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Protecting Your Water Rights: A Guide to Environmental Legislation and Limits on Mining Activities in Ontario

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PART I - Introduction

1.1 Mining and Water Rights - What Ontario Residents Need to Know

This document provides a detailed summary of mining and water issues in Ontario in terms of what laws and regulations citizens can use to protect their water rights.

In this report you will find the tools and resources citizens have available to them to help prevent:
(a) contamination of water
(b) de-watering
(c) change in the flow of water
(d) change in the temperature of water

In situations where a mining company's activities caused, or are suspected to cause, contamination to water sources, there are a great number of questions that a resident may ask, such as:
- What can I do to stop a mine from conducting operations on my land?
- What can I do to stop a mine from polluting or extracting water from or around my land?
- How do I go about getting compensated for any damages because a mine contaminated my water?

We attempt to answer these questions in this report.

In this report we offer some guidance to the procedures a person can take to protect his or her rights, including the steps s/he has to take and whom s/he has to contact.

1.2 Relevant Legislation

***Ontario*:**

Environmental Bill of Rights S.O. 1993, c. 28 (EBR)
Environmental Protection Act R.S.O. 1990, c. E.19 (EPA)
Lakes and Rivers Improvement Act R.S.O. 1990, c. L.3 (LRIA)
Mining Act R.S.O. 1990, c. M.14 (MA)
Ontario Water Resources Act R.S.O. 1990, c. O.40 (OWRA)

***Canada*:**
Canadian Environmental Assessment Act, S.C. 1992, c. 37
Fisheries Act R.S.C. 1985, c. F-14.
- Metal Mining Liquid Effluent Regulations, C.R.C. 1978, c. 819
Navigable Waters Protection Act (Canada),
Canada Water Act, R.S.C. 1985, c.C-11.
Migratory Birds Convention Act, S.C. 1994, c.22 (MBCA)
Species At Risk Act, S.C. 2002, s. 29 (SARA)

1.3 What is the Difference Between Law, Regulation and Policy?

Laws are binding and enforceable rules that govern the behaviour of individuals, companies and governments. Failure to abide by laws results in certain legal consequences.

There are 3 types of law:
1. statute law/legislation
2. regulation
3. common law

Statute law/legislation are those rules enacted by Parliament or a provincial legislature. Generally, statutes set out a broad framework of rules. The Canadian Fisheries Act, the Ontario Mining Act, and the Ontario Water Resources Act are examples of statutes.

Regulations are rules enacted by Cabinet in accordance with a statute. Regulations are subordinate to the governing statute and usually spell out in detail the implementation of a statute. Examples of regulations are the *Metal Mining Effluent Regulations* under the *Fisheries Act*, *Mine Development and Closure Regulations* under the *Ontario Mining Act*, and the *Taking and Use of Water Regulations* under the *Ontario Water Resources Act*. If you are interested in knowing more about a statute and its subordinate regulations, visit: www.canlii.org

Common law is a set of legal rules developed by the judiciary, based on case precedents. The common law interprets statutes and regulations as well as imposes rules that govern behaviour.

Policies are the instruments through which government sets out the goals and objectives of government and the ways in which law and regulation is to be implemented. Policy is not legally enforceable. As a result, there are no legal consequences that flow from violating a government policy. Policy may change when a new government is elected, when popular opinion changes, or when new issues arise. Policy may be implemented through government programs. Laws may be enacted or amended to implement policy objectives.

An example is the Federal Water Policy, a government policy document to 'encourage the use of freshwater in an efficient and equitable manner consistent with the social, economic and environmental needs of present and future generations'.[2]

1.4 The Effects of Mining on the Environment

Acidic mine drainage, tailings, the metals extracted, and products used for extracting and processing the metals contaminate the local environment.[3] Mine de-watering, liquid effluent from mining activities, and surface water drainage and seepage from waste storage and inactive mines are sources of water pollutants.[4] Large amounts of water are used up in the process and then re-circulated into the environment, containing contaminants. Mine water may contain chemical residues from explosives used in blasting as well as lubricants used in drilling and extraction. [5] The deposit of mill tailings can cause groundwater contamination.[6] In 1990 alone, it is estimated that the mining industry produced 950,000 tonnes of tailings and 1 million tonnes of waste rock each day.[7]

Some of the indications that water is being contaminated by a mine include vividly coloured orange, red, or black seeps or staining; areas devoid of vegetation; and the absence of species sensitive to low PH levels are definite signs of problems. [8]

It is important to keep in mind that the stage of the mining process may make a difference in the remedies available to you, as different rights, laws, and procedures apply at each stage of the mining process. The stages of mining are as follows:

1. prospecting
2. exploration
3. mining operation
4. milling
5. smelting and refining
4. closure
5. post-closure

1.4.1 Exploration Stage

The environmental effects may include[9]:

- camp garbage;
- trail/road and trenching erosion;
- disruption of habitat as well as harvesting and fishing activities;
- noise pollution; and
- acid mine drainage.

1.4.2 Mining and Milling Stage[10]

The environmental effects may include:

- damage to wildlife and fisheries;
- changes in local water balance;
- increased erosion and sedimentation of lakes and streams;
- containment of toxins in tailings ponds or leaching solutions;
- tailings ponds or leaching pads stability failure;
- potential acid generation from waste rock and pit walls;
- heavy-metal leaching from acid mine drainage;
- cyanide solution containment at heap leach operations;
- contamination of surface water and ground water from discharge of acid mine drainage including heavy metals originating in ore and tailings, and organic chemicals and cyanide originating from milling processes;
- waste rock piles and tailings disposal areas;
- water taking; and
- noise and wind-borne dust.

What areas should be tested?

Lakes, rivers, streams, brooks, groundwater, soil, and sediments may be contaminated and should be tested.

Contaminants to Test For:[11]

- Liquid discharges and heavy metals, which may include: antimony (undefined tolerance limit), cadmium, chromium, cobalt (undefined tolerance limit), manganese undefined tolerance limit), mercury (banned), selenium, and silver.

- Other pollutants that may also be present, including: ammonia, (candidate substances for bans or phase-outs (liquid discharges), cyanide, ethylene glycol, hydrogen fluoride, sulphuric acid, asbestos, and the pH of the effluent.

- At the milling stage, reagents used in extracting minerals from ore contain such chemicals as: cyanide, kerosene, organic flotation agents, activated carbon, and sulphuric acid. [12]

1.4.3 Smelting and Refining Stage[13]

The potential effects on the environmental may include:

- heavy metals, particulate matter, organics, and sulphur dioxide emissions to air;
- discharges of toxic chemicals, such as sulphuric acid and ammonia used during processing;
- high energy consumption resulting in indirect environmental impacts such as climate change.

1.4.4 The Effects of Water Taking

Water taking can lead to the lowering of water levels in lakes and rivers, and can contribute to the problem of water shortages, loss of habitat for aquatic plants, birds and fish, and reduction of biodiversity of species. In the summer of 2000, Spencer Creek in southwestern Ontario "disappeared" temporarily because of excessive taking in the local watershed.[14] Taking excessive amounts of water can affect drinking water quality, due to lower dilution of contaminants. Reduced water flow can increase siltation and turbidity (cloudiness of water) of the raw water. [15]

1.4.5 Abandoned Mines

According to the Environmental Bureau of Investigation, there are over 6,500 abandoned mines in Ontario with some 16,000 identified features that pose environmental, safety, and public health threats. [16]

The possible environmental effects after mining closure may include:[17]

- seepage of toxic contaminants, such as heavy metals, into surface and groundwater from acid mine drainage;

- wildlife and fisheries habitat loss;
- re-vegetation failure;
- wind-borne dust; and
- slope and tailings impoundment failure causing discharge of contaminants and sediments to water.

Radioactive Mines

Abandoned and active mines may contain radioactive materials that threaten the environment and human health. A Geiger counter is used to detect gamma radiation and other specialized equipment to detect alpha and beta radiation and radon gas. [18]

In these mines test for the following contaminants: Liquid discharges: cesium, carbon 14, iodine, krypton 85, lead 210, plutonium, radium, radon and radon daughters, strontium 90, thorium, and uranium. These pollutants can also be present in sediments. Air releases are predominately radon gas.

1.5 What are the Relevant Environmental Standards?

There are standards depending on the type of site, the type of habitat, type of water, and kind of water use. Standards are higher for drinking water than water for industrial uses. Some substances are completely banned, others are highly regulated. According to Joseph Castrilli, very few substances involved in mining activities have been made subject to regulations.[19]

Guidelines for water quality are guidelines, not regulations. Thus, they may not be legally binding limits. Guidelines for mining apply to: arsenic, copper, lead, nickel, radium 226, total suspended solids, and zinc. Guidelines for metal finishing facilities apply to: cadmium, chromium, copper, cyanides, lead, nickel, total suspended metals (TSM), and zinc. For more information on environmental standards, visit the EBI's, Citizen's Guide to Environmental Investigation and Private Prosecution. It is available online at: www.e-b-i.net/ebi/guide

1.6 Aboriginal Rights

Although this report cannot deal with Aboriginal Rights in great detail, it is important to make note of the fact that Aboriginal rights are a key issue in the discussion of mining and water rights in Ontario.

The Constitution recognizes and affirms aboriginal and treaty rights. Constitutionally protected rights of the Aboriginal people can be a means to restrict the activities of mining operations.[20] Aboriginal treaties cover a large part of Ontario.

In mineral development, impacts are borne first and foremost by First Nations people. It may seem that there are some exceptions, in situations where the First Nations people have already been removed from the land or relocated to other parts of their traditional territory, such as the older "camps" where mining has been taking place for a number of decades. However, those same relocations were often motivated by the Crown's interest in mineral or other natural resource development.

In the last 150 years, First Nations communities have gained considerable experience with the effects of mining. Mining and mineral exploration affect First Nations people in variety of ways, beginning with the social and environmental disruption of mineral exploration, and continuing long after the mine has closed, often leaving behind a steady source of contamination of water and country foods. Two messages emerge repeatedly in discussions among First Nations people about mining and its impacts: (1) First Nations are interested in economic development, and by extension are not necessarily opposed to all mine developments; (2) Aboriginal culture and lifestyle rely upon a relationship to the land and the safekeeping of the lands and waters.

At the same time, two common experiences repeat themselves from one First Nation territory to another: (1) mining has had adverse impacts on the land and water upon which First Nation people rely; and (2) First Nation communities often lack the background information and technical support they need in order to deal with the mining companies on an equal footing when they are confronted with mine development proposals.

Guaranteed in the Canadian Constitution and the Canadian Charter of Rights and Freedoms, numerous court cases have upheld and are giving definition to Aboriginal and treaty rights, most notably the *Sparrow*[21] decision in 1990 and *Delgamuukw*[22] in 1997. Many challenges remain, however, in having those rights recognized by both government and industry in the day to day struggles over mine development.

Also in 2001, Nishnawbe Aski Nation (NAN) issued a handbook on "consultation" in natural resource development, intended to inform and assist First Nations in planning for lands and resource development[23]. The purpose of the handbook was also to assist government and industry in understanding the positions of NAN communities, particularly with respect to the duty of the Crown to consult with First Nations about any project, development, activity, legislation or amendment to legislation which may impact on Aboriginal and/or Treaty rights. The handbook clearly sets out the duty of the crown, the role of resource development companies, and NAN consultation policy, as well as outlining the expected consultation process in a step-by-step fashion.

PART II - Federal Laws that Protect Water

2.1 Fisheries Act, R.S.C. 1985, c. F-14

Description:
The *Fisheries Act* is a statute purpose of which is to protect fish and fish habitat. The Act restricts or controls the deposit of substances into waters that may be harmful ("deleterious") to fish or fish habitat. Any activity that discharges or deposits substances that may affect waters "frequented by fish" is subject to the federal *Fisheries Act*.

The Act defines a "deleterious substance" as any substance that, if added to any water is or is likely to be deleterious to: a) fish; b) fish habitat; or c) to human use of fish that frequent that water.[24] This includes any water that contains a substance, or has been treated, processed or changed (by heat or other means) from a natural state so that it is or is likely to be harmful to fish or fish habitat.[25] Fish habitat includes spawning grounds and nursery, rearing, food supply and migration areas.[26] According to the B.C. Supreme Court, any substance, which affects fish eggs but not fish themselves, is not a substance deleterious to fish within the meaning of the Act.[27]

How the Act can be used to protect water rights:
The *Fisheries Act* imposes restrictions on mining operations in 4 general ways:[28]

1. Mines are prohibited from carrying out any activity that results in the harmful alteration, disruption, or destruction of fish habitat.[29]
2. Mines are prohibited from depositing deleterious substances in water frequented by fish.[30]
3. However, the deposit of certain substances into waters frequented by fish is permissible if allowed by regulation.
4. Mining companies are required to conduct environmental assessments of a proposed project that requires federal authorization to alter fish habitat or that requires changes of project plans and specifications, in accordance with the Canadian Environmental Assessment Act.[31]

Any person carrying out work that results in the harmful alteration, disruption or destruction of fish habitat may face a conviction. Unless permitted by regulation, the deposit of a deleterious substance is prohibited. [32] Persons convicted for contravening "fish habitat" and "deleterious substance" provisions may face substantial penalties, including up to $1 million fines, jail terms, profit-stripping, licence suspensions and restoration orders.[33]

If an offence is committed on more than one day, it is deemed to be a separate offence for each day, and punishment increases for each subsequent conviction.[34] The prosecution only needs to prove that a substance is of a type that is harmful to fish. The prosecution does not have to prove that the amount of the substance found in the water would actually cause harm.[35] Once it is determined that a substance is deleterious and that it has been deposited in the water, the offence is complete without ascertaining whether the water itself was rendered deleterious.[36]

In order to make out an offence, it is not necessary to show that the body of water contained a large number of commercially exploitable fish. It is sufficient that the water contain some fish life.[37] However, water is not "water frequented by fish" if it is proven that at all material times the water is not, has not been and is not likely to be frequented in fact by fish.[38]

It does not matter whether a substance is deposited intentionally or accidentally. The mining operation is still responsible for any offence committed by an employee or agent of the accused, unless the accused establishes that the offence was committed without the knowledge or consent of the mining operation.[39]

Limitations:
Mining operations may escape liability under the *Fisheries Act* if it took reasonable steps in the circumstances to prevent the deposit of deleterious substances in water or to prevent activities that is deleterious to fish habitat; or if there was an honest and reasonable mistake of fact (that would render conduct

innocent).[40] If a deleterious substance is washed into a body of water by an abnormally heavy rainfall, the accused may rely on the defence of "act of God".[41]

The second major limitation of the *Fisheries Act* is the authorization to pollute as set out in the *Metal Mining Effluent Regulations* (MMER, discussed below). The MMER permit mines to discharge certain substances into the environment, but sets a limit on the concentration of these substances.

Mining companies are also issued Letters of Authorization to alter or destroy fish habitat if they establish that there will be "No Net Loss" of fish habitat, because they can create new habitat equivalent to that destroyed, or enhance existing habitat in the same watershed (see www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/legislation-lois/policies/fhm-policy/index_e.asp).

Limitation period:
There is no limitation period for summary conviction proceedings. However, if the Ministry of Fisheries and Oceans becomes aware of the problem, then there is a limitation period of two years upon the Ministry being notified of the problem. There is no limitation period for proceedings regarding an indictable offence under the Act.

Enforcement of the Fisheries Act:
Charges under the *Fisheries Act* may be filed by the Ministry of the Environment or by a Canadian resident in what is called a private prosecution (discussed in sec.2.3 below). You may also bring a civil action against a person or company who has deposited a substance into waters that is harmful to fish or fish habitat.

The government bodies that enforce and administer the *Fisheries Act* include Environment Canada, Parks Canada, Ontario Ministry of Natural Resources, and the Ontario Ministry of the Environment.[42] Fisheries and Oceans Canada is the lead enforcement agency that deals with the harmful alteration, disruption or destruction of fish habitat. The Ontario Ministry of Natural Resources is the primary body that deals with deposits of silt that may be harmful to fish or fish habitat. Environment Canada will investigate deposits of deleterious substances in contravention with the Act if the Province does not act.[43]

Ontario v. Kingston (City) May 12, 2004 (Ontario Court of Appeal)

The City of Kingston operated a municipal dumpsite on the west shore of the Cataraqui River from the early 1950s to the early 1970s. After the dump was closed, the City changed the site into a recreation area. The City did not adequately address the environmental problems caused by the dumpsite. There were public demands for action. Studies showed that the site posed a serious environmental threat. After testing samples of liquids emanating from the landfill site, Janet Fletcher, an environmentalist, launched a private prosecution against the City. In a separate action, the Ontario Ministry of the Environment laid charges against the City and Mirka Januszkiewicz, the City's Director of Environmental Services and Engineering. The City was convicted of unlawfully depositing or permitting the deposit of a deleterious substance in the Cataraqui River, contrary to s. 36(3) of the Fisheries Act, and thereby committing an offence contrary to s. 40(2)(a) of that Act. The City was fined $150,000.00. The City was also ordered to monitor and inspect the recreation area and prepare a plan for controlling against future seeps. Ms. Januszkiewicz was given a suspended sentence in respect of her convictions.

