

Dallas, 11 June 2000

COUNCIL RESOLUTION 00-04

Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record regarding the assertion that Canada is failing to effectively enforce s. 35(1) of the *Fisheries Act* with respect to certain hydro-electric installations in British Columbia, Canada (SEM-97-001)

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

HAVING RECEIVED the final factual record;

NOTING that pursuant to Article 15(7) of the NAAEC the Council is now called upon to decide whether to make the factual record publicly available; and

AFFIRMING its commitment to a timely and transparent process;

HEREBY DECIDES:

TO MAKE PUBLIC and post on the registry the final factual record with respect to this submission; and

TO ATTACH to this resolution and the final factual record the letters sent by the Parties to the Secretariat pursuant to Article 15(5) of the NAAEC commenting on the draft factual record.

APPROVED BY THE COUNCIL:

Norine Smith
Government of Canada

José Luis Samaniego
Government of the United Mexican States

William A. Nitze
Government of the United States of America

Ottawa ON K1A 0H3

Ms. Janine Ferretti
Executive Director
Secretariat
Commission for Environmental Cooperation
393, St. Jacques Street West, Suite 200
Montreal QC H2Y 1N9

Dear Ms. Ferretti:

Further to Article 15(5) of the North American Agreement on Environmental Cooperation (NAAEC), we have reviewed the draft factual record on 97-001 ('BC Hydro') and provide the following comments.

While clearly a factual record cannot contain all of the information provided to the Secretariat, there are two contextual facts that are import to include:

- 1) almost all BC Hydro facilities were built and in service prior to 1977, the year that section 35(1) of the Fisheries Act came into force;
- 2) hydroelectric facilities affect 27 watersheds, representing 2% of all salmon bearing streams in British Columbia. There are no facilities in the mainstream of the Fraser/Thompson system.

Paragraph 137 contains a factual error: the final value of reduced power benefits is \$50 million per year.

Canada requests that the above comments be attached to, and from part of the final factual record.

Canada notes that the factual record goes beyond a compilation of facts, and contains opinions, conclusions and recommendations of the Secretariat or the Expert Group. For example, paragraph 143 contains speculation regarding issues that may "affect the effectiveness of the WUP process". Paragraph 149 is a long list of recommendations regarding "Issues worthy of attention in monitoring the effectiveness of the WUP program". Paragraph 233 contains a conclusion that "setting the baseline conditions at the habitat level when Water Use Plans (WUP) are initiated or in the recent past sets the bar too low for habitat protections". As you are aware, the question of the scope of factual records within the NAAEC is currently being considered by the Parties, and Parties intend to clarify their collective understanding of this matter as soon as possible.

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It will be important to note that the release of a factual record does not mean endorsement of it by the Council or the concerned Party. Consequently, we would like the following statement attached to the final factual record: "Canada is not to be taken as necessarily agreeing with the content of the factual record".

Finally, we note that comments of a Party are not to be made public unless and until Council votes to make the final factual record publicly available pursuant to 15(7) of the NAAEC.

Yours sincerely,

Norine Smith
Assistant Deputy Minister
Policy and Communications

c.c.: William Nitze
José Luis Samaniego

May 11, 2000

Janine Ferretti
Executive Director of the Secretariat
Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau
Montreal (Quebec)
Canada H2Y 1N9

Dear Janine:

On behalf of the United States of America, and pursuant to Article 15 of the North American Agreement on Environmental Cooperation (NAAEC), I would like to provide the Secretariat with comments on the draft factual record relating to Submission on Enforcement Matters 97-001 (the "British Columbia Hydro" submission). The U.S. government reviewed the draft factual record with interest. Although the U.S. could offer other thoughts and suggestions about the factual record, we restrict our comments to one issue that we consider to be extremely important.

It is the position of the U.S. government that the primary purpose of a factual record is for the Secretariat to set forth the facts surrounding a particular assertion of failure by a Party to the NAAEC to effectively enforce its environmental law. This statement of the facts should enable members of the public in North America to reach their own conclusions as to whether the Party is effectively enforcing its law. In this process the Secretariat has been given the important role of serving as a neutral and independent fact-finder. Consequently, it is important that the Secretariat refrain from offering comments in a factual record that appear to provide the Secretariat's own views about whether or not there has been effective enforcement of the law with respect to the assertions in a particular submission.

