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# From the Ocean to the Courtroom: Anatomy of a Fisheries Act File

**Canadian Institute of Resources Law Symposium**  
**Environment in the Courtroom: Protection of the Marine Environment**

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13 October 2016

# Overview

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- ECCC Enforcement 101
- From a pollution event to the courtroom:
  - Event
  - Inspection
  - Investigation
  - Charges



# The Evolution of Federal Environmental Enforcement



1976



Today



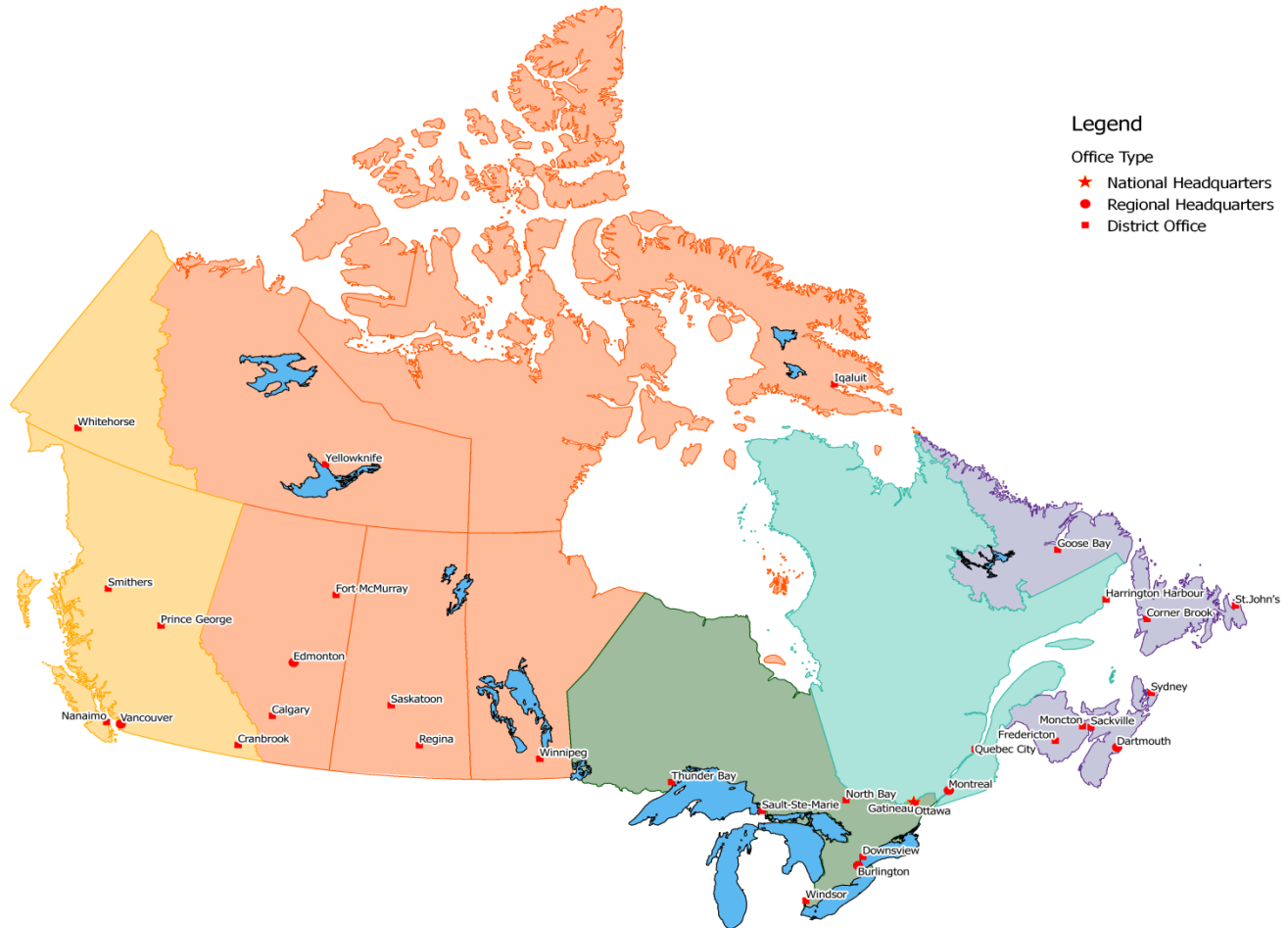
# The Enforcement Branch

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- Enforcement Branch (EB) counts ~400 staff, including ~245 badged enforcement officers across every province and territory
  - Officers have the powers and protections of peace officers for the purpose of enforcing Environment and Climate Change Canada's laws and regulations
- A snapshot of enforcement activities in 2014/15:
  - Total inspections: 15,695
  - Total investigations: 1,054
  - Total enforcement actions: 6,802
  - Total active prosecutions: 117



