
Secretariat of the Commission for Environmental Cooperation

Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation

Submission ID:	SEM-97-005
Submitter(s):	Animal Alliance of Canada Council of Canadians Greenpeace Canada
Concerned Party:	Canada
Date Received:	July 22, 1997
Date of this Determination:	May 26, 1998

I. INTRODUCTION

On July 21, 1997, the Submitters¹ filed with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or “Agreement”). This is the Secretariat’s determination as to whether the Submission meets the requirements of Article 14(1) so that it may be considered by the Secretariat.

II. SUMMARY OF THE SUBMISSION

The Submission alleges that Canada has a serious and growing endangered species problem, and that it has failed to enact federal legislation designed to protect endangered species. It also alleges that Canada’s failure to enact such legislation has implications for the other signatory countries to the NAAEC.

¹ The Submitters include Animal Alliance of Canada, Council of Canadians and Greenpeace Canada.

The Submission states that on June 4, 1992, the Governor in Council passed Order in Council No. P.C. 1992, 1204², authorizing the Prime Minister or Secretary of State for External Affairs to sign and ratify the *United Nations Convention on Biological Diversity* (“*Biodiversity Convention*”). On June 11, 1992, Canada’s Prime Minister signed the *Biodiversity Convention* on behalf of Canada at the U.N. Earth Summit in Rio de Janeiro. On December 4, 1992, Canada’s Prime Minister ratified the *Biodiversity Convention* on behalf of Canada by issuing an Instrument of Ratification.³

The Submission alleges that the Instrument of Ratification, made pursuant to the authority of Order in Council P.C. 1992, 1204 (the “Ratification Instrument”), is an “environmental law” as that term is defined in Article 45 of the NAAEC, and that Canada is failing to enforce that environmental law. The Submitters suggest that the legal effect of the Ratification Instrument is to “commit Canada to be bound by the *Biodiversity Convention* and fulfill its requirements in good faith”. Article 8(k) of the *Biodiversity Convention* requires a signatory nation to, “as far as possible and as appropriate” [...] “develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.” The Submitters state that Canada’s failure to enact endangered species legislation contravenes Article 8(k) of the *Biodiversity Convention*, which in turn constitutes a “failure to enforce” the Ratification Instrument.

The Submission also notes that the Submitters have communicated their concerns to the Canadian Government through various means, and concludes by arguing that the Submission merits a response from Canada as well as the preparation of a factual record.

III. ANALYSIS

1. *Article 14(1) of the NAAEC*

Article 14 of the NAAEC allows the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the requirements of Article 14(1). Where the Secretariat determines that the Article 14(1) requirements are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission.

The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable procedural screening devices. The Secretariat also believes that Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC⁴ and the provisions of the Vienna Convention on the Law of Treaties.⁵ However, the Secretariat also recognizes

² Attached as Appendix 5 to the Submission.

³ Attached as Appendix 7 to the Submission.

⁴ See Article 1 of the NAAEC.

⁵ Adopting such an interpretative approach is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See Pierre-André Côté, The

that meaning must be given not only to the specific criteria delineated in Article 14(1)(a)-(f), but also to the opening words of the section; that is, an “assertion” that a “Party” is “failing to effectively enforce its environmental law”.

While recognizing that the language of an “assertion” supports a relatively low threshold under Article 14(1), a certain amount of substantive analysis is nonetheless required at this initial stage. Otherwise, the Secretariat would be forced to consider all submissions that merely “assert” a failure to effectively enforce environmental law. The fact that the term “environmental law” is expressly defined in Article 45(2) for the purposes of Article 14(1) supports the conclusion that some initial screening is appropriate at the 14(1) stage.

This Submission raises a particularly challenging question that requires the Secretariat to determine whether or not the Submission involves an assertion relating to “environmental law”.

2. *The Subject Matter of the Submission*

The Secretariat is of the view that the Submission, on the basis of its subject matter, is relevant to the work of the Commission for Environmental Cooperation. The concerns raised by the Submitters regarding endangered species find expression in the NAAEC itself. Article 1(c) provides that one of the objectives of the NAAEC is to “increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna”. Further, the definition of “environmental law” in Article 45(2), which applies directly to Article 14, extends to laws for “the protection of wild flora and fauna, including endangered species, their habitat, and specially protected natural areas”.

Notwithstanding the above, the Secretariat must first determine under Article 14(1) whether the Submission asserts that Canada is failing to effectively enforce its environmental law.