In May 2004 an Ontario Court of Appeal decision upheld the decision of the lower court. The Court upheld the conviction based on evidence that the landfill leachate killed fish in lab tests. The Crown did not need to prove that the leachate would have been toxic in the river, or that it would have killed the specific kinds of fish that inhabit the river. [44]

2.2 Metal Mining Effluent Regulations (MMER)

Description:
The *Metal Mining Effluent Regulations* adopted under the *Fisheries Act* on December 6, 2001 replaced the *Metal Mining Liquid Effluent Regulations* (MMLER) that had been in place since 1977 and repealed the *Alice Arm Tailings Deposit Regulations*, which were promulgated in 1979.[45]

The MMER apply to all Canadian metal mines (except placer mines) with an effluent flow rate in excess of 50 cubic meters per day that were in commercial operation (25% of original design productive capacity).

The regulations classify certain substances that may appear in metal-mining effluent as deleterious and imposes limits on the concentrations of such substances. Regulated substances include arsenic, copper, cyanide, lead, nickel, zinc, total suspended solids, and radium 226.[46] The Regulations also prohibit the discharge of effluent that is acutely lethal to fish. The allowable levels were not based on an assessment of toxicity or of the potential for harm to the environment, but rather on a determination of what water treatment could be achieved through the "best available technology economically achievable (BATEA).

The *Metal Mining Effluent Regulations* (MMER) require that all Canadian metal mines conduct Environmental Effects Monitoring (EEM) as part of the mine's authority to deposit effluent, under the *Fisheries Act*, to determine if industrial effluent adversely affects fish health, fish habitat and the human use of fisheries resources.[47] The EEM required reporting on a number of substances that are not regulated under the MMER.

At the time of this report, there has not yet been a persecution under the MMER. Under the older MMLER, reports summarizing industry performance during the first two decades of the federal regulation being in place indicate that on average 25% of the mines were out of compliance with the *Metal Mining Liquid Effluent Regulations*, but between 1977 and 1998, there was not a single charge laid or prosecution brought under the *Regulation*.[48] The federal government's 1998 report on water pollution control in the mineral sector indicate that, consistent with performance over the last quarter of a century, 25% of the metal mines subject to the regulations were out of compliance. Almost half of the mines subject to the guidelines (gold mines are exempt from the regulations, but subject to a "guideline") were out of compliance. In 1999, Environment Canada conducted 14 site inspections and verified 43 reports of mines, as required under the MMLER. Only one mine was prosecuted under Section 36 of the Fisheries Act, although 3 closed mines were prosecuted under Section 33.

Mercury is not included in the MMER but falls under the general provisions of the Fisheries Act, and the Canadian Environmental Protection Act (see below). As well, most provincial jurisdictions have regulation including mercury. The Canada Wide Standards for Mercury set out allowable limits, even though the substance is considered to be "inherently toxic".

2.3 Navigable Waters Protection Act, R.S.C. 1985, c.N-22, s.3

Description:
The main purpose of the *Navigable Waters Protection Act* is to ensure public access to, and the efficient use of, waterways. The Act applies to the construction of works that affect the navigability of waters.

How the Act can be used to protect water rights:
The Minister of Transport's approval is required in order to construct any structure that would interfere with navigation (such as a bridge, boom, or dam.)[49] Approval is required by any company or person who proposes to construct a work (including the dumping of fill or excavation of materials from a water bed) in navigable waters. They are required to notify the public of their application[50] in the Canada Gazette, and in two local newspapers.[51]

The prohibition includes the depositing of sawdust, edgings, slabs, bark or like rubbish in navigable waters[52] Anyone who does so may face a fine of up to $5000. The Act also prohibits the depositing of any stone, gravel, earth, cinders, ashes or other material or rubbish into navigable water that is less than 20 fathoms deep. Anyone who contravenes this provision may face a fine of up to $5000.

The requirement for approval to undertake work that may interfere with navigation on navigable waters may trigger the federal environmental assessment process.[53]

International Minerals & Chemicals Corp. v. Canada (Minister of Transport)[1993] 1 F.C. 559 (Fed. T.D.)

A mining company proposed to construct a pipeline conveyor across a creek to carry potash from a proposed mine to two existing mine sites. The project was estimated to cost some $360 million. The project proposal included construction of two trestles carrying pipeline conveyor systems at two locations across Cutarm Creek, Saskatchewan, to transport potash from its proposed satellite mine site to two existing mine sites. The issue before the Court was whether the Act applied to Cutarm Creek, i.e., whether the waters of the Creek were "navigable waters". During much of the year the creek was not capable of being navigated by boats, canoes or rafts for any great distance. The court held that the creek was not a navigable waterway, thus no permit was required under the Navigable Waters Protection Act. This does not mean that creeks are not navigable waterways. Whether a waterway is navigable is a question of fact and of law. Generally, if vessels can travel through a waterway in its natural state, the body of water is considered 'navigable' and therefore, a permit is required under the NWPA for any activity that may interfere with a public right of navigation.

2.4 Canadian Environmental Protection Act, S.C. 1999, c.33

Description:
The Act addresses air and water pollution and environmental enforcement. It is primarily administered by Environment Canada. Health Canada also has certain responsibilities in relation to the assessment and regulation of toxic substances.

How the Act can be used to protect water rights:
Under the Act, the Minister of the Environment is required to issue guidelines recommending limits for the release of substances into the environment from works, undertakings or activities.[54]

Anyone convicted of contravening the Act faces significant penalties, including up to $1 million in fines, jail terms, profit-stripping restoration and restitution orders.[55] The statute also imposes separate punishment on officers and directors of corporations for offences committed by the corporation.[56] In certain circumstances, a person charged with an offence may avoid prosecution by agreeing to undertake prescribed environmental protection alternative measures.[57] The Act requires pollution prevention plans from companies whose commercial, manufacturing, processing, or other activities, involve prescribed toxic substances of the Act.[58] It also imposes a special duty upon corporate officers and directors to take all reasonable care to ensure that the corporation complies with the Act and its regulations, orders and directions.[59] If an offence occurs on more than one day, it is considered a separate offence for each day.[60]

Where an offence under this Act is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which it is committed or continued.

Compensation:
If the Crown obtains a conviction for an offence under the Act, a person who has suffered damage or loss due to the prohibited activity may bring an action for compensation. A plaintiff is not required to prove that the offending activity took place. Rather, a conviction is sufficient proof of offending activity.[61]

Injunction:
Any person who is about to suffer or is suffering loss or damage from conduct in violation of the Act may seek an injunction (a court order) to prevent or stop the damage.[62]

Enforcement:
Environment Canada's Environmental Protection Enforcement staff investigate potential pollution offences under the *Canadian Environmental Protection Act*, 1999 (CEPA, 1999) and the federal *Fisheries Act*.

What should I do if I suspect a CEPA infraction?
You should submit an application for investigation of an environmental offence with the Environmental Commissioner of Ontario (see 'How to Apply for an Investigation' below). Any Canadian resident who is 18 years or older may apply for an investigation of any offence under this Act.

What happens next?
The Minister of the Environment must acknowledge receipt of the application within 20 days of receiving the application. The Minister must investigate the facts relating to the alleged offence.

What if I am dissatisfied with the Minister's response?
The Minister may discontinue an investigation if the Minister believes that the alleged offence does not require further investigation or if there is insufficient evidence.[63] If the Minister fails to conduct an investigation within a reasonable time or if the Minister's response is unreasonable, you may apply for a court order to obtain a remedy in an 'environmental protection action'. The action can only be brought if the person has applied to the Minister for an investigation of an offence, and if the offence is one that has caused significant harm to the environment.[64] A person bringing an environmental protection action must do so within two years, beginning when you become aware of the activity causing environmental damage or when you should have become aware of it.

A person cannot seek compensation for damages under an environmental protection action. The types of remedies available under such an action include declaratory orders, a court order requiring the offender to refrain from any activity causing environmental damage, an order requiring the offender to repair harm caused to the environment. If your action is successful you may be rewarded costs of the proceeding.

The person launching an environmental protection action must notify both the Minister of the Environment and the Attorney General. The Attorney General does not have a right to stay a proceeding in an environmental protection action, unlike in a private prosecution.

What other potential remedies are available?
Any person who has suffered loss or damage as a result of conduct that contravenes the Act or its regulation may bring an action to recover monetary damages against the party who committed an environmental infraction under the Act.[65]

Limitation period:
Proceedings that involve a summary conviction offence can be brought at any time. However, proceedings must occur within two years after the time when the Minister became aware of the alleged offence.[66]

2.4.1 Guide for Reporting to the National Pollutant Release Inventory (NPRI) 2001

The National Pollutant Release Inventory (NPRI) provides Canadians with access to information on the releases and transfers of key pollutants in their communities. The NPRI requires companies to report information on releases and transfers of pollutants to the Government of Canada on an annual basis. However, the Guide includes provisions to exempt mining facilities from reporting releases and transfers of substances to the NPRI.[67] The exemption for mining is for activities related to the actual removal of ore, rock or overburden, up to and including primary crushing. However, releases and transfers of NPRI substances used in the further processing of rock ore, such as milling, concentrating, smelting and refining are reportable.

Releases of NPRI substances may include the following sources:[68]

- NPRI substances (e.g., metals) in runoff from disposed overburden, waste rock and ore storage piles.
- NPRI substances in waste rock used to construct dykes and roads on mine sites.
- NPRI substances in mine-waters (may contain traces of explosives, drilling fluids, lubricants, metals, other chemicals used in mine).
- NPRI substances in cooling waters for extraction equipment (may contain lubricants).
- NPRI substances in waste water (metals, process chemicals) from crushing and grinding operations.
- Water releases in runoff from exposed areas and administrative/workshop areas.

For more information, visit: www.ec.gc.ca/pdb/npri/npri_about_e.cfm

2.5 Canada Water Act, RSC. 1985, c.C-11

Description:
The Act regulates discharges of waste into designated water quality management areas (water that is being restored, conserved or improved under a quality management program). The Act also provides a federal-provincial framework for cooperation in the conservation, development, and utilization of Canada's water resources. The CWA is administered by Environment Canada.

How the Act can be used to protect water rights:
The Act prohibits the deposit of any waste in any designated water quality management area above prescribed levels. Any person who unlawfully deposits waste in contravention of the Act faces a summary conviction and a fine of up to $5000 for each offence.[69] Each day that the unlawful deposit of waste occurs is a new offence. In addition to a fine, a court may order that the individual stop any activity that will cause any further discharge of waste in contravention of the Act. Waste is defined as *any* substance that would degrade water quality to a degree that is harmful to animal, fish, plant or human use of the water. Waste includes harmful substances and any water that is treated, processed or changed, by heat or other means, that would degrade the quality of the receiving water.

How do I know if the water in my area is a designated water quality management area?
A water quality management plan has been published in the Canada Gazette and in a local newspaper at least once a week for four weeks before it is designated.

Limitation period:
Legal proceedings regarding an offence under the Act must be brought within two years after the time when the subject matter of the proceedings arose.

For more information, contact:

Watershed Management and Governance Branch
Water Policy and Coordination Directorate
Environmental Conservation Service
Environment Canada
Ottawa, ON K1A 0H3
Tel. (819) 997-2307
Fax. (819) 994-0237

2.6 Canadian Environmental Assessment Act, SC 1992, c.37

Description:
The CEAA can be invoked when mining activities have the potential to interfere with fish or fish habitat or other areas of federal responsibility.[70] The environmental assessment process (EA) can include:[71]

- a screening and the preparation of a screening report;
- a comprehensive study report;
- a mediation or assessment by a review panel and preparation of a report; and
- the design and implementation of a follow-up program.

The CEAA applies to provincial mining when there is a federal 'trigger' – involvement of the federal government in the project. Examples of triggers include any proposed construction, operation, abandonment or activity that would result in:[72]

- the harmful alteration, disruption or destruction of fish habitat
- the removal or damaging of vegetation,
- the disturbance or removal of soil in a wildlife area
- effects on Migratory Bird habitat
- the deposit of substances harmful to migratory birds in waters
- the diversion of water from a natural water body [73]
- the extraction of groundwater[74]

The CEAA can also be triggered by the activities involving federal responsibility on the Inclusion List, such as the proposed construction, decommissioning, expansions or abandonment of[75] most mines. Different rules apply to different kinds of mining.

2.6.1 Canadian Environmental Assessment Agency

Description:
The Canadian Environmental Assessment Agency is an independent federal body, accountable to Parliament through the Minister of the Environment. The Agency administers the CEAA. It was formed to provide Canadians with environmental assessments to contribute to informed decision making, in support of sustainable development.

Public participation:
The Canadian Environmental Assessment Agency is supposed to encourage public participation. Unfortunately this is not always the case, and in reality, much public participation consists of "show and tell" for affected communities. However, funding for public participation is accessed with difficulty and is rarely enough to hire appropriate technical assistance.

Public participation in the federal environmental assessment process enables an open, balanced process and strengthens the quality and credibility of environmental assessments. CEAA also encourages the use of local and traditional knowledge about a project's physical site to identify and address potential environmental effects at an early stage of the environmental assessment process.

You may find that you encounter a great deal of red tape in your efforts to participate in an investigation. Should this happen, be persistent – it is your right to do so. If the investigation is one where time is an issue, or if you are not satisfied with how the Agency is responding to your efforts, you may also want to consider contacting the Minister of the Environment's office directly to voice this concern.

Ways to get involved:
To participate in a CEAA investigation you can:[76]

- Visit the Canadian Environmental Assessment Registry for information about projects taking place in your area. Information about projects starting before November 2003 is available on the Federal Environmental Assessment Index.
- Take advantage of opportunities to participate in screenings, including reviewing and commenting on screening reports before a final decision is made on the project.
- Examine and comment on a class screening report before the Canadian Environmental Assessment Agency declares it an appropriate means to assess similar projects.
- Review and submit comments during a comprehensive study process. The Minister of the Environment takes public comments into account before determining the future of a project.
- Participate in any public meetings or hearings associated with a review panel.
- Apply for funding to assist your participation, or that of your organization of group, in the comprehensive studies, mediations and review panels through the Agency's Participant Funding Program.

For more information, contact:

Canadian Environmental Assessment Agency
22nd Floor, Place Bell, 160 Elgin Street, Ottawa ON K1A 0H3
Tel. (613) 957-0700
Fax (613) 957-0862
e-mail: info@ceaa-acee.gc.ca

Limitations:
Both the federal and provincial governments have environmental assessment legislation. There are many differences in the approach used among the provinces, territories and federal regimes. Since the passage of the *Canada Wide Harmonization Accord* in the late 1990s, the federal government has been developing "harmonization" agreements with the provinces. In Ontario, there is little overlap between those projects

that are subject to the provincial Act and those subject to CEAA, although there is potential for joint federal/provincial assessments.

The "self assessments" carried out under the *Canadian Environmental Assessment Act* are done by consultants hired by the private sector proponent, particularly in the case of mining projects, with resulting reports and conclusions critiqued and then adopted by the responsible federal departments. The Department of Fisheries and Oceans is most frequently the federal department responsible for issuing a permit for a mining project, and therefore becomes the "responsible authority", within the language of the *Act*.

To date, there is a very low level of satisfaction among public interest groups with the effectiveness or fairness of environmental assessments of mining projects done under CEAA. In those few cases where the review of proposed mining projects have been conducted by an independent panel, the federal government has often ignored key recommendations and has relied on "mitigation" to take care of environmental concerns.

The cumulative of projects that may be separately assessed is of serious concern. Although the Aquarius Mine near Timmins was subject to a Comprehensive Study, cumulative impacts were inadequately addressed.

Aquarius Mine

The gold mine, projected to operate for only 5 years, is going to affect a provincial park, a remote cabin, trap lines, moose habitat and a bear management area. The project includes filling a small valley which is host to a fish-bearing cold water stream, and is located in the same watershed as other mines and industrial operations and transportation routes, none of which were considered in terms of assessing cumulative impacts. The mine proponent claimed that effluent from other mines in the area discharging into a common water body met provincial standards, and that the effluent from the Aquarius mine would meet provincial standards. Further, the proponent put this information forward as their assessment of cumulative effects. In fact, area mines were not consistently in compliance, and the Aquarius was also expected to have some exceedences of the provincial standard. More significantly, simply establishing pass/fail on water quality standards does not constitute a cumulative effects assessment.

Despite the significant potential of environmental impacts, some mine projects escape environmental assessment reviews altogether. Such is the case with the expansion of the Lac Des Iles palladium mine, in the north end of the Lake Superior basin.

Lac Des Iles

The expansion of the Lac Des Iles mine will quadruple its production, and will involve a major expansion of the mine's footprint, including additional effluent discharge points, dewatering of a bog, water taking of up to 30 million litres per day, and creation of waste rock piles twice the height of the highest point of land in the area. The Department of Fisheries and Oceans has reportedly "worked things out" with the company in order to avoid issuing a permit, and so avoid triggering an environmental assessment review.[77]According to industry reports, the mine received the necessary construction permits just 60 days after deciding to expand. The Department of Fisheries and Oceans took more than twice that time to respond to public inquiries about the federal review of the mine expansion.