In this regard, the U.S. government is concerned with three portions of the draft factual record. The portion of the draft factual record of most concern to us is the last bullet of section 233. In that bullet the Secretariat discusses the tools Canada would need to use under particular circumstances in order to effectively enforce its law. Also of concern are section 141 and section 218 of the draft record. Section 141 appears to convey the Secretariat's views as to what actions taken by the Canadian government might satisfy the concerns of those who made the submission. Section 218 appears to set forth the Secretariat's thoughts on what "challenges" need to be addressed by Canada to resolve "harm to fish habitat caused by BC Hydro's operations." In our view, the statements in these sections cross the line or come very close to crossing the line

between independent fact-finding, on the one hand, and rendering judgment on the underlying legal issue at the heart of the submission, on the other hand. The U.S. therefore recommends that these sections be modified by the Secretariat in the final factual record to address this issue.

If the Secretariat requires further clarification of our comments, please do not hesitate to contact me, or Lorry Frigerio of my staff.

Very truly yours,

William A. Nitze
U.S. Alternate Representative to the Council



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***Unidad Coordinadora de
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UCAI/2442/00
REF: CCA.00/SEM 97-001

Mexico City, Federal District, May 11, 2000

Ms. Janine Ferretti

Executive Director

Commission for Environmental Cooperation

Mexico hereby acknowledges receipt of the Draft Factual Record for Submission SEM 97-001 to the Secretariat of the CEC, and expresses its recognition of the Secretariat's efforts to continue making progress toward perfecting the procedure established by Articles 14 and 15 of the NAAEC. In this regard, and in accordance with Article 15(5) of the NAAEC, Mexico is hereby transmitting to the Secretariat its observations concerning the accuracy of the Factual Record.

It is worth noting first that, as stipulated by the Agreement, after the Secretariat incorporates the relevant observations into the final factual record, it is exclusively for the Council to decide whether or not to make said document public, as provided by Article 15(7) of the Agreement.

As discussed in our specific observations, Mexico holds the view that a factual record should consist of the collection of facts alone, as the Agreement provides, and not of value judgements or recommendations from experts whose services are retained by the Secretariat, nor opinions of the Secretariat itself.

Moreover, we draw your attention to the fact that the documents presented as a *factual record* should be limited to describing the facts that motivated the Submission.

Additionally, we are of the opinion that a factual record cannot review or rule on the efficiency, effectiveness or suitability of a legal framework, but must focus exclusively on the factual corroboration of the alleged failures to enforce the law asserted in the submission relating to the case in question.



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Finally, and without minimizing the importance of the remaining observations discussed in the accompanying review, I must stress the need to conduct the process properly, i.e., in strict adherence with the Agreement. This will give us the opportunity to provide the public with a process that offers certainty, that is effective and transparent, and whose ultimate consequence will be a strengthened mechanism for public participation.

Not being there other matters, I stress my highest regards.

Yours sincerely,

José Luis Samaniego Leyva
Alternate Representative

VDM/MVL

cc: Julia Carabias Lillo, Secretary of the Environment, Natural Resources and Fisheries.
Norine Smith, Alternate Representative, Canada
William Nitze, Alternate Representative, United States of America



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**OBSERVATIONS OF MEXICO ON THE DRAFT FACTUAL RECORD FOR
SUBMISSION SEM 97-001
(BC ABORIGINAL FISHERIES COMMISSION ET AL.)**

Mexico City, Federal District, 8 May 2000

BACKGROUND

On 2 April 1997, the Sierra Legal Defense Fund and the Sierra Club Defense Fund (the Submitters) filed a Submission with the Secretariat of the Commission for Environmental Cooperation (CEC) under Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), in which they assert that the Government of Canada is failing to effectively enforce sections 35(1) and 40(1) of the Fisheries Act, in respect of the operations of the company BC Hydro and Tower Authority (BC Hydro).

Once the Submission was analyzed under Article 14(2) of the NAAEC, the Secretariat determined that the Submission warranted requesting a Response from the Party. Accordingly, Canada submitted its Response in July 1997.