# Location of Enforcement Branch Offices



# ECCC's Enforcement Responsibilities

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- Acts and their Regulations
  - *Canadian Environmental Protection Act, 1999*
  - *Fisheries Act Pollution Prevention Provisions*
  - *Canada Wildlife Act*
  - *Migratory Birds Convention Act, 1994*
  - *Wild Animal and Plant Protection and Regulation of Interprovincial and International Trade Act (WAPPRIITA)*
  - *Species at Risk Act*
  - *Antarctic Environmental Protection Act*
- Other Compliance Instruments
  - Pollution Prevention Notices
  - Significant New Activity (SNAc) Notices
  - Ministerial Conditions
  - Codes of Practice/Guidelines
  - Performance agreements



# Our Partners

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- Federal Partners (e.g. DFO, HC, CBSA, RCMP, Parks Canada, NCC, DND)
- Provincial & Territorial Counterparts
- US EPA
- US Fish & Wildlife Service
- The Commission for Environmental Cooperation's Enforcement Working Group (EWG)
- INTERPOL's Environmental Security Sub-Directorate



# Principal Activities

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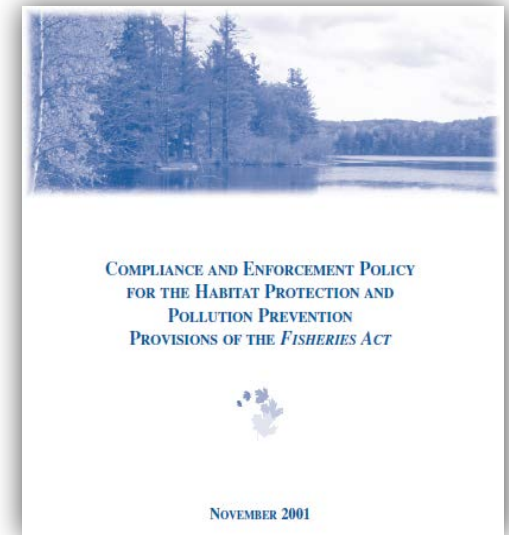
- **Intelligence**
  - Providing accurate, timely, and decision-quality intelligence to senior leaders and decision makers at the national level, and operational and tactical intelligence to managers and enforcement officers at the regional level, to best direct resources to target the highest-risk offenders
- **Inspections**
  - Verifying compliance with Acts and regulations
- **Investigations**
  - Gathering evidence to support or refute a suspected violation





# Compliance and Enforcement Policies

Environment and Climate Change Canada's enforcement officers are guided by compliance and enforcement policies, which are public documents that establish an overall framework for compliance and enforcement of the acts under ECCC's mandate:



- *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999*
- *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act*
- *Compliance and Enforcement Policy for Wildlife Legislation*



# Compliance and Enforcement Policies

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Officers consider the following criteria when choosing the appropriate response:

- ✓ The nature of the alleged violation (seriousness of harm, intent of the violator, compliance history, attempts to conceal information or obstruct)
- ✓ The effectiveness of the measure in achieving the desired result (general result sought is compliance within the shortest time with no further occurrence)
- ✓ Consistency in enforcement (consistency in responses to violations so similar situations are addressed in a similar fashion across regulated communities and across the country)



# Responses to Alleged Violations

Actions	Acts
Warnings	All Acts
Tickets (some provinces)	CEPA 1999, CWA, MBCA 1994, WAPPRIITA
Directions	CEPA 1999, FA, WAPPRIITA
Seizures	All Acts
Ministerial Orders	CEPA 1999, FA, SARA
Prohibition orders involving new substances	CEPA 1999
Recall orders for toxic substances or animate products of biotechnology	CEPA 1999
Detention orders for ships	AEPA, CEPA 1999, MBCA 1994
Compliance Order	AEPA, CWA, CEPA 1999, MBCA 1994, CWA
Injunctions	AEPA, CEPA 1999, FA
Laying of Charges	All Acts
Removal Notices	WAPPRIITA