2.7 Migratory Birds Convention Act, S.C. 1994, c.22 (MBCA)

Description:
This Act ensures the conservation of migratory bird populations by regulating potentially harmful human activities. The Act implements the Canada-US Convention for the Protection of Migratory Birds in Canada and the United States.

How the Act can be used to protect water rights:
A permit must be issued for all activities affecting migratory birds, with some exceptions detailed in the Regulations. The Regulations ban all unauthorized activities that are harmful to migratory birds, their eggs or their nests (except for regulated hunting). More specifically, any activity that will disturb or de-

stroy a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird is prohibited *unless* authorized by a permit. [78] The Act also prohibits the deposit of oil, oil wastes or any other substance harmful to migratory birds in any waters or any area frequented by migratory birds, except as permitted by regulation (under any applicable Act, see *Alberta Wilderness Association v. Cardinal River Coal* below). [79]

Anyone who contravenes the Act or its regulations can face up to $100,000 and prison terms. Fines are even higher for corporations. A separate fine is imposed for each migratory bid or nest affected in contravention of the Act. A court may also order a stop to the activity affecting migratory birds, or any preventative actions to be taken to avoid harm to migratory birds. If an offence occurs on more than one day, it is considered a separate offence for each day on which the offence is committed or continued.

For a list of the migratory birds protected by the Act, see Schedule (section 2) of the Act. This can be accessed by visiting www.canlii.org or the Department of Justice web site.

Alberta Wilderness Association v. Cardinal River Coal* [1998] F.C.J. No. 821 *(Trial Division)

In 1996, Cardinal River Coal ("CRC") applied to build an open pit mine in its mine permit area just east of Jasper National Park. This sparked considerable opposition by environmental groups, including the Alberta Wilderness Association. Under the Fisheries Act, authorization was required for the proposed mine operations because it would result in the deposit of harmful substances (waste rock) in areas frequented by migratory birds. The approval was in fact given by the federal Department of Fisheries and Oceans for the mining project.

The project would result in the deposit of millions of tonnes of waste rock and materials in areas frequented by migratory birds, particularly harlequin ducks. The mining process would involve the removal of millions of tonnes of waste rock, debris and other materials, much of which would be deposited into creek valleys on the project site. The deposit of this waste would permanently bury at least three creeks and valley bottom areas that are important habitat used by harlequin ducks and other migratory birds for nesting, rearing and other purposes.

The major issue was whether the Minister was prohibited from issuing Fisheries Act authorizations for aspects of the Project that would contravene the Migratory Birds Regulations (MBR). Harmful substances under the MBCA were interpreted to include the deposit of waste rock. The court found that while rock might be inert, millions of tonnes of it deposited into creek beds constitutes a threat to the preservation of migratory birds that nest there, and therefore in such circumstances is "harmful" in contravention of the MBR

The Fisheries Act conflicted with the MBCA prohibition to deposit substances harmful to migratory birds. The court held that even if authorization is made under the Fisheries Act to "allow the harmful alteration, disruption or destruction of fish habitat", it is still contrary to the MBCA, and hence "contrary to law".

2.8 Species At Risk Act, S.C. 2002, s. 29 (SARA)

Description:
The SARA was established to prevent wildlife species from becoming extirpated[80] or extinct, to ensure for the recovery of endangered or threatened species, and encourage the management of other species to prevent them from becoming at risk. It gives legal protection of wildlife species and the conservation of their biological diversity. There are currently 444 plant and animal species at risk in Canada[81]

How the Act can be used to protect water rights:
The Act is triggered when there is a listed species in the water area affected by mining activities. The Act prohibits the destruction of critical habitat of any listed endangered, threatened, or extirpated species. [82] The Act also prohibits the destruction of migratory bird habitat.[83] A person who commits an offence on more than one day is liable to be convicted for a separate offence for each day the offence is committed. Violations of the statute can carry up to $300,000 fines and jail terms. The statute also imposes separate punishment on officers, directors, and agents of corporations for offences committed by the corporation.

For a list of species at risk, see Schedules I, II, and III of the SARA, available at www.canlii.org.

Part III - Provincial Laws That Protect Water Rights

3.1 Environmental Protection Act, R.S.O. 1990, c. E.19

Description:
The EPA applies to water, air, and land and imposes a general prohibition on pollution. The purpose of the Act is to protect human health and the environment from the risks associated with the use of toxic substances. It requires the obtaining of approvals respecting waste management activities, and it contains provisions requiring speedy cleaning of spills.

How the Act can be used to protect water rights:
The *Environmental Protection Act* puts considerable restrictions on the type of effects such discharges may lawfully cause.[84]

If a person or company discharges a contaminant into the natural environment, so that land, water, property, animal life, plant life, or human health or safety is injured, or endangered or is likely to be injured or endangered, the director may order the person to

1. repair the injury or damage,
2. prevent the injury or damage or,
3. provide alternate water supplies (if injury occurred)[85]

Under the Act, a public hearing must be held before a waste disposal site may be established or expanded to receive hauled liquid industrial waste or hazardous waste, as designated in the regulations.[86]

Like the *Ontario Water Resources Act*, the OEPA imposes a special duty upon officers and directors of companies to take all reasonable steps to prevent the corporation from causing unlawful discharges of pollutants. Failure to carry out this duty is an offence, whether or not pollution results (see *R. v. Matachewan Consolidated Mines* below)[87]

If a spill occurs, owners and persons in charge of the control of pollutants have a duty to:

1) notify the Ministry of the Environment if a spill occur;
2) clean up and restore natural environment to pre-spill conditions. Failure to carry out this duty may result in civil liability and punishment under the EPA.[88]

The EPA regulations monitor and control the quality of effluent discharged from mining operations. The regulations set maximum concentration limits of certain substances and total loading limits by individual mining company.

The EPA regulations apply to:

- metal casting (O. Reg. 562/94);
- industrial minerals (O. Reg. 561/94);
- metal mining (O. Reg. 560/94).

Each sector is subject to maximum contaminant concentrations (concentration limits for cyanide, total suspended solids, copper, lead, nickel, zinc, and arsenic), sampling, monitoring and reporting requirements.[89]

Remedies under the Ontario Environmental Protection Act:
Control Orders:

On-going pollution caused by mining activity can be ordered abated and specific steps to achieve compliance within specified time limits, including:[90]

a) the installation of equipment;
b) studies demanded of effects and means of control of pollution; and
c) the monitoring and reporting of discharges;

Orders to take Preventive Measures:

The environmental offender may be ordered to take preventative measures, including:[91]

a) to have available equipment, material and personnel;

b) to obtain, construct, install and modify devices, equipment and facilities to implement specified procedures; and
c) to take all steps necessary to ensure prescribed procedures are followed in the event a contaminant is discharged into the natural environment from the mining operation;

The environmental offender may be ordered to provide an alternate water supply. This order has applied to cases of contaminants, which may impair water.[92]

Stop Orders:

A mine can be ordered to immediately stop the discharge of any contaminant(s) that poses an immediate danger to human life, the health of any person or to property[93]. The prohibition on discharge may be either permanent or for a specified time. Immediate compliance is required[94];

Remedial Orders:

A mining operation may be ordered to: a) repair an injury or damage; and b) prevent the injury or damage, if the mining operation discharges a contaminant(s) into the natural environment so that land, water, property, animal life, plant life, or human health or safety is or is likely to be injured, damaged or endangered.[95]

Restitution Order:

A polluter convicted of an offence under the Act may be ordered to pay a victim who has suffered to damage to property for reasonable expenses actually incurred.[96]

Enforcement:
The Ministry of the Environment may prosecute environmental violations of the EPA and its regulations.

Limitation period:
To initiate a prosecution of an environmental offence under the act must be done within two years of either when the offence was committed or when a provincial officer investigating the offence was notified of the alleged offence.[97]

R. v. Matachewan Consolidated Mines (1994)

The Matachewan Mining Company had a 21-year lease with the Ontario Government for the mineral rights to property several yards from a lake. In 1954 the mine was closed, and mine tailings remained on the property contained by a tailings dam. In 1990 a breach occurred in the tailings dam as a result of a rise in the water level of a nearby lake. The mine tailings were discharged into Davidson Creek, which flowed into the Montreal River. The mine was convicted under s. 16(1) of the Ontario Water Resources Act for discharging materials which could impair water quality. The company's director was charged under s.147 of the EPA for failing to take all reasonable care to prevent the corporation from causing or permitting the unlawful discharge. The Matachewan Mining company was sentenced to a $4,000 per day fine. The director of the mine was convicted under the EPA for failing to take all reasonable care to prevent the corporation from causing or permitting the discharge of mine tailings into river.

International Graphite Inc., Kearney Graphite Mine

International Graphite, which operated a graphite mine outside the town of Kearney, was convicted on four charges under the Environmental Protection Act (for failing to comply with a control order). The mine was fined a total of $55,000 plus a 25 per cent victim surcharge for environmental offences. The company failed to monitor and maintain equipment as specified, it also failed to conduct a groundwater monitoring program and failed to implement the approved rehabilitation plan and schedule).

The company was also convicted of six charges under the Ontario Water Resources Act. (The company faced 11 charges under the *Ontario Water Resources Act* with failing to comply with the terms or conditions of a certificate of approval related to failing to monitor a polishing pond, tailings pond, open pit water and the Magnetawan River. Three additional charges related to failure by the mine to maintain the appropriate pH level in the tailings pond and failing to have a pH control method available for immediate use). The company stated it was unable to conduct the various monitoring programs required by its certificate of approval due to a lack of funds.

3.2 Ontario Environmental Assessment Act R.S.O. 1990, c. E.18

"The purpose of this Act is the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment."

The Act applies to "enterprises or activities or proposals, plans or programs in respect of enterprises or activities by or on behalf" of the Crown, or by a public body or public bodies or by a municipality or municipalities;

The Act does NOT apply to private projects unless a special regulation is passed. The Minister of the Environment can, with Cabinet approval, exempt proponents, classes of undertakings or individual undertakings from the EA process.

There have only been a few mines designated in Ontario, since the Act came into being. Mines may be caught by Ontario Environmental Assessment when there are government grants, roadways, electrical lines and water taking permits required from the Crown. Mine licences have been exempt since 1981, under an exemption order. The question of EA coverage for activities under the Mining Act is currently under review (September 2004).

Ontario has a system of "Class EA", which categorizes projects that are similar and exempts them from individual scrutiny. So far, through a fortuitous glitch, the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects does not apply to the Ministry responsible for the Mining Act (the Ministry of Northern Development and Mines).

If an Ontario Environmental Assessment is determined to be required, then Terms of Reference are drawn up by the Ministry and the proponent of the project must submit a report addressing the following:

(a) a description of the purpose of the undertaking;
(b) a description of and a statement of the rationale for,
    - the undertaking,
    - the alternative methods of carrying out the undertaking, and
    - the alternatives to the undertaking;
(c) a description of,
    - the environment that will be affected or that might reasonably be expected to be affected, directly or indirectly,
    - the effects that will be caused or that might reasonably be expected to be caused to the environment, and
    - the actions necessary or that may reasonably be expected to be necessary to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment by the undertaking,
(d) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking; and
(e) a description of any consultation about the undertaking by the proponent and the results of the consultation.

The project proponent has to give public notice of the submission of the environmental assessment. The public notice must indicate where and when members of the public may inspect the environmental assessment and state that they may give their comments about it to the Ministry. It must also contain such other information as may be prescribed or as the Director may require. The proponent shall give the information contained in the public notice to the clerk of each municipality in which the undertaking is to be carried out.

The Proponent submits the EA to the Ministry. If the Minister accepts the EA, a 15-day public review is held. If no requests for a hearing emerge, the Minister can decide, with Cabinet approval, to accept the EA.

If the Minister decides to hold a hearing, notice is sent out to the proponent, reviewers and the affected public. Pre-hearing meetings or preliminary hearings may be held to exchange documents and determine the issues. The EA Board then writes its decision based on the hearing testimony.

The Minister has 28 days to rescind the Board's decision or request another hearing.

Where the CEAA and the Ontario EAA are both triggered, agreements may be made to hold Joint Hearings.

Michipicoten Harbour quarry proposal

In 2004, the Concerned Citizens of Michipicoten Harbour on the shores of Lake Superior launched a campaign to get the Minister to designation a trap rock quarry on private land under the Ontario Environmental Assessment Act. The quarry was to be exempt as it was a private undertaking on private land. The CCMB argued that the quarry would have serious environmental and social implications, and should be reviewed. The decision is still pending at the time of this report.

3.3 Ontario Water Resources Act, R.S.O. 1990, c. O.40

Description:
The purpose of the OWRA is to maintain water quality by prohibiting the discharge of harmful substances into any body of water, such as lakes, rivers, streams, and wells. The Act also regulates the taking of large amounts of water from surface or groundwater sources.

How the Act can be used to protect water rights:

3.3.1 Prior to Mining Operation

The *Ontario Water Resources Act* requires that before a mining company can emit contaminants into water, the mining company must first obtain an approved water discharge certificate from the Ministry of the Environment.[98] To obtain a copy of the Certification of Approval that permits the mine to discharge substances, contact the Ministry of Environment district office where the mine is located.[99]

A mine must acquire a permit from the Ministry of Environment and Energy if it takes more than a total of 50,000 litres of water in a day.[100] A list of conditions are generally attached to the water permit which provide that water taking must be done in a manner that does not cause environmental damage or interference with neighbours. A violation of these conditions is an offence.[101] The Director of the Ministry of the Environment may prohibit water taking that interferes with any public or private interest in water.[102] A Director may issue, amend, refuse or cancel water taking permits over 50,000 litres a day.[103] Conservation authorities are obligated under the *Conservation Authorities Act*, to consider the impacts of water takings on the watershed.

A Director who is considering an application for a permit to take water may require the applicant to consult with other persons who have an interest in the taking and provide the Director with information on the interests of and responses of the persons consulted.[104] A company that has a quarry license does not have a vested right to take water merely because it is entitled to extract minerals. Under *the Ontario Water Resources Act*, it still needs a permit to take water.[105]

Permit proposals that are subject to the *Environmental Bill of Rights* are posted on the Environmental Registry for 30 days of public comment. After the comment period, the Ministry posts a decision notice indicating whether the permit was issued or not, and its reasons.[106]

How to find out about water taking in your area:
The Ministry of the Environment posts notices of applications for water taking permits on the Environmental Bill of Rights Registry only for the period in which the permit application is being reviewed. You

can comment on these proposals during the public comment period. You can contact your local Ministry of the Environment office for information on permits already approved in your area.[107]

Contact the Environmental Commissioner of Ontario at:
1075 Bay Street, Suite 605, Toronto, Ontario M5S 2B1
Tel. (416) 325-3377 or toll-free at 1-800-701-6454
Fax (416) 325-3370

If you have Internet access, you can access the Environmental Bill of Rights Registry Notices at: www.ene.gov.on.ca/envision/env_reg/ebr/english/.

How to appeal a water taking permit:

Under the *Environmental Bill of Rights*, the public has the right to ask the Environmental Review Tribunal for leave to appeal a water-taking permit.

3.3.2 During or After Mining Operations

Under the Act, the discharge of material into water that might impair water quality is prohibited.[108] It is not necessary to prove that the mining operation did in fact impair water quality. A mere possibility that the water might become diminished in quality is sufficient to make out an offence.[109] It is not necessary to establish that the quality of the water in question was unimpaired prior to the alleged offence.[110]

It is not a defence to show that the effluent discharged is less contaminated than the receiving water.[111] In fact, mining companies have been convicted under the OWRA for discharging mine effluent that is less contaminated than the receiving water body (see *R. v. Falconbridge Nickel Mines* (1983), 12 C.E.L.R. 137 (Ont. Dist. Ct.) below).

The *Ontario Water Resources Act* also imposes a special duty upon officers and directors of companies to take all reasonable steps to prevent the corporation from causing unlawful discharges of pollutants. Every director and officer of a company that engages in an activity that may result in the discharge of a contaminant is obliged to make inquiries to determine whether unlawful discharges are occurring.[112]

Penalties:
Punishment for a first conviction under this Act is a maximum fine of $20,000($100,000 for corporations). Punishment for a subsequent conviction is a maximum fine of $50,000 ($200,000 for corporations) for each date or part of a day that the offence occurs. An individual may also face a maximum prison term of 1 year.[113]

If an offence involves the *risk* of impairing water quality then that person may face a maximum fine of $50,000 ($250,000 for corporations) for each day or part of a day on which the offence occurs. For each subsequent conviction, a person may face a fine of up to $100,000 ($500,000 for each subsequent conviction). An individual may also face a maximum prison term of 1 year.