Having analyzed both the Submission and the Response of the Party, the Secretariat found that the Submission warranted the development of a factual record pursuant to Article 15(1) of the NAAEC, and so notified the Council of the CEC on 27 April 1998.

By Resolution 98-07, Council ordered the Secretariat to develop said record.

On 28 March 2000, the Secretariat submitted the "Draft Factual Record for Submission SEM 97-001" (the Draft) to Council pursuant to Article 15(5) of the NAAEC.

The following is a summary of the contents of both the Submission and the Response of the Party, the actions of the Secretariat in relation to the development of the corresponding Draft Factual Record and the characteristics of said Draft.

1. The Submitters assert that sections 35(1) and 40(1) of Canada's Fisheries Act "*make it an offence to carry on any work that results in the harmful alteration of fish habitat,*" supporting their statement with the enumeration of six specific cases in which the operations of



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BC Hydro are harming fish and their habitat. Thus, they assert that BC Hydro has “*consistently and routinely violated [federal Fisheries Act] section 35(1)*” and that the regular operation of its dams “*causes consistent and substantial damage to fish and fish habitat*” (paragraphs 11 and 13, p. 13 of the Draft).

The Submission also states that section 35(2) of the Fisheries Act contains an exception to section 35(1) to allow alteration, disruption or destruction of fish habitat by any means authorized by the Minister of Fisheries and Oceans or under regulations made under the Act.

In addition, it states that the Ministry of Fisheries and Oceans of Canada “*has not issued any authorizations pursuant to s. 35(2)...that permit Hydro to damage fish habitat, nor are there any regulations under the Act that exempt Hydro from complying with s. 35(1).*” The Submitters emphasize that the Department of Fisheries and Oceans—the federal body responsible for enforcement of the Fisheries Act—has failed to enforce section 35(1) in the case of BC Hydro, since it has “*only laid two isolated charges...against [BC] Hydro since 1990, despite clear and well documented evidence that Hydro’s operations have damaged fish habitat on numerous occasions*” (paragraph 13, p. 13 and paragraph 19, p. 15 of the Draft).

The Submitters assert that “*the Party has failed to effectively enforce the Fisheries Act. [The Submission] states: “DFO...has failed, and continues to fail, to enforce s. 35(1) against Hydro*” (paragraph 19, p. 15 of the Draft).

2. The Government of Canada, for its part, contends that it is effectively enforcing its environmental laws, stating that “*Article 5 of the NAAEC recognizes that enforcement encompasses actions broader than just prosecution and provides a non-exhaustive list of appropriate enforcement actions.*” It further argues that the Submitters are basing their assertions on an overly limited definition of effective enforcement, one that “*equates enforcement directly with legal and judicial sanctions*” (paragraph 23, p. 16 of the Draft).

The Party states that it “*has determined that a range of compliance activities, from voluntary compliance and compliance agreements to legal and judicial sanctions, are the most productive in terms of providing for the long-term protection of the environment with respect to fish and fish habitat*” (paragraph 24, p. 16 of the Draft). In addition, it states that “*Canada does not hesitate to utilize the full power of its laws to protect fish and fish habitat, where the exercise of these powers is deemed by Canada to be the appropriate response*” (paragraph 25, p. 17 of the Draft).



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In support of its contentions, Canada includes in its Response a table, titled “Orders and Authorizations Issued to BC Hydro since 1990,” containing authorizations issued under sections 32 and 35(2) of the Fisheries Act, as well as a list of minimum flow orders pursuant to section 22(3) of the Act. As well, Canada identifies the following five strategies for law enforcement and compliance: New Projects, Emergency Operations, Regional Technical Committees, Water Use Planning Initiative and Water Quality Guidelines.