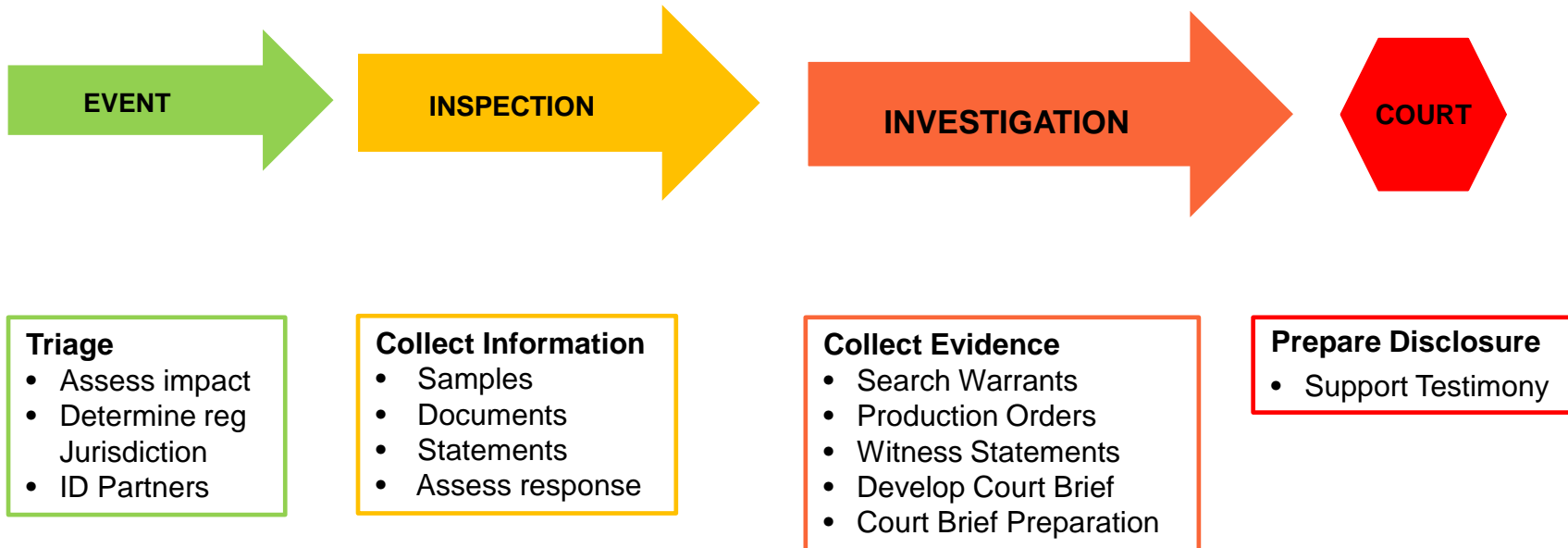
# Establishing the Elements of an Offence

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... no person shall **deposit** or **permit the deposit** of a **deleterious substance** of any type in **water frequented by fish** or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance **may enter** any such water.



# An officer's path from a pollution event to the courtroom



## EVENT: Triage

- Incident Report – Nov & Dec 2009
  - 3 reports of dead lobsters near aquaculture sites received from DFO
    - Caged mortalities
- Triage – Gather info to decide response
  - Officer contacted informant to determine the seriousness of the incident

November 2009



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## EVENT: Triage

- Identify Partners
  - Federal: Pest Management Regulatory Agency and DFO
  - Province of New Brunswick
- Determine jurisdiction
  - Contact partners to compare respective legislation to identify regulatory landscape
- Response
  - Assemble response team and necessary equipment
  - Travel to site to collect lobster samples and speak with witnesses

November 2009



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## INSPECTION: Collect Information

- Conduct inspections
  - Several inspections required to gather legal samples from various unconfirmed sources that could reasonably be linked to lobster death, e.g. Agricultural run-off, freshwater runoff, marine activity etc. Process of elimination
- Carry out interviews
  - Interviewed 80 witnesses (fishermen, aquaculture employees, PMRA, DFO, etc)
- Review Documentation
  - Provincial permits
  - Aquaculture site maps to pinpoint areas of concern
  - Aquaculture industry practices

November  
2009

February 2010



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# Pressure to Respond

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- Growing tension between lobster fishers and aquaculture industry
  - Aquaculture and Lobster fisheries are viewed as key economic drivers
    - NB Aquaculture industry is worth roughly \$192M (2008)
    - NB Lobster industry is worth roughly \$115M
  - Both industries significant employers in rural communities
  - ENGOs and traditional fisheries associations demand a ban on all chemical usage
  - Left untreated sea lice kill farmed fish within 4 weeks
  - DFO advises that another lobster kill could create further unrest



## INSPECTION: Collect Information

### ● Inspection Results

- EC toxicologists confirm presence of cypermethrin (pesticide) in trace amounts in lobster and salmon samples collected
- No provincial permits issued for use of cypermethrin
- PMRA confirms cypermethrin not registered for marine use in Canada
- Cypermethrin based pesticides are amongst the most toxic insecticides known. Considered super-toxic by scientific table of relative toxicity
- Officers conclude reasonable grounds exist to suspect violation of the Fisheries Act