If an offence involves the impairment of water quality then that person may face a maximum fine of $4 million ($6 million for corporations) for each day or part of a day on which the offence occurs. A court may order that a person who impairs water quality in contravention of the Act to provide an alternate water supply (as directed by the court).[114]

For each subsequent conviction, a person may face a fine of up to $6 million ($10 million for each subsequent conviction). An individual may also face a maximum prison term of 5 years less a day.[115] Note that subsequent convictions include past convictions under the Ontario Water Resources Act and under the Environmental Protection Act.[116]

Limitations:
There is no formal notification process in place to inform municipalities or local residents when a water-taking permit is being considered.[117] Also, the Environmental Commissioner in a report, "*Ontario's Per-*

mit to Take Water Program and the Protection of Ontario's Water Resources", observed that the Ministry of the Environment permitted water takings without taking into account the quantity of water available in certain watersheds. Also, there was no evidence that the Ministry applied an ecosystem approach, as the regulation requires.[118] Even though notices of proposed water takings are posted on the Environmental Registry, it often reports less water taking than the actual amount being taken.[119]

R. v. Falconbridge Nickel Mines (1983), 12 C.E.L.R. 137 (Ont. Dist. Ct.)

A mining operation was located adjacent to a lake. The lake was grossly polluted. A 1977 study showed that the only organism found at the sole outlet of the lake was a resistant organism referred to as a mite, or blood-worm or blood-fly. On a scale known as a diversity index, one is considered to mean severely stressed and this lake would be scaled at less than one. The reason for this scarcity of living organisms and plants was due to the chemical contamination caused by the high nickel, copper and sulphate concentrations. The pH level and the nickel-concentration levels in the lake were more deleterious than the mine water that was introduced. In assessing whether the concentration levels impaired water quality in violation of s.32 of the OWRA, the court considered the ministry guidelines that defined acceptable concentrations to protect aquatic life. The court held that the OWRA covers any impairment, whether the body of water is in pristine condition or has already suffered from the effects of the discharge of harmful substances. It doesn't matter whether the mine water is less impaired than the receiving water.

R. v. Blackbird Holdings (1990), 6 C.E.L.R. (N.S.) 119

A Justice of the Peace sentenced an Ameliasburgh Township man to six months in jail for under s.16(1) of the Ontario Water Resources Act for permitting the discharge of a material into water that may impair the quality of the water.

Tay River, Perth, Ontario

Residents of Perth appealed a permit granted by the Ministry of the Environment that allowed a Swiss company to take 4.5 million litres of water daily from the Tay River in two phases. The Environmental Review Tribunal decided that the company could take only 1.5 million litres a day. Proceedings were later overtaken by the moratorium on new and expanding permits to take water, announced by the Ontario government in December 2003.[120]

Inco and Grassy Creek

From sometime in February until March 2, 1994, there was a spill from INCO's Levack tailings area into Grassy Creek. The spill contained at least 880 times the amount of nickel recommended in the Ontario Water Guidelines (44 ppm to.05 ppm), and lasted at least 8 days. Abatement officers visited the site on March 2, took samples and interviewed employees. The Investigation Officer subsequently conducted intensive interviews with employees and seized documents and samples from the offices. He thought he was acting under the authority of the Ontario Water Resources Act, which had been intended to give fairly broad powers to IEB officers to apprehend companies that broke the rules. INCO was charged with impairing water quality and with failure to report. INCO was found guilty and fined $24,010.

INCO, however, appealed the decision on two grounds. They said that the IEB officer, since he had "reasonable and probable grounds" that the offence had taken place, should have sought a search warrant before he took evidence, and that by not having a search warrant he breached the charter rights of the employees. On February 1, 1999, the Province amended the OWRA to require IEB officers to get judicial authorizations and/or search warrants ("Investigative techniques authorizations") before they conduct an investigation.

The Court also found that the Crown had to prove that the discharge had impaired the Creek- having regard to " the quantity, quality and length of time of the discharge" In 2001, the Ontario Court of Appeal ordered new trials both on the abuse of power issue and the impairment issue. At the trial in 2004, however, the warrant had been sought. At the new trial on the impairment issue, the judge found that the Crown had not given evidence about the species of nickel discharged and its effects on water, and dismissed the charges.

***Update*: Source Water Protection Planning Law – White Paper Issued**[121]

The MOE published a *White Paper on Watershed-based Source Protection Planning* on February 12, 2004. This *White Paper* provides a proposal for legislation that will require source protection plans to be developed regionally and implemented locally for every watershed in the province.

All municipalities in a watershed will be required to buy in to these plans, and the plans will have to be approved by the Minister. It is unclear what the plans will authorize or prohibit, and how they will interact with other planning laws, local and regional environmental approvals, local by-laws and *Environmental Protection Act* approvals for waste disposal and bio-solid spreading.

The planning process will involve public stakeholder consultation as well as consultation cooperation between municipalities with local and regional watersheds.

The *White Paper* acknowledges the collection and analysis of the technical data needed to "support" the plans, but does not identify the source of the money that "key stakeholders" will need to develop and to analyze the information.

The paper released by the MOE also includes discussions on clarifying the rules surrounding water-taking permits and the factors to be considered in designing a system of water-taking charges. Mining companies have been arguing that they do not "take water" but recycle it, and should therefore be exempt.

3.4 Mining Act, R.S.O. 1990, c. M.14

Description:
The purpose of the Act is to promote mining in Ontario in a manner that minimizes damage to the environment.

How the Mining Act interferes with water rights:
A "mining claim" includes land under water, that has been staked and recorded.[122] An application for a claim cannot be rejected just because it includes land covered with water.[123]

The mining company can be granted the right to:
1) drain off, lower or divert and use any specified water, and
2) construct and maintain dams and other works and rights of way through or over any land or water. [124]

If land is needed for mining or milling operations, the Mining and Lands Commissioner may make an order giving to the owner of the mine, mill or quarry the right to use someone else's land to[125]:
(a) construct drainage works though the property;[126]
(b) discharge water onto the land;
(c) drain off, lower or divert the water of a lake, pond, river, stream or watercourse;
(d) collect and dam water;
(e) bring water for the use of the mine, mill or quarry;
(f) pass by land or water over land or water[127];
(g) transmit electricity;
(h) enter on and use a specified area of other land for or in connection with the working of the mine, mill or quarry; and
(i) deposit tailings, slimes or other waste products on any land, or discharge the waste products into water if the effect of the deposit or discharge will not be injurious to life or health.[128]

How the Act can be used to Protect Water Rights:
A mining lease does not carry with it the right to take the water necessary to work the lease.[129] The rights granted under the *Mining Act* are subject to the:
1. *Ontario Water Resources Act*
2. *Environmental Protection Act*

After obtaining an order of the Mining Commissioner, a person responsible for a mine, a mill or a quarry can not deposit tailings, slimes, or other waste products upon any land, or discharge the same into water, **if** the effects of such deposits are harmful to life or health.[130]

A mine, however, must compensate for any injury caused to someone else's property. [131] Once the Commissioner grants an easement, then the affected landowner does not have a right to seek an injunction to stop or prevent injury or damage to the property. The property owner is entitled to compensation, but cannot veto the mine.

(a) Decommissioning and closure, reclamation and rehabilitation:

Ontario's contaminated site guidelines, including legal requirements for the reclamation of mine sites and other measures outlining the posting of security for reclamation costs were implemented in 1990 and amended in 1995. In addition to the previous standard of ensuring contamination is kept to "background levels", the guidelines now allow remediation to "a generic standard", or "on the basis of a site-specific risk assessment." No longer does MOE have to approve the acceptability of the remediation.[132]

Many of the 1990 mining reforms were dismantled in the mid and late 1990s, some before they had been fully implemented:

- The requirement to post "realizable financial securities" against the risk of bankruptcy and public liability for mine closure costs was eliminated, and replaced with an option for mining companies to "self assure", meaning they could meet a financial means test instead for posting real securities, the net effect being that taxpayers are more likely to pay for the costs of remediation or clean-up;
- Information respecting financial assurances for mine closures and submitted to government was exempted from access to information legislation, making public access to such information less likely;
- Annual reporting requirements to the Ministry of Northern Development and Mines on mine closure plans were eliminated, which implies the loss of a key measure of accountability in implementation of plans;
- Holders of mining claims were exempted from statutory liability for "preexisting mine hazards", if they surrender their leases within twelve months of the Bill 26 amendments to the *Mining Act*.

Another change to the *Mining Act* was to delegate the approval of mine closure plans to any person designated by regulation. Prior to these changes, the practice of the Ministry of Northern Development and Mines (MNDM) was to co-ordinate review of closure plans among the ministries of Environment, Labour, and Natural Resources before acceptance by MNDM. With the changes, a mine owner could still seek the approval of the Director of Mine Rehabilitation, however the option now exists to simply file the closure plan, so long as it is certified by the company's Chief Financial Officer and then "accepted" by MNDM.

Closure at Barrick Gold's Renabie Mine

The Renabie Gold Mine, now closed, is located 20 km east of Missinabie in northern Ontario, and straddles the height of land between the watersheds of Lake Superior and Hudson Bay in the heart of the land claim area being negotiated by the Missinabi Cree First Nation. Homestake Canada Inc. and Barrick Gold Corp. are joint owners of the property and have applied for an "exit ticket" for the Renabie Mine, asking the provincial government to allow them to "surrender" the land back to the Crown. This means that for a one-time payout in this case a nominal fee of $102,290299 - the companies will be exempted from any further liability for the site, even if it arises as a direct result of the companies' past operations, actions or inactions.[133]

The mine operated during various time periods from 1947 to 1991, and the mine site was badly managed throughout its operations. There were approximately 17 tailings spills and highly toxic effluent discharges were released, resulting in contamination of sediments and waters downstream of the mine. Current conditions are those of a mine site which is far from remediated. Surface water flowing from the property contains elevated levels of zinc, cobalt, iron and copper. Acid mine drainage/metal leaching potential has not been fully assessed.

Surface water at the outflow from the mine does not meet Provincial Water Quality Objectives, showing exceedances for zinc, iron, cobalt and copper. Based on water quality, closure work at the Renabie Mine has not met the requirements of the *Mine Rehabilitation Code* of Ontario, which stipulates that surface water quality of a closed site must meet Provincial Water Quality Objectives, or scientifically established background levels, or that the propo-

nent may use a mixing zone based on a sound rationale. The Ministry of Northern Development and Mines has responded to these concerns by saying that the closure plan was received in 1991 and approved in 1992, and so was "grandfathered" into the new legislation. By MNDM's reasoning, this means that Renabie is not subject to today's standards.

The application for the Renabie Mine "exit ticket" is the first such application in Ontario under the amended *Mining Act*. Prior to the amendments coming into force, companies retained responsibility for mining properties and their associated liabilities indefinitely. A public notice of June 28, 2001 of the proposed transfer of title (i.e. the "exit ticket") was posted on the Ontario Environmental Bill of Rights electronic registry with a 30 day comment period.

It seems highly improbable that the proposed "exit ticket" fee will cover all of the many costs associated with long term care and maintenance of the site, including the requirement for fencing this safety hazard into perpetuity. The fee of $102,290 could not possibly cover costs of long-term monitoring or the necessary perpetual care for the mine, even without the water quality treatment that may be required to meet provincial water quality objectives or in the event of acid mine drainage or metal leaching.

Faraday Uranium Mines v. Arrowsmith, [1962] O.R. 503 (C.A.)

The Respondent, a uranium mining company, applied for an order under s. 646 of the Mining Act, R.S.O. 1960, c. 241, giving it the right to deposit "tailings, slimes or other waste products" from its operations in a tailings pond on its property, and to permit the overflow of water from the tailings pond to enter a certain lake by a stream passing through the pond. The application was resisted by the appellant - resort owners. It was established that the formerly clear water of the lake had become turbid and discoloured and had been changed from soft water to hard. After the first deposit of tailings a dike was built to prevent the flow of radioactive solids or water into the lake, but radioactive seepage through the dike still took place. Expert witnesses from the Ontario Water Resources Commission and the Ontario Department of Health gave their opinion that the level of radioactivity in the lake did not represent a threat to health from swimming or drinking, although it was admitted that the long term effect of exposure to a very low level of radioactivity was within the realm of an "educated guess".

It was also established that there was no continual build-up of levels of radioactivity in the lake.

The Commissioner granted the order and, in accordance with s. 646(3) of the Act, and held that the resort owners were entitled to damages. Damages were restricted to loss of past profits, since there had been no physical damage to their property.

The Ontario Court of Appeal granted the mining company's application, but held that the mining company had to adequately compensate the resort owners for diminishing the water quality.

The case illustrates that:
- the onus was on the mining operation to establish clearly that the deposit of tailings was not injurious to life or health.
- expert evidence from the Water Resources Commission and the Department of Health can be determinative as to whether deposits are injurious to health
- even though a mining company is granted an order giving it the right to deposit tailings, slimes or other waste products onto the land and into the water, the company must adequately compensate the person(s) injured.

3.5 Lakes and Rivers Improvement Act R.S.O. 1990, c. L.3

Description:
The Act deals with dams, and the construction, repair and use of dams. The Act ensures that proposed water works do not adversely affect water quality or cause undue erosion and silting.

How the Act can be used to protect water rights:
Approval is required by the Minister of Natural Resources for any work that forwards, holds back or diverts water, such as channelization, pond creation/by-pass, dams, weirs, and locks. Thus, a mine cannot deposit mine tailings intended for use as a dam or acting as a dam in a river (including creeks, streams, brooks and any similar watercourse) or lake without written approval by the Minister of Natural Resources.[134] This is particularly relevant with respect to mining activity since the disposal of mine tailings

has resulted in the filling in, damming, and diversion of thousands of lakes, rivers, and streams in Northern Ontario.[135]

A person who fails to get approval by the Minister of Natural Resources is guilty of an offence and may face a maximum fine of $1million and/or a maximum prison term of 6 months.[136]

If approval is not met, then the Minister of Natural Resources may order that the mine[137]:

1. Provide plans and specifications of the dam
2. Remove the dam or any part of it.
3. Open up the dam.
4. Repair the dam.
5. Improve the dam.
6. Alter the dam.

If the mine deposited mine tailings and/or diverts water without constructing a fishway, the Minister may order that the mine provide for a free and unobstructed passage of fish up and down stream at any season of the year. [138] Failure to do so is an offence with a maximum fine of $1 million for the first day and $20,000 for each subsequent day, and/or up to 6 months imprisonment.[139]

The Minister may order that anyone who has deposited substances into a lake or river (or on shores or banks) in a manner that conflicts with the management and perpetuation of fish and wildlife habitat or conflicts with the interests of landowners bordering on the water, to remove the material. [140] Also, the Minister may order the removal of substances deposited in a manner that impairs the natural beauty of the lakes and rivers and their shores and banks.[141]

3.6 Environmental Bill of Rights

Description:
The Environmental Bill of Rights (EBR) is a recognition of the primary responsibility of the Provincial Government for protecting, conserving and restoring the natural environment. It also recognizes that the people of Ontario have the right to participate in government decisions about the environment and the right to hold the government accountable for those decisions.

How the Bill of Rights can be used to protect water rights:
The Environmental Bill of Rights is an important tool to protect and restore the natural environment. Because you can't participate in environmental decision-making if you don't know what decisions are being proposed, the *EBR* requires that certain government ministries let you know about the environmental Acts, regulations and policies they're drafting. The Environmental Registry gives you that information. It's an Internet database designed to keep the public up to date on environmental proposals, decisions, court cases and other related information.

• You have the right to review and comment on proposed laws and standards, and ministries are obligated to consider your comments — before decisions are finalized.

• The *EBR* requires that government ministries develop Statements of Environmental Values (SEVs) to guide ministry staff when they make environmentally significant decisions. The SEVs, which are posted on the Environmental Registry, describe how ministries will integrate environmental values with social, economic and scientific considerations when they make environmentally significant decisions.

• The *EBR* gives people the right to apply for leave to appeal certain ministry decisions, such as the licenses, permits and other instruments issued to industrial facilities.

• The *EBR* gives you a formal process for proposing that existing environmental Acts, regulations, instruments or policies be reviewed, changed or improved. You can also ask the government to consider establishing new ones.

• If you think that environmental Acts or regulations are being broken, you can ask the government to investigate the alleged violation. In some cases, you can go to court if you're still not satisfied with a ministry's response to your request.

• The *EBR* gives you the right to sue someone (for example, a polluter) for causing environmental harm to a public resource. In addition, if you experience economic or personal loss because of a public nuisance that's causing environmental harm, you can now sue for personal damages.

• The *EBR* gives you added protection if you "blow the whistle" on the unsafe environmental practices of your employer. You now have legal protection from harassment if you report spills, unlawful emissions or other hazardous activities at your workplace.

Ministries subject to the EBR include Natural Resources, Environment, and Northern Development and Mines.

* for detailed information on the processes listed below, please consult the Environmental Bill of Rights User Guide, published by the Environmental Commissioner of Ontario and available on-line at: www.eco.on.ca/english/publicat/usrguide.pdf.

Although at first glance the EBR may sound like an all-inclusive tool used to promote public participation in the protection of public resources, in reality it is still highly ineffective. For instance, to request investigations, outlined in more detail below, there must be two residents of Ontario who fill out applications and provide affidavits to the ECO. The ministry then can make the decision of whether or not to investigate. A civil suit, as opposed to a criminal suit, can only be brought in circumstances where the ministry decides not to investigate, does not investigate or does not report the results of an investigation within a 'reasonable' time. Also of note is the fact that if a complainant in a civil suit loses, the court may order him or her to pay the defendant's court costs, making it a huge risk to even bring a suit against a polluter in the first place.

How to comment:
The *EBR* gives you a way to help shape proposed environmental Acts, regulations, instruments and policies to protect the environment. You have the right to comment on environmental decisions proposed by the Ontario government — right from the start.