3. Having received instructions from Council, the Secretariat initiated development of the Draft Factual Record, for which purpose it carried out the following activities:
 - a. retained the services of an environmental expert with an in-depth knowledge of the citizen submission process (paragraph 39, p. 28 of the Draft);
 - b. convened an Expert Group on hydroelectric operations, regulatory and compliance matters and fish habitat-related issues, for the purpose of preparing a report *“relating to the effectiveness of Canada’s enforcement practices”* (paragraph 40, p. 29 of the Draft and Appendix 2, p. 2);
 - c. identified Canada, the Submitters, the province of British Columbia and BC Hydro as Stakeholders in the factual record development process (paragraph 41, p. 30 of the Draft);
 - d. invited the Stakeholders to provide information, both verbal and written, by a deadline that was subsequently extended several times, as well as to meet with the Expert Group in order to present information (paragraph 42, p. 30 and paragraphs 49 and 50, p. 35 of the Draft), at meetings at which it was intended that all the Stakeholders would attend as observers.¹ (paragraphs 46, 48, 49 and 52, p. 35 of the Draft);
 - e. distributed to Stakeholders the document titled “Commission for Environmental Cooperation, Draft Factual Record Under Articles 14 and 14 [sic] SEM-97-001, Synopsis,” produced by the Secretariat, which *“provided an overview of the Article 14 process and the process the Secretariat intended to use to develop information for consideration in the Factual Record”* (paragraph 43 of the Draft, p. 30);
 - f. distributed to Stakeholders a document entitled “Commission for Environmental Cooperation, Draft Factual Record Under Articles 14 and 14 [sic] SEM-97-001, Scope of Inquiry” in order *“to focus the information-gathering process and thereby enhance the efficiency and*

¹ It should be pointed out that the Draft Factual Record states that *“the Secretariat made efforts to schedule presentations by Canada and the Province of British Columbia to the Expert Group. One such presentation was scheduled for 11 February 1999, for example, but this presentation was postponed at Canada’s request. No such presentation was ever made”* (paragraph 49, p. 35 of the Draft), neglecting to explain that the reasons why Canada did not participate derived from its dissatisfaction with the process itself, its format and scope, which gave rise to a specific deliberation between the Council and the Secretariat, culminating in the suspension of the hearings.



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- effectiveness of the effort to develop information*” (paragraph 44, p. 31 of the Draft). The purpose of the document was to “*promote development of information regarding whether Canada has been effectively enforcing its environmental laws*” (Appendix 3, p. 1);
- g. sent a letter to the Stakeholders notifying them that the factual record would focus on a subset of the six BC Hydro plants, so as to gather information on the principal adverse impacts, the measures taken by Canada and “*the extent to which the government’s actions and BC Hydro’s efforts have been successful in reducing impacts.*” The same letter “*requested that the Stakeholders identify any other facilities that should be selected*” (paragraph 45, p. 34 of the Draft); and
 - h. invited citizens to participate in the process, placing the above documents (the letter of invitation to the Stakeholders inviting them to present information and participate in the meetings with the Expert Group, the Synopsis and the Scope of Inquiry) on the CEC web site and “*established a document repository*” (paragraph 53, p. 36 of the Draft) at the Institute of Dispute Resolution of the University of Victoria, British Columbia, containing the foregoing documents, as well as the “*...Submission itself, Canada’s Response, the Submitters’ Reply, the Council’s Resolution, and the Agreement and Guidelines,*” for consultation (Appendix 2, p. 2).

Through these activities, the Secretariat obtained and developed information relating, inter alia, to the nature of the enforcement activities undertaken by Canada and the effectiveness of said activities in enforcing section 35(1) of the Fisheries Act.

- 4. In the Summary section of the Draft Factual Record, the following principal results are noted:
 - a. habitat alterations are inevitable with the operation of hydroelectric plants;
 - b. Canada has various initiatives underway geared toward enforcement and reducing damage to fish habitat;
 - c. resolving the damage to fish habitat caused by the operations of BC Hydro is a major challenge, but entails finding a suitable trade-off between competing interests, improving understanding of the fish habitat potentially impacted by BC Hydro’s operations, as well as the possible options for resolving the harm to such habitat caused by such operations;
 - d. there are many activities, not only hydroelectric operations, that can damage fish habitat;
 - e. Canada mentioned the various enforcement approaches that it has undertaken, and is undertaking, to resolve the harm to fish habitat caused by BC Hydro operations: prosecution against BC Hydro; Fisheries Act s. 22(3) orders and ss. 32 and 35(2) authorizations; creation of various regional committees to better address aspects of the habitat; enforcement of the Water Quality Guidelines (paragraphs 216–220, pp. 118–120 of the Draft);