➤ **EC opens two investigations (two lobster kills)**

November  
2009

February 2010



## INSPECTION: Ongoing Monitoring

- EC meets with key regulatory partners in Jan 2010:
    - Informs partners of investigation
    - Proposes a joint inspection program to monitor ongoing compliance
    - EC conducts 300+ inspections of all sites in Bay of Fundy over 2 years (roughly every 6-8 weeks)
- **Due to illegal pesticide hits - 17 additional investigations opened**

Spring 2010

Summer 2012



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## INVESTIGATION: Initial Stages

- S&T, Enforcement and DFO conduct lab studies
  - Reverse engineering/tracking back to a source
  - Gill samples amount compared to toxic treatment amount
  - Exposure studies (spikes) conducted to determine amounts released and half life
  - Results compared with samples from all nearby sites
- S&T, Enforcement and DFO conduct modelling studies
  - Drift studies – how far will pesticide travel? (source elimination)
  - Plume inspection – how does plume move through water?
  - Data analyzed to determine potential source and to eliminate cross contamination from other sites, including US and other companies



## INVESTIGATION: Gathering Evidence

- Intelligence staff research company operations and locations, using various corporate databases, human sources, and surveillance activities
- Officers, working closely with PPSC, draft “Information to Obtain” a search warrant (ITO)
- Officers present ITO to Provincial Court Judge to obtain 8 search warrants
  - 77 page ITO, includes a full and frank disclosure of all material facts



## INVESTIGATION: Gathering Evidence

- Search warrants executed on Nov 2010
  - Significant coordination effort
  - 8 locations simultaneously, 30 officers
  - Revenue Canada IT team seizes 6 million e-files
  - 30K files transferred to EC



## INVESTIGATION: Building the Court Brief

- Confirming the source of the pesticide
  - EC Intelligence Unit and officers identify potential source of illegal pesticide in Maine through interviews
  - Enf mgmt contacts Maine State and US EPA officials to request additional inspections in US to obtain sale records
    - Boston EPA confirms that paper records are in Canada
  - EC officer obtains and executes inspection warrant for US pesticide supplier's Canadian home, assisted by RCMP/forensics
  - EC confirms US supplier of pesticide via interviews at RCMP detachment



## INVESTIGATION: Building the Court Brief

- Collation and Analysis of Evidence
  - Seized documents (30,000 files), cautioned and witness statements and science evidence compiled
  - Officers examine all evidence, including 80 interviews (some cautioned, some at detachment), 30,000 electronic files, 9 bankers boxes of paper evidence, over 300 sample results, plume modelling studies, etc.





## PROSECUTION: Laying Charges

- Charges – Indictable – Nov 2011
- EC lays charges against company and senior managers for the Illegal release of deleterious substance into water frequented by fish
  - Indictment due to company CEO's alleged knowledge of and intention to commit crimes, as well as alleged knowledge of impact to environment



## PROSECUTION: Court Process and Outcome

- Outcome:

- On April 26, 2013 Kelly Cove Salmon Ltd. pleaded guilty to two counts of violating s.36(3) of the Fisheries Act, and agreed to the following facts:
  - Kelly Cove Salmon Ltd acquired 72 cases (8 pints per case) of a Cypermethrin based pesticide from a specialized supplier in 2009
  - Kelly Cove Salmon Ltd. was aware at all relevant times that Cypermethrin based pesticides were not registered for use in the marine environment in Canada
  - Kelly Cove Salmon Ltd. used a Cypermethrin based pesticide at 15 different aquaculture sites (total of 19 illegal deposits) to control sea lice



## PROSECUTION: Court Process and Outcome

- Outcome:
  - On April 26, 2013 Kelly Cove Salmon Ltd. was ordered to pay \$500,000 in fines:
    - \$100,000 paid to the courts
    - \$ 50,000 paid to the Environmental Damages Fund
    - \$ 350,000 to be administered by the University of New Brunswick for environmental scholarships and environmental research projects
  - On November 19, 2014, Clyde Eldridge (US pesticide Vendor) pleaded guilty in Maine to 1 count of making a false statement to EPA investigators
  - In April 2015, Clyde Eldridge was sentenced to pay a \$5,000 fine and one year probation

November  
2009

February  
2010

Summer  
2010

Fall 2010

Winter Spring  
2011

Summer  
Fall 2011

April 2013

November  
2014

April 2015



# Thank You

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