Commenting process:
1. Proposal posted on Environmental Registry
2. Prepare your comments
3. Send your comments to the appropriate Ministry
4. Decisions are posted by the Ministry on the Environmental Registry
5. See how your comments are considered.

How to appeal Ministry decisions on instruments:
Under the *EBR*, ministries must classify instruments — the permits, licenses or Certificates of approval they issue to proponents such as industrial facilities — according to their environmental significance. This classification determines which instrument proposals are posted on the Environmental Registry and whether they are subject to *EBR* processes such as review, investigation and appeal.

There are two ways you can become involved in appealing ministry decisions on instruments:

1. You can start an appeal process yourself by seeking leave (or permission) to appeal a decision. Details about the appeal process can be obtained in the EBR User Guide, or by contacting the Environmental Commissioner of Ontario.

2. You can participate in an existing appeal process already initiated by a proponent. Appealing a ministry decision on an instrument takes time, money and expertise, and you may wish to hire a lawyer.

* The Lawyer Referral Service of the Law Society of Upper Canada can provide you with the names of Ontario lawyers who practice environmental law. You can call them at 1-416-947-3330 or 1-800-268-8326.

How to apply for a review:
There are two kinds of reviews in the review process established under the EBR. You can ask a minister to review existing policies and prescribed Acts, regulations, and instruments, or you can ask a minister to review the need for new Acts, regulations and policies. Two Ontario residents must co-apply for a review. You may call or write the ECO for an Application for Review or download the form from the ECO web site.

How to sue to protect a public resource:
The EBR gives you the right to sue someone who is violating or is about to violate an environmental Act or regulation, and is harming, or about to harm a public resource. You are not entitled to personal awards or compensation for damages under this civil action — you can go to court only to protect a public resource.

What do I need to know before I sue?
You should carefully consider the pros and cons of going to trial. Even if your case is strong, court actions can be expensive, time-consuming and stressful. Make sure you've considered all your options before you decide to sue.

You must first apply for an investigation before you can bring a lawsuit through the EBR (unless there's a serious risk of harm to a public resource). If you've asked for an investigation, you can sue only if:

a. the ministry didn't give notice of a decision not to investigate within a reasonable time.
b. the ministry didn't complete the investigation within a reasonable time.
c. the ministry didn't give notice of the outcome of an investigation within a reasonable time.
d. the ministry's response to your Application for Investigation was unreasonable.

How to sue over a public nuisance:
Individuals in most other parts of Canada have limited access to the courts when they want to sue for public nuisances because of the requirement that they first obtain the consent of the provincial Attorney General. But under s.103 of the EBR, any person in Ontario who experiences direct economic or personal loss because of a public nuisance causing harm to the environment, such as a widespread pollution problem, may sue for damages or other personal remedies without having to obtain the Attorney General's consent.

For details about how to sue a polluter using the public nuisance provisions in the EBR, you will need to consult a lawyer.

How to get protection from employer reprisals:
Many employers in Ontario both use and create toxic or hazardous materials and wastes. If you know about or have been forced to participate in unsafe practices, spills, leaks, or violations of environmental laws, you can report your employer without fear of reprisal.

Today, you don't have to choose between your civic duty and your job. The EBR provides protection for employees who may in the past have been dismissed, penalized, disciplined, coerced, intimidated or harassed for reporting environmental contraventions. You are also protected from retaliation by your employer if you participate in any of the processes under the EBR.

You are also protected if disobey you your employer but comply with laws and regulations subject to the EBR. For example, you may turn off a valve to stop an illegal discharge of effluent directly into a river. However, don't take any of these steps lightly. Talk to your co-workers, shop steward or a lawyer first unless the situation is an emergency.

If you do participate in the EBR and you believe your employer has taken reprisals against you should begin the Employee Reprisal Protection Process by contacting the Ontario Labour Relations Board

(OLRB) for an Unlawful Reprisal Application form (OLRB Form A-59). You can obtain background information and copies of the OLRB application forms at www.gov.on.ca/lab/olrb/eng. You can then fill out the application and file with the OLRB.

Contact:

Ontario Labour Relations Board
505 University Avenue, 2nd Floor, Toronto, ON M5G 2P1
Tel. (416) 326-7500
Fax (416) 326-7531

Acts Subject to the Environmental Bill of Rights

The following Acts, listed by ministry, are subject to Applications for Review and Applications for Investigation under the EBR. Although most Acts are subject to both application processes, some are subject to only one process.

Ministry of the Environment

Environmental Protection Act
Ontario Water Resources Act
Pesticides Act
Waste Management Act
Environmental Bill of Rights*
Ministry of Energy
Environmental Assessment Act
Energy Efficiency Act

Ministry of Natural Resources

Aggregate Resources Act
Conservation Authorities Act
Crown Forest Sustainability Act
Endangered Species Act
Fisheries Act (s. 36)***
Fish and Wildlife Conservation Act**
Lakes and Rivers Improvement Act
Niagara Escarpment Planning and Development Act*
Oil, Gas and Salt Resources Act
Provincial Parks Act
Public Lands Act

Ministry of Northern Development and Mines

Mining Act

3.6.1 Environmental Registry

Description:

The Environmental Registry is an Internet database of all the important proposals related to environmental decision-making by most Ontario government ministries.

Ministries must post this information on the Registry so that the public is able to provide input on decisions before they are made.

The Registry gives you the information you need to participate in environmental decision-making, including:

- The text of the *Environmental Bill of Rights (EBR)* and its regulations.
- General *EBR* information.
- Ministries' Statements of Environmental Values.
- Summaries of proposed Acts, regulations, policies and instruments.

- Ministry decisions on proposed Acts, regulations, policies and instruments, and explanations of how public comments influenced the decisions.
- Notices of appeals of instruments and appeal decisions.
- Notices of court actions and final results.
- Links to the full text for many proposals for Acts, regulations and policies.

You can access the Environmental Registry on-line at www.ene.gov.on.ca/envision/ebr
You can get on-line:
- through the Internet
- at the nearest public library
- At the ECO's Resource Centre. Call the ECO for Resource Centre hours (1-800-701-6454).

3.6.2 Office of the Environmental Commissioner (ECO)

Role of the ECO:
- The office of the ECO serves as a clearinghouse for Applications for Review and Investigation. For example, if you want a ministry to review an existing environmental Act, regulation or policy, you may obtain an Application for Review from the ECO. Staff will assist you with any questions you may have in filling out your application. Send your completed Application for Review to the ECO, and it will then be forwarded to the appropriate ministry.
- In order to use your environmental rights, it's important to understand the EBR. ECO staff are here to provide public education programs and to answer your questions. Educational groups interested in hearing about the EBR can call the ECO to arrange for a presentation by a Public Education Officer, who can provide publications and informative workshops on the EBR.
- The ECO is home to a Resource Centre with a strong and growing collection of environmental resource documents. The Centre is open to the public, who are welcome to use the facility to find out more about the *EBR* and related issues and legislation. You can also access the Environmental Registry at the Resource Centre. Call for Resource Centre hours at (416) 325-0363, (416) 325-3377 or 1-800-701-6454.

How the Commissioner may be used to help protect water rights:
In the event that you suspect mining activities have polluted your water supply, you should contact the office of the Environmental Commission of Ontario.

The web site can better help you understand your rights under the *Environmental Bill of Rights*. You'll also find the forms you can use to pursue your rights under the legislation, and you can access the Environmental Registry, which gives you information about the environmentally significant proposals and decisions made by Ontario ministries.

ECO contact information:

Environmental Commissioner of Ontario
1075 Bay Street, Suite 605, Toronto, ON M5S 2B1
Tel. (416) 325-3377
Toll-Free: 1-800-701-6454
Fax (416) 325-3370
e-mail: inquiry@eco.on.ca
web site: www.eco.on.ca

Part IV - Private Prosecutions[142]

4.1 What is a Private Prosecution?

Unfortunately, the federal and provincial governments rarely prosecute polluters. In 1996, the Ontario Ministry of the Environment only laid 3 charges under environmental legislation, despite evidence of 1024 violations of water pollution limits.[143] During the 1990s there were significant cutbacks and hundreds of environmental enforcement and abatement officers were laid off, three environmental labs were closed and Ontario Ministry of the Environment prosecutions decreased by over 50% since 1995.[144] Despite lack of enforcement by the Federal and Provincial authorities, there have been many cases in which private citizens have successfully prosecuted polluters for violations of environmental statutes.

A citizen generally has two means of directly enforcing environmental laws if the government fails to do so. A citizen may either pursue a private prosecution or a civil suit (lawsuit for environmental damages, discussed below). Note that prosecution by the government does not preclude a private prosecution or a civil suit, meaning that you can still bring a private prosecution or a civil suit even if the alleged polluter is being charged by the government.

Under a private prosecution, a private party can bring charges against another individual or company if they have reasonable and probable grounds to believe that a person or company has caused harm to the environment. A private citizen may initiate enforcement proceedings for any offence created by statute.[145] Everyone has the right to initiate a private prosecution against a suspected polluter for a violation of statute that carries punishment. In a private prosecution the individual gathers evidence of an environmental offence.

Steps to Investigate an Environmental Offence are available in the EBI's "Citizen's Guide to Environmental Investigation and Private Prosecution," which is available online at www.e-b-i.net/ebi/guide/chapter1.html#1.1.

Under the Fisheries Act, half of the fine imposed for a violation goes to the private party who launched the prosecution.

There are alternative ways of holding polluters accountable, and it is not even required that the person bringing the charges has suffered harm by the offence (see civil suits, s.2.4) [146]

4.2 Obstacles to Pursuing a Private Prosecution

The first major obstacle to pursuing a private prosecution is that it is very expensive, difficult and time consuming. In a private prosecution the cost of the investigation, monitoring, scientific reports and expert testimony are borne by the person bringing the charges. Shortages of investigative and prosecutorial resources are also significant hurdles.

The Attorney General has the right to intervene in a private prosecution, usually against the wishes of the citizen. When the Attorney General intervenes, it takes over the prosecution from a private citizen. In some jurisdictions, such as British Columbia and Alberta, the Attorney-General must approve and conduct all prosecutions.[147] Attorney General may then direct that the case be withdrawn, prosecuted or stayed. There have been several instances in which the government has intervened in a private prosecution and have stayed charges.[148] In addition, the courts have not required that the Crown give reasons for the intervention or stay of a private prosecution.[149]

It is possible to seek judicial review of an intervention of a stay of a private prosecution, however, attempts have largely been unsuccessful.[150] In a judicial review of a stay of this nature, the court must decide between the opinions of two different prosecutors: the private prosecutor who seeks to continue the prosecution versus the Attorney General who does not.[151]

Stolt Sea Farm, Inc., British Columbia

In the spring of 1999, Lynn Hunter, on behalf of the David Suzuki Foundation, brought criminal charges under the Fisheries Act against Stolt Sea Farm Inc. According to the David Suzuki Foundation, the private prosecution was launched because neither the province nor the federal Department of Fisheries and Oceans did anything in relation to a 1996-97 provincial report that found pollution from excess feed and feces emanating from a number of salmon farms.[152]

Oak Ridges Moraine

In 2004, a private prosecution was launched by environmentalists against York Region, alleging that the construction of a pipe that would require pumping up to 66 billion litres of underground water out of the ground near the sensitive Oak Ridges Moraine, violated the federal Fisheries Act.[153] The environmentalists allege that the pipe has resulted in the harmful alteration, disruption or destruction of fish habitat and the deposit of a deleterious substance into water frequented by fish. The charges relate to massive groundwater removals from Oak Ridges Moraine aquifers and the dumping of this deep groundwater into Robinson Creek, a Rouge River tributary. The charges were approved by a Justice of the Peace who, based on the evidence submitted, held that there reasonable grounds to believe that violations of the Federal Fisheries Act occurred.

Oldman River

In 1990, a private prosecution was launched in Alberta against the provincial government in relation to the construction of a dam on the Oldman River. Charges were brought against provincial cabinet ministers. This prosecution was stayed by the Attorney General of the province. It is the policy of the Alberta Attorney General's Office to intervene in all private prosecutions commenced in the province.[154]

R. v. Cyanamid Canada Inc.

A private prosecution was brought against the defendant for discharging ammonia effluent into waters frequented by fish, in violation of the Federal Fisheries Act. The federal fisheries officials and the provincial environmental officers refused to initiate legal proceedings. Even though the defendant was found guilty, the court took account of the defendant's multi-million dollar expenditures on pollution abatement equipment and provincial supervision. The court fined the corporation $1.

Part V - Civil Suits

5.1 Statutory Violations

Any Ontario resident can launch a civil action against someone who has contravened environmental legislation, causing significant harm to a public resource of Ontario. A civil action is also available against someone who will imminently contravene environmental legislation that will result in harm to a public resource.[155] Water in a body of water the bed of which is privately owned and on which there is no public right of navigation is excluded.[156]

Remedies for this cause of action include: an injunction to stop the environmental infraction, a court order to negotiate a restoration plan, a declaration. There is no award of monetary damages available.[157]

Before one can bring a lawsuit, the plaintiff (the person bringing the action) must have applied for an investigation into the contravention, and either has not received a response within a reasonable period or has received a response that is not reasonable.[158] Also, a lawsuit is subject to a limitation period, meaning that an action cannot be initiated after too much time has passed (see limitation periods below).

The advantage of a civil suit is that consent of the Attorney General generally is not required. However, the Attorney General does have the right to present evidence and make submissions to the court in the action, and to appeal a judgment. The burden of proof is a lower standard than in a criminal proceeding. The disadvantage is that an award of costs can be made if you are unsuccessful, unlike in private prosecutions.

Limitation
This right of action only applies to Acts prescribed for an Investigation (Aggregate Resources act, Conservation Authorities Act, Crown Timber Act, Endangered Species Act, Energy Efficiency Act, Environmental Assessment Act, Environmental Protection Act, Fisheries Act, Game and Fish Act, Gasoline Handling Act, Lakes and Rivers Improvement Act, Mining Act, Ontario Water Resources Act, Pesticides Act, Provincial Park Act, Public Lands Act, Waste Management Act.)[159]

The Canadian Environmental Protection Act allows any one who has suffered loss or damage as a result of a violation of the Act or its regulation, to seek an injunction to prevent or stop environmental damage or to sue for damages.[160]

5.2 Common Law Torts

At common law, one can seek redress for environmental damage or injury caused by activities such as mining operations. Such an action does not rely on a specific statute provision, but is based on rights that are recognized and protected by the court. The advantage of a common law action is that one need not establish that the party causing environmental damage violated a particular statute. However, one can rely on a breach of statute as evidence to support a tort claim.

Types of remedies
An individual may seek a remedy of monetary compensation, an injunction, and/or a declaration.

ii) *Compensation:* You can seek compensation for environmental injuries, including: personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income.

iii) *Injunction:* You can seek a court order to stop or prevent a person or entity from harming the environment.

iv) *Declaration:* You can seek a declaration by the court, in which a judge determines the legal rights and positions of the parties regarding a dispute.

5.3 A Suit Can Be Brought Against a Person or Company for[161]

(1) negligence: A person can bring an action in negligence if that person suffers injury either to health or property due to the failure by the defendant to take steps to prevent harm that they knew or ought reasonably to have known that harm would result.

(2) trespass: A person may bring an action in trespass for the unwanted deposit of foreign substances, such as water, garbage, or other waste on someone else's property and as a result, disturbs that person's possession of the property, however slight, regardless of whether the substance is toxic or non-toxic. [162]

(2) private nuisance: A person may bring an action in nuisance for the unreasonable interference with the owner's or occupier's use and enjoyment of land. A private nuisance need not be a physical intrusion, but may be the result of noise, vibrations, pollutants, or silt contamination. [163] The plaintiff need not prove that any physical damage resulted from the nuisance.

(4) riparian rights: Riparian rights are rights to continued flow of water in its natural quantity and quality in an unpolluted state by virtue of ownership of the land bordering on that water. This right is subject to a statutory right to pollute (i.e. MMER)

(5) strict liability: Strict liability arises when a person brings something onto his or her land that is "not naturally" there, and which is likely to cause harm if it escapes. If it does escape, the person may be required to compensate another for injury or damages, even if the loss was not intentional or negligently inflicted.[164]

(6) public nuisance: A public nuisance is any activity that affects the general community. However, a private citizen may only bring an action in public nuisance if that person suffered damages that are of a different in kind from those suffered by other members of the public. If a common injury is suffered by members of the community, a plaintiff's injury is common to all and is no greater than that of other members of the public, only the attorney general, representing the community, may sue in public nuisance.

The Environmental Bill of Rights, however, permits a person who has suffered or may suffer a direct economic loss or direct personal injury to bring an action due to a public nuisance causing environmental damage.[165]

If charges are brought against a polluter for violating a statute, this does not preclude you from bringing your own lawsuit to seek a remedy.

5.4 Defence of Statutory Authorization

The biggest obstacle to a civil action is the "defence of statutory authorization." This defence is available if a person or company has authorization, either by statute or regulation, to pollute (i.e. pursuant to the MMER under the Fisheries Act). However, a defence cannot succeed unless the polluter can establish that:

(1) s/he has specific statutory authority to proceed with the activity;
(2) the statute authorized the tort; and/or
(3) the tort was the inevitable consequence of what the statute authorized and contemplated.[166]

It is not a valid defence if the polluter has exceeded pollution amounts permitted by statute or regulation.