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- f. concerning Canada's enforcement activities and their impact within the context of the six facilities, the Expert Group Report indicates that Canada's efforts to resolve the habitat problems vary greatly from one facility to the next. The Expert Group notes that *"the fact that some activities produced benefits is clear but that information generally is limited concerning the degree and adequacy of benefit produced."* It also stresses the importance of applying a comprehensive, system-wide approach in resolving harm to fish habitat (paragraph 221, p. 120);
- g. Canada has initiated the development of a Water Use Planning process which is considered to be the centerpiece of its efforts to resolve the harm to fish habitat caused by BC Hydro operations, and which is designed to include collection and gathering of necessary data as well as compliance assessment measures, a monitoring plan and the possibility of adaptive management that provides opportunities to incorporate evolving knowledge (paragraphs 222, 226 and 227, pp. 121–122 of the Draft);
- h. in connection with the foregoing, the Draft Factual Record states that the Expert Group concluded that the Water Use Planning process *"is an improvement in many ways over previous strategies to resolve harm to fish habitat caused by BC Hydro operations."* It further indicates that *"the overall direction...is promising...the "proof" will lie in the results over the next several years."* The Expert Group mentions *"...a series of issues to monitor concerning whether the WUP process will prove to be effective"* (paragraphs 231–233, p. 124 of the Draft);
- i. concerning the procedure itself, the Draft Factual Record states that *"the Submitters' assertion appears to be that the WUP process may constitute effective enforcement of s. 35(1) of the Fisheries Act if...:"*
 - ◆ *Canada decides that a s. 35(2) authorization is needed for each BC Hydro operation that continues to cause or could continue to cause harm to fish habitat...;*
 - ◆ *Canada follows s. 35(2) and CEEA [Canadian Environmental Assessment Act] requirements in reviewing whether an authorization should be issued and in determining the terms and conditions to be included in each authorization...;*
 - ◆ *Canada "effectively enforces" (through prosecutions or otherwise) in those situations (if any) in which it declines to issue an authorization and the facility continues to operate in a way that violates s. 35(1) by harming fish habitat, and in situations (if any) in which there is non-compliance with an authorization"* (paragraph 234, p. 127 of the draft);



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- j. Concerning the enforcement measures taken other than the Water Use Planning process, the Draft states that *“limited information was provided concerning the effectiveness of the use of these tools.... Canada appears to contemplate considerably greater use of s. 35(2) authorizations as part of the [Water Use Planning] process, and the Expert Group provides information concerning the potential benefits of such a strategy”*:

“Section 35(2) authorization is an enforcement tool that can be used in the normal process of managing multiple uses of habitat. Although section 35(2) does not appear to have been often used in this way in the past, DFO indicates that it intends to use such authorizations as part of the WUP process. A wider use of section 35(2) authorizations would rationalize a process that, at present, appears haphazard and arbitrary. In particular, where habitat alterations are unavoidable, such as with the operation of hydro electric facilities, section 35(2) authorizations should provide a means of establishing expectations for habitat quality and productivity in the context of facility operation” (paragraph 220, pp. 119–120 of the Draft).

OBSERVATIONS

Mexico’s observations, which are intended as illustrative rather than exhaustive, are in keeping with the provisions of Article 15(5) of the NAAEC, which states that “[a]ny Party may provide comments on the accuracy of the draft within 45 days [of submission of the draft factual record]”:²

1. *The Draft factual record submitted by the Secretariat of the CEC does not specifically focus on establishing whether Canada failed to effectively enforce sections 35(1) and 40(1) of the Fisheries Act, which is the matter raised by the Submitters.*

Although Canada indicated the existence and enforcement of a wide range of measures at

² Mexico received two versions of the draft factual record, one in English and the other in Spanish. Although Article 19 of the NAAEC states that “[t]he official languages of the Commission shall be English, French and Spanish...”, the Spanish version of the draft factual record indicates, on page 3, that it is “an unofficial, unedited translation of the original English version. In the event of a discrepancy, the original shall prevail in the same measure” [English translator’s version]. In consequence, this Party states that the present observations were made by examining the Spanish version and comparing it insofar as possible with the English version, since otherwise it would have been necessary to work with the English version.



