschmann Information depend on action being

[18] *Southam Inc.* v *Ontario* (1990), 75 OR (2d) 1 (OCA), at para 14.
[19] See para 19 and footnote 15, *supra*.
[20] *Code*, subsections 507.1(5)-(7).
[21] SEM-96-003 (*Oldman River I*) Article 15(1) Determination (2 April 1997) at 3.

taken by the informant, rather than by the Party, Canada cannot be considered to be "pursuing" an "action" with regard to the Boschmann Information, in accordance with the definition in Article 45(3)(a).

IV. NOTIFICATION

28. In summary, the Response does not allow the Secretariat to conclude that the subject-matter of the Submission is the subject of a pending proceeding. Indeed, the Boschmann Information cannot be considered a pending judicial or administrative proceeding because under Canadian law, no criminal prosecution or "action" has commenced; nor can the Party be said to be pursuing any such action.

29. Thus, not having any information before it that a case for termination of the *Alberta Tailings Ponds* Submission has been made out due to the existence of a pending "judicial or administrative proceeding" under Article 14(3)(a), as defined in Article 45(3)(a), the Secretariat informs the Council and the Submitters that it is proceeding with its consideration whether the Submission in light of the Response warrants recommending the development of a factual record, in accordance with Article 15(1).

Respectfully submitted on this 14th day of April, 2014.

Secretariat of the Commission for Environmental Cooperation

Per: Irasema Coronado, Ph.D.
Executive Director