Part VI - Laws Governing the Great Lakes and the St. Lawrence

6.1 International Boundary Waters Treaty

Water pollution:
Canada and the United States are obligated under the Boundary Waters Treaty to ensure that the waters flowing across the boundary are not polluted on either side. The Treaty is applicable to the Great Lakes, the Lake of the Woods, the Great Lakes, the section of the St. Lawrence River from the outlet of Lake Ontario to Cornwall, Ontario, which are transboundary waters. In 1988, the US requested that a BC mine opening near the Alaskan border be referred to the International Joint Commission due to concerns that the mine would cause pollution in a river flowing from BC into Alaska, even though the mine was approved by the B.C. Environmental Assessment Act.[167]

Water taking:
International Boundary Waters Treaty Act prohibits the bulk removal of boundary waters from the water basins in which they are located. A license is required from the Minister of Foreign Affairs for water-related projects that affect the natural level or flow of waters on the American side of the border.

Resolving disputes:
The Treaty creates the International Joint Commission to prevent and resolve water disputes. It is a six-member panel that hears disputes, investigates issues relating to water quality and water quantity, and rules on applications for approval of projects affecting boundary and trans-boundary waters and may regulate the operation of these projects. The International Joint Commission also assists in the implementation of the *Great Lakes Water Quality Agreement* (discussed below).

6.2 North American Agreement on Environmental Cooperation (NAAEC)

Under the NAAEC, Canada, the United States and Mexico are required to ensure that their respective laws and regulations provide for high levels of environmental protection. Under the Agreement, the countries are required to enforce their respective environmental laws. The Commission for Environmental Cooperation (CEC) was created by the Agreement to address regional environmental concerns and to ensure the effective enforcement of environmental law. To obtain information on how to submit a complaint regarding the lack of enforcement of provincial or federal environmental legislation, contact:

Submissions on Enforcement Matters Unit
Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200,
Montréal (Québec) H2Y 1N9
Tel. (514) 350-4300
Fax (514) 350-4314
web site: www.cec.org

6.3 Accord for the Prohibition of Bulk Water Removal from Drainage Basins

Ontario signed the Accord for the Prohibition of Bulk Water Removal from Drainage Basins in 1999. This agreement prohibits the bulk removal of surface and groundwater from the Canadian portion of major basins.

6.4 Canada Protection Act

The Canada Protection Act applies in circumstances where a substance is released from a source in Canada into water that creates or is anticipated to create water pollution in a country other than Canada, or if the discharge of substances violates an international agreement. The Act controls Canadian sources of international water pollution through regulations, interim orders or pollution prevention planning.

Under the Act, no one can carry on an activity that results in the release of a substance in contravention of the Act.[168] Anyone who is responsible for the unlawful release of a substance can face up to a $1 million fine and jail time.[169]

A person responsible for the discharge of pollutants in contravention of the Act must take all reasonable measures consistent with the protection of the environment and public safety to prevent the release or, if it cannot be prevented, to remedy any dangerous condition or reduce or mitigate any danger to the environment.[170]

If a person carries on or proposes to carry on any activity that results or may result in the release of a substance that creates or may create water pollution, the person must upon request, provide the Minister with plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the activity and the released substance.

6.5 Great Lakes Water Quality Agreement

The Agreement is a policy instrument, which set a number of objectives and guidelines to restore and maintain the chemical, physical and biological integrity of the Great Lakes Basin Ecosystem. It is the policy of both governments under the Agreement to prohibit the discharge of toxic substances in toxic amounts, and to eliminate all persistent toxic substances.

Canada's Failure to Enforce Environmental Laws is Met by US Opposition

Canada was accused of being in contravention of the Agreement for failing to enforce the Fisheries Act in relation to the discharge of contaminants into the St. Lawrence (from the Montreal Technoparc, a waste landfill cite owned by the City of Montréal).

Environment Canada initiated an investigation of the site, however, it later dropped its investigation, stating that the source of the contamination could not be determined. The Environmental Bureau of Investigation and the Societé pour Vaincre la Pollution even offered to provide Environment Canada with samples, notes, pictures, and a biologist's report.

The Secretariat of the Commission for Environmental Cooperation requested a response from the Government of Canada. In its response, Canada explains that in October 1998, Environment Canada issued a warning to the City of Montreal regarding the site, and since that time, Canada states that the Ministry has carried out twenty visual inspections of oil-containment booms at the site. In April, 2004, the Secretariat recommended a factual record to develop and present information regarding the following matters in relation to whether Canada is failing to the Fisheries Act.

PART VII - Possible Problems when Pursuing an Environmental Action

7.1 Pre-Existing Contaminants

Although "natural environment" is generally understood to mean air, land, and water in its natural state, free of contaminants from human activities, at least two courts have held that the natural environment must be taken to include any contaminants *in existence* at the time an alleged offence (under the *Environmental Protection Act*), and that therefore it is not an offence to discharge contaminants consistent with what the area's natural environment *already contains or to which the area has adapted.*[171] Under the Canada Water Act, waste is defined to include any wastewater or substance that would degrade the quality of the receiving water. Thus, if the receiving water has already been degraded due to years of contamination, it may be difficult to make out an offence under the Act. However, under the Ontario Water Resources Act, mining companies have been convicted for discharging mine effluent that was less contaminated than the receiving water body.[172]

7.2 Lack of Enforcement & Government Underfunding

Government employee cutbacks have hampered investigation of possible water contamination. In the Deloro case, Ontario environmental investigators were unable to measure radioactive contamination before charges were laid.[173] According to the Environmental Bureau of Investigation, between 1995 and 1998, the number of Ontario Ministry of the Environment environmental prosecutions alone declined by over 50%.[174] As a result, a private prosecution or civil suits may be powerful alternatives to force a to mine to comply with environmental laws. A person or group of persons can bring charges against a polluter. A person need not suffer a loss or injury to launch a private prosecution.

7.3 Limitation Periods

Statutory claims:
The environmental statutes mentioned above usually define a limitation period in which you may seek charges following an environmental offence. Most environmental statutes have a six-month limitation period, but some have longer limitation periods of up to two years (i.e. the Fisheries Act).

Public resource
If you are bringing a lawsuit for a statutory infraction respecting a public resource, the Environmental Bill of Rights requires that the action be brought within than two years after either: a) learning of the infraction; or b) within the time in which a reasonable person ought to have known of the contravention; or c) public notice is given of an action respecting the infraction.

Private resource
If you are suing with respect to a statutory infraction in relation to a private resource, the claim cannot be brought after two years of when the environmental harm was discovered.

If the limitation period has expired under the statute, you may be able to bring a civil action for a violation of common law rights.

7.4 Civil Suit for Violation of Common Law Right

An environmental claim cannot be brought after two years of when the environmental harm was discovered. As a result, you must bring a claim to the appropriate administrative body as soon you notice that environmental damage may have occurred as a result of mining activity. There is no limitation period in respect of an environmental claim that has not been discovered.[175] This is particularly important if the limitation period to charges has expired under environmental legislation.

If you are trying to reach an out of court resolution with a polluter, the limitation period does not run until an agreement is made, negotiations are terminated, or until a party withdrawals from an agreement.[176]

There is no limitation period if you are seeking a declaration or a court order (injunction) to stop or prevent environmental damage[177]

Limitation periods in the *Environmental Bill of Rights, 1993* are potentially more expansive than the general two-year limitation period.

7.5 Authorized Pollution

Even though environmental legislation prohibits the discharge of materials that may be harmful to the environment, there is generally no blanket restriction on harmful substances (except for some hazardous substances, which are completely restricted).

A permit or approval to discharge pollutants is not an unlimited right to pollute. Rather, it is restricted in the *amount or concentration of allowable substances*. The holder of a pollution permit is still subject to environmental laws and regulations.

7.6 Due Diligence

A mining company can avoid liability for environmental damage if the company took all reasonable steps in the circumstances to avoid environmental damage or comply with environmental statutes and regulations.

R. v. Jack Cewe Ltd. (1987), 4 F.P.R. 271 (B.C. Prov. Ct.)

Jack Cewe Ltd., a mining company avoided liability under the Fisheries Act because the mine took all reasonable steps in the circumstances to solve environmental problems. The mine participated in a government committee, which had not identified a problem with company's operations. The mining company also complied with all government directions, and spending $1.2 million on implementing environmental protection measures.

PART VIII - If You Suspect Problems With Your Community's Water

8.1 In the Case of an Emergency

If you think the situation is an emergency, call or visit your nearest ministry office responsible (see the Blue Pages in your telephone book). Or if it is a spill onto land or into water, call the Ministry of the Environment's Spills Hotline at 1-800-268-6060 or (416) 325-3000.

8.2 When It Is Not an Emergency

If the situation is not an emergency, begin the investigation process by requesting an application for investigation.

If there is a potential problem is detected in a drinking water supply, the local Medical Officer of Health is informed. The Medical Officer makes the decision on whether the water is safe, and can order a number of different actions if he or she feels there is a threat to human health. A Medical officer can order a "boil water advisory" or a "drinking water advisory" to protect local populations until the water incident has been resolved.

8.2.1 How to apply for an investigation

If you suspect that there is a potential environmental infraction you should submit an application for investigation with the Environmental Commissioner of Ontario. Two Ontario residents are required to fill out an application. The Environmental Commissioner of Ontario investigates infractions of the Fisheries Act, the Environmental Protection Act, the Environmental Assessment Act, the Lakes and Improvement Act, the Mining Act, and the Ontario Water Resources Act. All personal information submitted is confidential.

For more information on an application for investigation, contact:

Public Information Officer
Environmental Commissioner of Ontario
1075 Bay Street, Suite 605, Toronto, ON M5S 2B1
Tel. (416) 325-3377
Fax (416) 325-3370
Toll Free: 1-800-701-6454

An application for investigation are also available online at the Commissioner's web site at www.eco.on.ca/english/publicat/index.htm

8.2.2 What information do I need to submit an application?

Before you complete your application, gather as much evidence as you can about the alleged violation. Note the location, time of day, people involved, any physical evidence (such as dead fish, empty chemical barrels, etc.), and any other evidence (for example, license plate numbers, company names, videos or photographs of the activity). If you witnessed the incident, write down what you saw. Keep a log of the people you have contacted and notes about your discussions with parties involved and any correspondence with the government.

8.2.3 What happens next?

Within 10 days of receiving the application, the Environmental Commissioner must refer it to the minister responsible for the administration of the statute under which the contravention is alleged to have been committed.[178] Within 20 days of receiving the application from the Environmental Commissioner, the minister is required to acknowledge receipt of the application to the applicants. The minister then decides whether or not to pursue an investigation. The minister will not investigate if his department thinks:

- the application is frivolous or vexatious;
- the alleged contravention is not serious enough to warrant an investigation;
- the alleged contravention is not-likely to harm the environment; or
- there is already an ongoing investigation or completed investigation.

If the minister does not investigate, within 60 days of receiving the application, the minister is required to give notice of the decision to the applicants. The minister is required to state the reasons for the decision.

8.2.4 How long will the investigation take?

The minister must complete the investigation within 120 days of receiving the application or give the applicants a written estimate of the time required to complete it.[179] The minister must give notice of the outcome of the investigation within 30 days of completing the investigation, including what action, if any, has or will be taken a result of the investigation.[180]

8.2.5 Will charges be laid?

The Minister may submit the information to the Attorney General of Canada who reserves the discretion on whether to pursue a prosecution.

8.2.6 Who else should I contact?

You should contact your regional office of Environment Canada, the Department of Fisheries and Oceans, and the Ontario Ministry of the Environment.[181] You should also contact environmental groups such as the Environmental Bureau of Investigations (EBI), Sierra Legal Defence Fund, Sierra Club, Greenpeace, Pollution Probe, World Wildlife Fund, and Mining Watch. Contact information is listed below.

8.2.7 What if the government is not doing enough to hold polluters accountable?

You can make a complaint about non-enforcement of environmental legislation under Article 15 of the North American Agreement for Environmental Cooperation. Contact the Commission for Environmental Cooperation to make a complaint:

Submissions on Enforcement Matters Unit
Commission for Environmental Cooperation
393, rue St-Jacques Ouest, Bureau 200
Montreal (Quebec) H2Y 1N9
Tel. (514) 350-4300
Fax (514) 350-4314
web site: www.cec.org

PART IX - Evidence in Environmental Investigations

9.1 Before You Start

Documents in support of the evidence you gather if you decide to conduct a field investigation will help to confirm and reinforce your case. The following pieces of advice are recommendations made by the Environmental Bureau of Investigation (EBI) that may assist you in your case. You can access a more detailed and expansive version of the information found in this section by consulting the Bureau's publication, the *"Citizen's Guide to Environmental Investigation and Public Prosecution"*. This Guide can be accessed through EBI's web site, www.e-b-i.net. Hard copies may also be purchased through consulting the site.

- If the suspected polluter is a corporation, you need to obtain a copy of the company's certified Certificate of Incorporation to verify its legal name and to ensure that the proper organization is being charged. You may also need to obtain a land title to prove that the land belongs to the polluter.
- The Freedom of Information Acts available at the different levels of government are excellent, although time-consuming, tools to obtain documents.
- You should keep all documents gathered in the course of your investigation, as their relevance may not become clear until late in the investigation, so set up a system to keep track of them.
- Keep orderly notes of any telephone. calls you make or receive about the case. Make a habit of sending letters confirming the contents of any conversation relevant to your case
- It is often useful to make a time line of the events that led to the offence, using documents obtained as supporting evidence. This exercise will also help you prepare the brief.

9.2 Documentary Evidence

Freedom of Information (FOI) requests

The federal Access to Information Act and the provincial and municipal Freedom of Information Acts are invaluable tools available to all Canadian citizens. Using these acts, you can obtain any correspondence or other relevant documents that may relate to the events or sites you are investigating.

Government files may contain a letter from a regulatory agency to a company, requiring it to take certain steps before, during, or after an offence. Failure to follow these instructions may exacerbate the offence or be the reason an offence has occurred. This type of information may strengthen your case, so include the documents you obtain in your brief as proof that the accused could have avoided the offence, that the person or company failed to follow instructions, or that they were aware of the situation for a duration of time within which they failed to take preventative action.

Remedial Action Plan program (RAP reports)

All the Great Lakes have "areas of concern" identified in the Remedial Action Plan program publications, funded by the federal and provincial governments in the late 1980s and early 1990s. Ontario has 12 areas of concern, stretching from Thunder Bay on Lake Superior to Cornwall on the St. Lawrence River.

You can find Remedial Action Plans and associated documents at public and university libraries, on the Internet (for the Great Lakes, see www.cciw.ca/glimr/raps/intro.html), and at the Environment Canada offices in Ottawa.

Certificates of Approval (C of A)

Certificates of Approval would be better named "pollution permits" since they define what contaminants, and in what concentrations, a polluter is allowed to release. In accordance with the Ontario Water Resources Act, every discharge to the environment in Ontario must be covered by a Certificate of Approval issued by the Ontario Ministry of the Environment.

Monitoring data

As part of their pollution permits, companies may be required to provide monitoring data to a regulatory agency. Monitoring data may also be required if the polluter is subject to MISA or similar regulations. Companies sometimes publish monitoring data in their annual reports. Government agencies or univer-

sity studies may also provide you with some information about the types and levels of contaminants contained in the discharges. You may have to use a Freedom of Information request to obtain the data.

Municipal-Industrial Strategy for Abatement (MISA)
The Municipal-Industrial Strategy for Abatement (MISA) aims to control contaminants in municipal and industrial discharges in Ontario. It uses an industry-based approach in which final clean water regulations under the Ontario Environmental Protection Act (EPA) were defined in 1993 in consultation with industry for various sectors.

National Pollutant Release Inventory (NPRI)
The National Pollutant Release Inventory – created under the Canadian Environmental Protection Act (CEPA) in 1992 – makes information available to the Canadian public about pollutants released into the environment.

The NPRI only monitors the substances that appear on its list, which does not include pesticides, ozone-depleting substances, or other contaminants that are banned or are covered by other acts and regulations. The original 1993 list consisted of 178 substances; the current list has 268.

Ontario's Environment Registry under the Environmental Bill of Rights (EBR)
The Environmental Registry provides Ontario residents with information on government ministries' environmentally significant proposals and decisions and allows them to comment on the posted proposals for new acts, regulations, policies, or instruments. Postings include the name and contact information of a ministry person. The comment period is usually 30 days, but the postings stay on the registry for viewing after that period expires. The registry may yield documents helpful to your investigation and lead you to other helpful information.

Inspection results and non-compliance reports
Environment Canada makes its annual inspection results of facilities under its jurisdiction available to the public. Not all of the facilities under its supervision get inspected every year or even every five years, but you may glean some useful information from these results.

Certificates of Incorporation
To charge a corporation, you must have its exact name, which you can obtain by contacting the provincial Registrar of Companies (RoC) to request a certified copy of the company's Certificate of Incorporation. Be prepared to give the RoC basic information such as the company's business name and address.