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its disposal, whose execution had to be corroborated in order to confirm that the assertions made in the Response of the Party were correct, the Secretariat focused on an analysis of the efficiency, efficacy and degree of effectiveness with which those measures were and should be enforced, which, from our point of view, vitiates the purpose of the factual record.

Thus, the Secretariat based its determination to develop a factual record on the insufficiency of information relating to the effectiveness of the actions taken by Canada to enforce its environmental law, instead of focusing on the factual corroboration of the alleged failures to enforce said law asserted by the Submitters, as it should do based on a broad interpretation of the term “effective enforcement,” as well as on the fact that Canada, in its Response, cited an additional series of measures that imply the effective enforcement of its environmental law.³

In this way, the Secretariat made up for the defects in the Submission, going into an analysis of the measures taken by Canada, even though the text of the Submission only made reference to the failure to enforce sections 35(1) and 41 of the Fisheries Act relating to prosecution.

2. *From our point of view, Canada is making use of its discretionary power in determining the type of action it considers relevant in each case, among the various provisions at its disposal. In this regard, we consider such decisions to be in keeping with Article 45(1)(a) of the NAAEC, and thus the selective enforcement of measures it considers to be relevant, arising from its discretionary power, falls outside the scope of the process established by Articles 14 and 15 of the Agreement.⁴*

³ We adopt the definition of “enforcement” given in *Black's Law Dictionary*: “Enforcement: the act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command.” *Black's Law Dictionary*. Sixth Edition. Centennial Edition (1891-1991), p. 528.

⁴ “Article 45: Definitions

1. For purposes of this Agreement:

A Party has not failed to “**effectively enforce its environmental law**” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

(a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or

(b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities;



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3. *By requesting additional information from the Submitters, including information relating to the Response of the Party, the Secretariat overstepped its authority under the NAAEC, which does not provide for such a possibility. Specifically, Article 21(1)(a) stipulates that additional information for the development of a Factual Record, including compliance and enforcement information, may only be requested from the Party.*

By acting in this way, the Secretariat opened the door for the Submitters to expand on the original content of their Submission, as they did, as well as to contest the arguments contained in the Response of the Party. This procedure adopted by the Secretariat has no basis in the NAAEC nor [in] the Guidelines.

Moreover, if the Secretariat considered it necessary to introduce this type of novel practice during the process of developing the Draft factual record, it should have requested Council's opinion on the matter, thus guaranteeing the reliability, transparency and predictability of the process.

4. *The Expert Group focused on gathering information on the effectiveness of the Canadian law enforcement activities, and here too the Secretariat overstepped its authority, since as discussed in point 1 of these Observations, the Secretariat is only empowered to analyze whether the Party failed to enforce its environmental law, but not to question the suitability of such law.*
5. *By inviting citizens to participate in the process and establishing a document repository at the Expert Group's office at the University of Victoria, further stipulating that the information provided to the repository would be available to the public unless its confidentiality were invoked, the Secretariat made the information in the factual record public before the vote in Council pursuant to Article 15(7) of the NAAEC and the Guidelines, and delegated functions reserved to it, since neither the NAAEC nor the Guidelines permit the establishment of a public document repository other than the public registry and file contemplated in Guidelines 15 and 16. In addition, the Secretariat placed documents on the CEC web site different from those expressly contemplated in Guidelines 15 and 16.*
6. *The Draft Factual Record questions the suitability of Canadian law by assessing the measures taken by the Party in terms of the degree and sufficiency of the benefits said measures produced, further discussing aspects to be surveyed in order to determine*



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whether the measures will prove to be effective, and also by including various recommendations on the manner in which the measures should be enforced so that they do not appear to be random or arbitrary.

In summary, it is clear that the Secretariat put procedures into practice that have no basis, thereby vitiating the process contemplated in Articles 14 and 15 of the NAAEC and its *Guidelines*.



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