3. *Is the Ratification Instrument “Environmental Law”?*

Article 45(2) of the NAAEC defines the term “environmental law” for the purposes of Article 14(1) in the following manner:

2. For the purposes of Article 14(1) and Part Five:

Interpretation of Legislation in Canada, 2nd ed. (Cowansville: Les Editions Yvon Blais, 1991), c.2; Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), c.8, and The Vienna Convention on the Law of Treaties, concluded at Vienna, May 23, 1969, entered into force January 27, 1980, 1155 U.N.T.S. 331 (“Vienna Convention”). The Vienna Convention is in force in both Canada and Mexico as of January 27, 1980. The United States signed the Vienna Convention on April 24, 1970 but has not ratified it. I.M. Sinclair notes in *The Vienna Convention on the Law of Treaties* (2nd ed., 1984) that since 1969, provisions of The Vienna Convention have frequently been cited in judgments of the Courts of the United States and in state practice as accurate statements of the customary rules in relation to interpretation of treaties.

- (a) **“environmental law”** means any statute or regulation of Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
- (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,
 - (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas

in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

Consistent with Article 14(1), the Secretariat is of the view that the term “environmental law” should be interpreted expansively. It would not be consistent with the purposes of the NAAEC to adopt an unduly restrictive view of what constitutes a statute or regulation which is primarily aimed at protection of the environment or prevention of a danger to human life or health.

The central argument in the Submission is that the Ratification Instrument “obligates” Canada to fulfill the obligations of the *Biodiversity Convention*. The Submission argues that Canada has not met the requirements of Article 8(k) of the *Biodiversity Convention*, and so has therefore failed to “enforce” the Ratification Instrument. However, with respect, the Secretariat is of the view that the Submission fails to make a critical distinction between “international” and “domestic” legal obligations. The purpose and effect of the Ratification Instrument is simply to confirm Canada’s international obligations in respect of the *Biodiversity Convention*.⁶ In Canada, there is a fundamental and long-standing constitutional principle, derived from Canada’s legal heritage, that the ratification process does not import international obligations into domestic law. Until international obligations are implemented by way of statute or regulation pursuant to a statute, those obligations do not constitute the domestic law of Canada.⁷

The Secretariat acknowledges that an Order in Council can, in certain circumstances, constitute a “regulation”, as that term is used in Article 45(2).⁸ However, in this case, the Ratification Instrument is not, in the opinion of the Secretariat, a “regulation”. The Ratification Instrument simply evidences and constitutes a one-time administrative act by a representative of the executive branch of the Canadian

⁶ See generally A. Jacomy-Millette, *Treaty Law in Canada*. U. of Ottawa Press, 1975, pp. 50-68 and 196-207.

⁷ P. Hogg, *Constitutional Law in Canada* (2d) (loose-leaf version) 1997, p.11-5; *International Law Chiefly as Applied and Interpreted in Canada*, eds. H. Kindred et al. (5th ed), Emond Montgomery, 1993, p.168.; Jacomy-Millette, *ibid.*, p. 196-207.

⁸ See R. Dussault and L. Borgeat, *Administrative Law: A Treatise* Vol. 1 (2nd ed.) (Toronto: Carswell, 1985) at 326-329.

government, in this case, the Prime Minister of Canada. It is properly distinguished from a “regulation”, which is authorized by statute and is subjected to the formal process of registration, Parliamentary scrutiny and publication.⁹ The Ratification Instrument is not legislative in nature, and has not been subjected to the rigours of the *Statutory Instruments Act*. While formally confirming international obligations, the Ratification Instrument has no effect on Canada’s domestic law, and so cannot be considered as an “environmental law” of Canada for the purposes of Article 14(1).

In making this determination, the Secretariat does not wish to exclude the possibility that future submissions may raise issues in respect of a Party’s international obligations that would meet the criteria of Article 14(1). Further, as noted above, the Secretariat acknowledges that the subject matter of the Submission raises important environmental concerns that should be the subject of debate and discussion between the NAAEC state Parties. However, it is not the role of the Secretariat to attempt to resolve these issues within the Article 14(1) process. The Secretariat is bound to interpret the provisions of Article 14(1) in a manner consistent with the language and purposes of the NAAEC.

IV. CONCLUSION

The Secretariat finds that it is precluded from further considering the Submission because it does not assert a failure by Canada to effectively enforce its environmental law. In accordance with Article 6(2) of the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the NAAEC*, the Submitters may provide the Secretariat with a submission that conforms to the criteria of Article 14(1) of the Agreement, within 30 days of receipt of this notification.

per: Janine Ferretti
Interim Executive Director

⁹ See the *Statutory Instruments Act*, R.S.C. 1985, c. S-22.