Land titles
The common law provinces (all but Quebec) have two conceptually different systems of recording interests in land: the registry system and the land titles (or Torrens) system. The registry system registers or records interests in land but does not actually declare who owns it. To determine ownership and whether any encumbrances are outstanding against the land's title, a researcher must examine the records for the previous 40 years. The land titles system declares the current state of title to any registered parcel of land. An investigation of title under the land titles system requires only a review of current registrations.

Interviews
In the course of your investigation, you will talk to many people, including company representatives, government officials, and scientists. After a discussion, always write down the date, the person's name and affiliation, and a contact number or address. Keep accurate notes of what you and the interviewer said.

9.3 Physical Evidence

Air emissions
You can usually detect air pollution by seeing coloured and/or noxious fumes, and sometimes, particulate matter. Air emissions require special investigation techniques and vigilance since they often vary according to the manufacturing period, time of year, time of day, direction of the wind, and so on.

Liquid discharges
Liquid discharges come in many forms, most commonly as leachate and effluent out of a pipe. Contaminated effluents usually lead to contaminated sediments as well.

Signs that can help you begin or focus a water pollution investigation include suspended solids, colour, smell, iridescence, foam, excessive sediment deposition, dead fish, changes in wildlife, algae blooms, and sewage fungus.

Trespassing
One of the difficulties a private citizen may encounter when investigating a pollution offence is obtaining physical evidence from private property.

Municipally, provincially, or federally owned sites are generally open to the public and do not pose the problems that privately operated sites do. If you are sincerely unaware of site boundaries due to the absence of fences or signs and if no one indicates that you are on private property, you may take samples at the site and not be troubled. However, if you know that you have entered private property and proceed nonetheless, you may be charged with trespassing, the information you gathered may not be admitted into evidence, and you may lose credibility in the eyes of the court and the public.

Note taking
Note taking is an essential part of any investigation. Good notes describe in a few words where you were, when you were there, why you were there, and what you saw. They could also indicate who you spoke to and what was said

Chain of custody
Any sample may become evidence; hence, you should handle all the samples in a manner that will allow you to identify them in court and to prove that no one has tampered with them

Analysis and testing
Chemical analysis will reveal an effluent's composition and sometimes that may be sufficient. For example, the effluent may contain high levels of a known toxicant – in concentrations above what regulations allow – or any trace of a banned substance.

Laboratories can perform chemical analysis on liquid, solid, and gaseous samples, but not all laboratories perform every test available. Chemical analysis can be expensive, and you may have to test many samples, so it is important to select the tests wisely, based on the documentary information you have obtained.

Visual Evidence
Videos and photographs – visual documentation of environmental infractions – make good evidence. They are also useful in publicizing your case and great material to distribute to the media. For these reasons, visual evidence can be one of the keys to a successful case, but both videos and photographs present advantages and disadvantages.

9.4 Recommended Steps to Follow for an Environmental Investigation

Step 1: Identify pollution source
Step 2: Obtain documents
Step 3: Check whether something has been or is being done about the problem
Step 4: Identify potential contaminants
Step 5: Go on field and sampling trips
Step 6: Analyze and test samples
Step 7: Make a violation table (to track who has broken laws/ breached regulations)
Step 8: Contact the appropriate regulatory agency and make a formal complaint
Step 9: Proceed with legal action

PART X - Appeals

10.1 Appealing a Tribunal Decision

The Environmental Review Tribunal (ERT) is an independent tribunal that hears applications and appeals under several environmental statutes, including the Environmental Assessment Act, the Environmental Protection Act, the Safe Drinking Water Act, the Ontario Water Resources Act, and the Pesticides Act, and leave to appeal applications under the Environmental Bill of Rights, 1993.[182] The Members who sit on the tribunal may include environmentalists, scientists, academics and lawyers. None of the Members of the Tribunal is an employee of the Ministry of the Environment. [183]

Anyone who feels they are affected by a mining activity before the tribunal may apply to the ERT to participate in the proceedings. You may request to be added as a party, participant or presenter. You must notify the Tribunal that in writing before the hearing begins of your intention to participate as either a party, participant or presenter.

A party may make submissions to the tribunal, or may call witnesses or may be a witness at the hearing. A participant may observe, present views and make submissions. A presenter presents their views before the tribunal.

Any party to a hearing may appeal a Tribunal decision to the Minister of the Environment or if a question of law is involved, to Divisional Court. The appeal must be made within 30 days after releasing the tribunal's decision.

Under the Environmental Protection Act and the Ontario Water Resources Act, appeals must be made either directly to Cabinet or if a question of law is involved, to Divisional Court. Under the Environmental Assessment Act, appeals must be made in writing to the Minister of the Environment within 28 days of the tribunal decision being released.

To get more information, contact:

Environmental Review Tribunal
P.O. Box 2382, 2300 Yonge Street, Suite 1201, Toronto, ON M4P 1E4
Tel. (416) 314-4600
Fax (416) 314-4506
e-mail: erttribunalsecretary@ert.gov.on.ca
web site: www.ert.gov.on.ca

**Because each appeal tribunal is different, you should contact the tribunal for information about its procedures.*

10.2 Judicial Review

Applications for judicial review are made under sections 18 to 18.5 and section 28 of the *Federal Court Act* and, except in cases where the Trial Division directs that the application should be proceeded with as an action, Part 5 of the Federal Court Rules is applicable. Both divisions of the Court can offer the same remedies.[184]

In Canada, as well as in many other constitutional democracies, there are two types of 'judicial review' – judicial review on administrative acts, and judicial review on the constitutionality of legislation. Both types of 'judicial review' are based on the idea of the rule of law. This idea means that not only citizens, but also government officials, are subject to the law. If these officials do something that the law does not allow them to do, the courts are allowed to nullify their actions[185].

When a court strikes down legislation on grounds of "division of powers", it does not mean that the content of law itself violates the constitution. Rather, it means that the institution which enacted the law (a provincial legislature or Parliament) violated the Constitution. Consequently, if there is a strong public interest in enacting this legislation, the appropriate institution can enact this act. Conversely, when a court strikes down legislation on *Charter* grounds, it means that the content of the law violates the Constitution, and no legislature could properly enact this law. For this reason, 'judicial review' on *Charter*

issues is often criticized as illegitimate since it gives to the judiciary the power to block important legislative initiatives.

Anyone directly affected by the matter may apply for relief, as well as the Attorney General of Canada. Unless otherwise specified by statute, the application must be made within 30 days after the decision or when the order in question was first communicated to the Deputy Attorney General or to the party directly affected. A judge of the appropriate division may, however, extend the time. (See Rules 8, 359 and 369)

Subsection 18.1(3) of the *Act* provides that either division may:

- order the tribunal to do what it has unlawfully failed to do or has unreasonably delayed in doing [paragraph 18.1(3)(a)] or
- declare a decision, order, act or proceeding to be invalid or unlawful, or quash, set aside or set aside and refer back, prohibit, or restrain the decision. [Paragraph 18.1(3)(b)]

The amendments to the *Federal Court Act*, S.C. 1990, Chapter 8, have extended the grounds for review. [Subsection 18.1(4)] The application must be based on the grounds that the board, commission, or tribunal:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

Requests for Judicial Review are often submitted in regards to environmental matters. Two such cases involve the Sierra Legal Defence Fund.

Cheviot Mine

This past August 13, 2004. Fording Canadian Coal Trust announced that an application for judicial review had been filed in the Federal Court of Canada by the Sierra Legal Defence Fund on behalf of five environmental groups. The application submitted seeks to compel the Minister of Fisheries and Oceans to undertake another environmental assessment of the Cheviot Coal Mine Project in west central Alberta.

The Cheviot project was approved following a thorough and lengthy environmental assessment process that spanned over eight years. Elk Valley Coal had secured most necessary provincial mining and environmental approvals and intended to commence operations in the new mining area upon receipt of a Fisheries Act Authorization from the federal Department of Fisheries and Oceans (DFO)[186].

Oilsands EA

In May 2004, Sierra Legal Defence represented a group of environmentalists before a Federal Court judge to reconsider the scope of an environmental assessment for a $3.3-billion oilsands project in northern Alberta.[187] A lawyer for the Sierra Legal Defence Fund said the federal government dodged its responsibility over TrueNorth Energy's proposed mine near Fort McMurray by recommending the least extensive type of environmental review and delegating important questions to an Alberta-run process. They asked the Court to set aside a 2002 Fisheries Department decision saying the review should only consider the destruction of one small stream.

PART XI - Resources

11.1 Government:

Spills Action Centre
To report a spill or other environmental emergency, call the Spills Action Centre: 1-800-268-6060

Pollution Reporting Hotline
For reporting acts of pollution, contact the 24 hour public hotline at: 1-866-MOE-TIPS
(1-866-663-8477) or e-mail the hotline at: moe.tips@ene.gov.on.ca

Fisheries and Oceans Canada
Fisheries and Oceans Communications Branch
13th Fl., St. 13228, 200 Kent St., Ottawa, ON K1A 0E6
Tel. (613) 993-1516
Fax (613) 990-1866
e-mail: info@dfo-mpo.gc.ca
web page: www.ncr.dfo.ca

Environment Canada - Environmental Protection Branch
Environmental Protection Branch
4905 Dufferin St., Downsview, ON M3H 5T4
Tel. (416) 739-5850
Fax (416) 739-4159
web site: www.on.ec.gc.ca/epb/fpd/

Environment Canada - National Pollutant Release Inventory
National Pollutant Release Inventory
Environmental Protection Branch – Ontario
2nd floor, 4905 Dufferin St., Downsview, ON M3H 5T4
Tel. (416) 739-5886 or 739-5890
Fax (416) 739-4326 or 739-4251

Environmental Bill of Rights Office
To comment on an Environmental Registry notice, please refer to the contact person in the Environmental Registry notice. To submit a comment about the EBR contact:
Environmental Bill of Rights Office
40 St. Clair Avenue West, 12th floor, Toronto, ON M4V 1M2
e-mail the EBR office at: Cathy.Clarke@ene.gov.on.ca

Ministry of the Environment - For general information or publication requests:
Ministry of the Environment
Public Information Centre
1st floor, 135 St. Clair Avenue West, Toronto, ON M4V 1P5
Tel. 416-325-4000 or toll-free at 1-800-565-4923
e-mail the Public Information Centre at: picemail@ene.gov.on.ca

Minister of the Environment - To write to the Minister of the Environment:
The Honourable Leona Dombrowsky
Minister of the Environment
12th Floor, 135 St. Clair Avenue West, Toronto, ON M4V 1P5
Tel. (416) 314-6790
Fax (416) 314-7337

11.2 Environmental NGOs

Environmental Bureau of Investigation
EBI is a non-profit organization that investigates and prosecutes environmental crime and helps citizens and groups in their fight against polluters. The EBI was involved in the successful prosecution of the City of Kingston for dumping toxic waste into the Cataraqui River. The EBI has investigated mining sites suspected of polluting. The EBI also laid charges under the *Fisheries Act* in both the Deloro Mine case and the Belle Park case. The Bureau also investigates noise, odour and vibration pollution.

225 Brunswick Ave., Toronto, ON M5S 2M6
Tel. (416) 964-9223
Fax (416) 964-8239
E-mail: EBI@nextcity.com
Web site: www.e-b-i.net

Sierra Club of Canada
Sierra Club of Canada (SCC) has active chapters in every region, with offices in Ottawa, Vancouver, Victoria, Sydney, Corner Brook, Halifax, Edmonton and Toronto. SCC has developed major national campaigns with four program areas: Health & Environment, Protecting Biodiversity, Atmosphere & Energy, and Transition to a Sustainable Economy.

412-1 Nicholas Street, Ottawa, ON K1N 7B7
Tel. (613) 241-4611
Toll free: 1-888-810-4204
e-mail: info@sierraclub.ca
web site: www.sierraclub.ca/national

MiningWatch Canada
MiningWatch Canada is a direct response to industry and government failures to protect the public and the environment from destructive mining practices and to deliver on their sustainability rhetoric. With technical and strategic expertise from across Canada, MiningWatch Canada carries out and provides support for the monitoring, analysis and advocacy necessary to affect the behaviour of industry and public decision-makers.

Suite 508, City Centre Building, 880 Wellington St., Ottawa, ON K1R 6K7
Tel. (613) 569-3439
Fax (613) 569-5138
e-mail: Canada@miningwatch.ca
web: www.miningwatch.ca

Pollution Probe
Pollution Probe is a Canadian environmental organization that:
- Defines environmental problems through research;
- Promotes understanding through education; and,
- Presses for practical solutions through advocacy.

Pollution Probe is dedicated to achieving positive and tangible environmental change. The organization has four major program and several special program areas, including the re-building of its water program, following the extensive work they have done on the Great Lakes. The initial phase of their water program has focused on ensuring clean, safe drinking water in Ontario.

625 Church Street, Suite 402, Toronto, ON M4Y 2G1
Tel. (416) 926-1907
Fax (416)-926-1601
E-mail: pprobe@pollutionprobe.org
Web site: www.pollutionprobe.org

Ducks Unlimited Canada
Ducks Unlimited Canada (DUC) has been committed to wetland conservation for more than 65 years. DUC is a national, private, non-profit organization – it is Canada's Conservation Company. DUC's conservation efforts take many forms. On-the-ground work is guided by the wetland and environmental research of DUC's scientists. DUC works to change policy in favour of wetland and habitat conservation. DUC also delivers wetland and environmental education programs to teach Canadians about wetlands and the need to conserve them. As a non-profit organization, DUC relies on the support of Canadians from across the country. DUC's dedicated volunteers, members and staff work very hard to help DUC in achieving its conservation mission and vision.

Oak Hammock Marsh Conservation Centre, P.O. Box 1160, Stonewall, MB R0C 2Z0
Tel. 1 (800) 665-DUCK (3825)
Fax (204) 467-9028
e-mail: webmaster@ducks.org
web site: www.ducks.ca

Greenpeace
Greenpeace is an independently funded organization that works to protect the environment. The group challenges government and industry to halt harmful practices by negotiating solutions, conducting scientific research, introducing clean alternatives, carrying out peaceful acts of civil disobedience and educating and engaging the public. Greenpeace seeks to:

- Protect biodiversity in all its forms;
- Prevent pollution of the earth's oceans, land, air and fresh water;
- End all nuclear threats;
- Promote peace, global disarmament and non-violence

Ste. 605, 250 Dundas St. W., Toronto, ON M5T 2Z5
Tel. (416) 597-8408
Fax (416) 597-8422
e-mail: greenpeace.toronto@dialb.greenpeace.org
web site: www.greenpeace.org

11.3 Lawyers and Legal Aid

Sierra Legal Defence Fund is Canada's foremost national non-profit organization dedicated to enforcing and strengthening the laws that safeguard our environment, wildlife and public health.

Sierra Legal Defence Fund – Ontario Office
Ste. 300, 106 Front St., Toronto, ON M5A 1E1
Tel. (416) 368-7533
Fax (416) 363-2746
e-mail: sldfon@sierralegal.org
web site: www.sierralegal.org

Canadian Environmental Law Association
CELA is a free legal advisory clinic for the public, and will act at hearings and in courts on behalf of citizens or citizens' groups who are unable to afford legal assistance.

130 Spadina Avenue, Suite 301, Toronto, ON M5V 2L4
Tel. (416) 960-2284
Fax (416) 960-9392
web site: www.cela.ca

Law Society of Upper Canada
The Law Society of Upper Canada (LSUC) offers public legal information including how to find a lawyer. The Law Society of Upper Canada also offers a Lawyer Referral Service that parties can call to get

the name of a lawyer who will provide up to 30 minutes free consultation to help you determine your rights and option. The cost is $6 for the service.

Tel. 1-900-565-4LRS (4577)
web site: www.lsuc.on.ca

Legal Aid
Parties with a small income, or who are receiving social assistance might qualify for legal aid. Legal aid can help pay for some or all of parties' legal costs. Legal Aid Ontario provides legal aid services. Its web site includes addresses of legal aid offices throughout the province. The numbers for local legal aid offices are also available in the white pages of telephone books.

Tel. (416) 979-1446 or toll-free: 1-800-668-8258
Fax (416) 979-8669
web site: www.legalaid.on.ca

Public information on legal issues is also available from the following:

Community Legal Education Ontario
CLEO is a community legal clinic, founded in 1974, that specializes in public legal education. CLEO is administered by a volunteer board of directors, and funded by Legal Aid Ontario and the Department of Justice Canada. Staff include lawyers, editors, support staff, and a part-time librarian.

Tel. (416) 408-4420
Fax (416) 408-4424
e-mail: cleo@cleo.on.ca
web site: www.cleo.on.ca

Legal Line
Legal Line provides free legal information through telephone and Internet systems. All Ontario residents now have direct access to the laws under which they are governed.

Contact: Ms. Antree Demakos
Tel. (416) 929-8400 ext. 899
e-mail: antree@LegalLine.ca
web site: www.legalline.ca/a1.html

11.4 Suggested Print Resources

1. Elizabeth J. Swanson and Elaine L. Hughes, *The price of pollution: environmental litigation in Canada*, (Edmonton: Environmental Law Centre, 1990).
2. David Estrin and John Swaigen (Eds), *Environment on trial: a guide to Ontario environmental law and policy* (Toronto: Emond Montgomery, 1993).
3. Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91-158
4. Joseph F. Castrilli, "The Ontario Forest, Land Use, and Mining Initiatives of 1999 and the Management of Public Land in Canada in the 21st Century: One Step Forward, Two Steps Back," 43 C.E.L.R. (N.S.) 11
5. Environmental Bureau of Investigation web site: www.e-b-i.net/ebi/index.html
6. Sue Moodie, *Mine Monitoring Manual: a Resource for Community Members*, Yukon Conservation Society and Project Underground, June 2001.

Endnotes:

[1] Lara McGuire and Jonquille Pakare in their second year at the University of Ottawa, English Common Law.
[2] Environment Canada, "Federal Water Policy," (reviewed 2003-08-05) http://www.ec.gc.ca/water/en/policy/pol/e_pol.htm (accessed August 13, 2004)
[3] Environmental Bureau of Investigation, "Citizen's Guide to Environmental Investigation and Private Prosecution," Available online at: http://www.e-b-i.net/ebi/guide/chapter1.html#1.1 (accessed August 18, 2004).
[4] J. Swaigen et al, "Environment on Trial," (1993) p.552.
[5] J. Swaigen et al, "Environment on Trial," (1993) p.552.
[6] J. Swaigen et al, "Environment on Trial," (1993) p.552.
[7] J. Swaigen et al, "Environment on Trial," (1993) p.535.
[8] Environmental Bureau of Investigation, "Citizen's Guide to Environmental Investigation and Private Prosecution," Available at: http://www.e-b-i.net/ebi/guide/chapter1.html#1.1 (accessed August 18, 2004), chapter 2.3.
[9] Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 9.
[10] Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 10.
[11] Environmental Bureau of Investigation, "Citizen's Guide to Environmental Investigation and Private Prosecution," Available at: http://www.e-b-i.net/ebi/guide/chapter1.html#1.1 (accessed August 18, 2004), chapter 2.3.
[12] J. Swaigen et al, "Environment on Trial," (1993) p.552.
[13] Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 11.
[14] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).
[15] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).
[16] Environmental Bureau of Investigation, "Citizen's Guide to Environmental Investigation and Private Prosecution," Available online at: http://www.e-b-i.net/ebi/guide/chapter1.html#1.1 (accessed August 18, 2004).
[17] Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 12.
[18] Environmental Bureau of Investigation, "Citizen's Guide to Environmental Investigation and Private Prosecution," Available at: http://www.e-b-i.net/ebi/guide/chapter1.html#1.1 (accessed August 18, 2004). chapter 2.7.
[19] Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 63.
[20] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35, Part II (rights of the aboriginal peoples of Canada).
[21] *R v Sparrow* [1990] 1 SCR 1075.
[22] *Delgamuukkw v British Columbia* [1997] 3 SCR.
[23] Nishnawbe Aski Nation, *A Handbook on "Consultation" in Natural Resource Development.* 1st ed, July 2001. [online: http://www.nan.on.ca/lands/pubs/handbooknrdev.pdf]
[24] Fisheries Act, R.S.C. 1985, c. F-14, s. 34(1).
[25] Fisheries Act, R.S.C. 1985, c. F-14, s. 34(1); R. v. Jordan River Mines Ltd., [1974] 4 W.W.R. 337 (B.C. Prov. Ct.) (mine tailings found deleterious to fish); *R. v. Chew Excavating Ltd.* (1978), 2 F.P.R. 163 (B.C. Prov. Ct.) (siltation of creek by clean-up operation constituting deposit of deleterious substance)
[26] Fisheries Act, R.S.C. 1985, c. F-14, s.34.
[27] *R. v. Stearns-Roger Engineering Co.*, [1973] 2 W.W.R. 669 (B.C.S.C.); reversed on other grounds [1974] 3 W.W.R. 285 (C.A.).
[28] Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 69.
[29] R.S.C. 1985, c. F-14, s. 35(1).
[30] R.S.C. 1985, c. F-14, s. 36(3).
[31] S.O.R./94-636, Schedule I, Part I, listing ss. 35(2) and 37(2) of the Fisheries Act
[32] Fisheries Act, R.S.C. 1985, c. F-14, s.36(3); 40(2)
[33] Fisheries Act, R.S.C. 1985, c. F-14, sections 40(2), 79.1 and 79.2
[34] Fisheries Act, R.S.C. 1985, c. F-14, s. 78.1 [en. 1991, c. 1, s. 24];
[35] J. Swaigen et al, Environment on Trial (1993), p.522.
[36] *R. v. MacMillan Bloedel (Alberni) Ltd.* (1978), 42 C.C.C. (2d) 70 (B.C. Co. Ct.); 210, affirmed (1979), 47 C.C.C. (2d) 118 (C.A.); leave to appeal to S.C.C. refused (1979), 47 C.C.C. (2d) 118n (S.C.C.); *but see R. v. Great Canadian Oil Sands Ltd.* (1978), 2 F.P.R. 108 (Alta. Dist. Ct.); affirming (1977), 2 F.P.R. 105 (Prov. Ct.) (Crown's appeal from acquittal dismissed where evidence failing to establish harmful effect on river).
[37] *R. v. Jordan River Mines Ltd.*, [1974] 4 W.W.R. 337 (B.C. Prov. Ct.).
[38] Fisheries Act, R.S.C. 1985, c. F-14, s. 40(5)(b).

[39] Fisheries Act, R.S.C. 1985, c. F-14, s. 78.3 [en. 1991, c. 1, s. 24]; *R. v. MacMillan Bloedel Industries Ltd.* (1973), 41 D.L.R. (3d) 247 (B.C. Prov. Ct.) ("due diligence" requiring successful communication of adequate information and instructions to person on job);
[40] R.S.C. 1985, c. F-14, s. 78.6.; *R. v. Prince George Wood Preserving Ltd.* (1986), 5 F.P.R. 413 (B.C. Co. Ct.) (successful due diligence defence made out by timber licensee in circumstances because all reasonable care taken to prevent siltation from logging road entering stream).
[41] *R. v. Jack Cewe Ltd.* (1975), 23 C.C.C. (2d) 237 (B.C. Co. Ct.) (accused's precautions to prevent sediment from being carried into river of no avail in unusually heavy rainfall); *R. v. Byron Creek Collieries Ltd.* (1978), 8 C.E.L.R. 31 (B.C. Co. Ct.) (excessively heavy rainfall causing mud slide into creek frequented by fish); *R. v. Pioneer Timber Co.* (1979), 9 C.E.L.R. 66 (B.C. Co. Ct.) (run-off of water from spring thaw which could have been avoided not "act of God").
[42] Fisheries and Oceans Canada, "Fish Habitat in Ontario: Compliance Protocol," (February 2000) p.2.
[43] Fisheries and Oceans Canada, "Fish Habitat in Ontario: Compliance Protocol," (February 2000) p.2.
[44] Williams & Shier Environmental Lawyers LLP on-line: www.willmsshier.com/latestupdates/ latestupdatespage2
[45] Canada-Ontario Business Service Centre on-line: www.cbsc.org
[46] Metal Mining Liquid Effluent Regulations, ss. 4-5, and Schedules I-II; Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 71.
[47] Environment Canada, 'Factsheet 5: Environmental Effects Monitoring (EEM): Metal Mining and Pulp Effluent Regulations,' available online at: http://www.ec.gc.ca/ceqg-rcqe/English/Html/SAS/factsheet_5.cfm
[48] MiningWatch Canada. *The Boreal Below: Mining Issues and Activities in Canada's Boreal Forest Region*. Dec. 2001.
[49] Navigable Waters Protection Act, R.S.C. 1985, c. N-22, s. 5(1)(a)
[50] Navigable Waters Protection Act, R.S.C. 1985, c. N-22, s. 9(3)
[51] Navigable Waters Protection Act, R.S.C. 1985, c. N-22, s. 9(3)
[52] Navigable Waters Protection Act, R.S.C. 1985, c. N-22, s. 22.
[53] John Swaigen, "Environment on Trial," p.524.
[54] Canadian Environmental Protection Act, 1999, c.33, s.54.
[55] Canadian Environmental Protection Act, 1999, c.33, s.272-294.
[56] Canadian Environmental Protection Act, 1999, c.33, s.280(1)
[57] Canadian Environmental Protection Act, 1999, c.33, s.295-7.
[58] Canadian Environmental Protection Act, 1999, c.33, *(Schedule I, Part 4)*;
[59] Canadian Environmental Protection Act, 1999, c.33, s.280(2)
[60] Canadian Environmental Protection Act, 1999, c.33, s.276
[61] Waldemar Braul, "CEPA 1999's Citizen Enforcement Remedies," Fasken Martineau DuMoulin LLP. Avail. at: http://www.fasken.com/WEB/FMDWEBSITEFRENCH.NSF/0/41CBC9C2672E2A8E85256C4D00493E78/$File/CEPA%201999%20CITIZEN%20ENFORCEMENT%20REMEDIES.PDF?OpenElement (accessed August 17, 2004)
[62] Canadian Environmental Protection Act, 1999, c.33, s.39.
[63] Canadian Environmental Protection Act, 1999, c.33, s.21(1).
[64] Waldemar Braul, "CEPA 1999's Citizen Enforcement Remedies," Fasken Martineau DuMoulin LLP. Avail. at: http://www.fasken.com/WEB/FMDWEBSITEFRENCH.NSF/0/41CBC9C2672E2A8E85256C4D00493E78/$File/CEPA%201999%20CITIZEN%20ENFORCEMENT%20REMEDIES.PDF?OpenElement (accessed August 17, 2004)
[65] Canadian Environmental Protection Act, 1999, c.33, s.40.
[66] Canadian Environmental Protection Act, 1999, c.33, s.275.
[67] Environment Canada, 'Discussion Paper on Pollutant Release Reporting Requirements As It Relates to Mining Facilities,' http://www.ec.gc.ca/pdb/npri/documents/html/2003WGR/Mining_paper_final_e.cfm
[68] Environment Canada, 'Discussion Paper on Pollutant Release Reporting Requirements As It Relates to Mining Facilities,' http://www.ec.gc.ca/pdb/npri/documents/html/2003WGR/Mining_paper_final_e.cfm
[69] Canada Water Act, RSC. 1985, c.C-11, ss.9, 30(1).
[70] Joseph F. Castrilli, "The Ontario Forest, Land Use, and Mining Initiatives of 1999 and The Management of Public Land in Canada in The 21st Century: One Step Forward, Two Steps Back," **43 C.E.L.R. (N.S.) 11**
[71] Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 14
[72] Inclusion List Regulations [SOR/94-637], Part I to X.
[73] diversion of 10 000 000 m^3/a or more; or an expansion of such a structure that would result in an increase in diversion capacity of more than 35 per cent. Comprehensive Study List Regulations, [SOR/94-638], s.9.
[74] extraction of 200 000 m^3/a or more; or an expansion of such a facility that would result in an increase in production capacity of more than 35 per cent. Comprehensive Study List Regulations, [SOR/94-638], s.10.
[75] Comprehensive Study List Regulations, [SOR/94-638], s.16.
[76] Canadian Environmental Assessment Agency. Visit: http://www.ceaa-acee.gc.ca/011/index_e.htm
[77] MiningWatch Canada. *The Boreal Below:Mining Issues and Activities in Canada's Boreal Forest Region*. Dec. 2001
[78] Migratory Birds Regulations, C.R.C., c.1035, s.6.

[79] Migratory Birds Regulations, C.R.C., c.1035, s.35(1).
[80] "Extirpated" means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere
[81] Environment Canada, "Species at Risk," http://www.speciesatrisk.gc.ca/default_e.cfm (last updated: 2003-08-05)
[82] Species At Risk Act**,** S.C. 2002, s. 29, ss.58, 61.
[83] Species At Risk Act**,** S.C. 2002, s. 29, s.58.
[84] ss. 14(1), 179.
[85] Environmental Protection Act, R.S.O. 1990, c. E.19, s. 17; *R. v. Consolidated Mayburn Mines Ltd.* (1996), 133 D.L.R. (4th) 513 (C.A.) (clean-up order not limited to anticipatory contaminating events; collateral attack on validity of order not available in enforcement proceedings); *Re Singh* (1996), 20 C.E.L.R. (N.S.) 256 (Ont. Environmental App. Bd.) (applicant not causing or permitting gasoline spill; applicant not required to pay clean up costs); *see also* Environmental Protection Act, R.S.O. 1990, c. E.19, s. 196.
[86] Environmental Protection Act, R.S.O. 1990, c. E.19, s. 30
[87] ss. 194(1),(2) of Ontario's *Environmental Protection Act*, R.S.O. 1990, c. 141, and ss.116(1),(2) of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40
[88] Environmental Protection Act, R.S.O. 1990, c. E.19, part X
[89] Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements," (2000) 34 U.B.C. L. Rev. 91 - 158 at para 78; See
[90] Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 124-127
[91] Environmental Protection Act, R.S.O. 1990, c. E.19, s. 18.
[92] *R. v. Power Tank Lines Ltd.* (1975), 23 C.C.C. (2d) 464 (Ont. Prov. Ct.).
[93] Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 8, 128; *see also* Environmental Protection Act, R.S.O. 1990, c. E.19, Pt. XII (ss. 131-36) (Financial Assurance); see, in particular, s. 132(1)
[94] Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 8, 128, 187(6)- (8) [en. 1998, c. 35, s. 37] (penalties for failing to comply with stop order); *see also* Environmental Protection Act, R.S.O. 1990, c. E.19, ss. 117-119, 194
[95] Environmental Protection Act, R.S.O. 1990, c. E.19, s. 17;
[96] Environmental Protection Act, RSO 1985, c.E.19, s. 190.
[97] Environmental Protection Act, RSO 1985, c.E.19, ss.5, 195(1)
[98] *R. v. Sheridan*,, [1973] 2 O.R. 192 (Dist. Ct.); *R. v. North Canadian Enterprises Ltd.* (1974), 20 C.C.C. (2d) 242 (Ont. Prov. Ct.).
[99] Environmental Bureau of Investigation, "Citizens Guide to Environmental Investigation and Private Prosecution," Available online at: http://www.e-b-i.net/ebi/guide/chapter4.html (Accessed July 29, 2004).
[100] Ontario Water Resources Act, RSO c.O. 40, s.34(3)(c); THE TAKING AND USE OF WATER, Ontario Reg. 434/03, s.1.
[101] Ontario Water Resources Act, RSO 1990 c.O. 40, s.107(3)
[102] Ontario Water Resources Act, RSO 1990 c.O. 40, s.34(4)
[103] Water Taking and Transfer Regulation ONTARIO REGULATION 285/99
[104] Water Taking and Transfer, ONTARIO REGULATION 285/99, s. 6.
[105] United Aggregates Ltd. v. Niagara Escarpment Commission (1995), 17 C.E.L.R. (N.S.) 229 (Ont. Gen. Div.) affirmed (1996), 19 C.E.L.R. (N.S.) 68 (Ont. C.A.)
[106] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).
[107] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).
[108] Ontario Water Resources Act, RSO 1990 c.O. 40, s.30.
[109] *R. v. Toronto Electric Commissioners* (1991), 6 C.E.L.R. (N.S.) 301 (Ont. Gen. Div.) (unnecessary to prove that quantity of material impairing water beyond reasonable standards; offence made out by proof of discharge of any material which by its nature impairing quality of water; discharge including leak; evidence overwhelming that PCBs cause harm to environment; s. 30(1) of Ontario Water Resources Act creating complete prohibition.
[110] *R. v. Sheridan*, [1973] 2 O.R. 192 (Dist. Ct.).
[111] *R. v. Cherokee Disposals & Construction Ltd.*, [1973] 3 O.R. 599 (Prov. Ct.).
[112] Section 147a of the *Environmental Protection Act* and s. 75 of the *Ontario Water Resources Act*.
[113] Ontario Water Resources Act, RSO 1990 c.O. 40, s.108.
[114] Ontario Water Resources Act, RSO 1990 c.O. 40, s.112.
[115] Ontario Water Resources Act, RSO 1990 c.O. 40, ss.109(4),(5).
[116] Ontario Water Resources Act, RSO 1990 c.O. 40, s.110.
[117] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).
[118] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).
[119] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).

[120] Canadian Environmental Law Association, "Frequently Asked Questions," Available online at: http://www.cela.ca/faq/cltn_detail.shtml?x=1504#1664 (accessed August 20, 2004).
[121] Ibid.
[122] Mining Act, R.S.O. 1990, c. M.14, s. 1 "mining claim".
[123] Claim Staking Regulation, O. Reg. 7/96, s. 3
[124] Ontario Mining Act, RSO 1990, c.M.14, ss. 175(1)(c), (i), (3), (4)
[125] Dome Petroleum Ltd., Re (1992), 28 O.M.B.R. 47 (O.M.B.) affirmed (1994), 75 O.A.C. 356 (Ont. Div. Ct.) (existence of sub-surface easement for mining and mineral extraction not precluding remainder of lands from being assessed as farmlands)
[126] Wright Hargreaves Ltd. v. Last (1954), 3 M.C.C. 144 but see Howes v. Manderson (Estate) (1977), 5 M.C.C. 348
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