



UNIVERSITY OF
CALGARY

Compliance and Enforcement in Canadian Environmental Law: A Crisis in the Making?

Professor Martin Olszynski
University of Calgary Faculty of Law
26 February 2016

- Objective
- Historical Perspective
- Anecdotal Evidence
 - Lac Megantic, Mount Polley
- Systematic Assessments
 - Ecojustice, “Getting Tough on Environmental Crime?” (2011)
 - Commissioner for Environment and Sustainable Development
 - Various reports re: DFO, EC, TC, NEB
- Path Forward?

- “The fourth systemic weakness afflicting Canadian environmental law and policy **is a failure to effectively implement and enforce the law**, dating back to the 19th century slaughter of the buffalo...
- In 1999 the *Globe and Mail* described Canada as the “**promise land**” for polluters because of a **78% drop in prosecution rates** between 1992 and 1999...
- If there is a chasm between environmental laws and their enforcement in the United States, then in Canada there is a **Grand Canyon.**”
 - David Boyd, *UnNatural Law* (2003)







UNIVERSITY OF
CALGARY

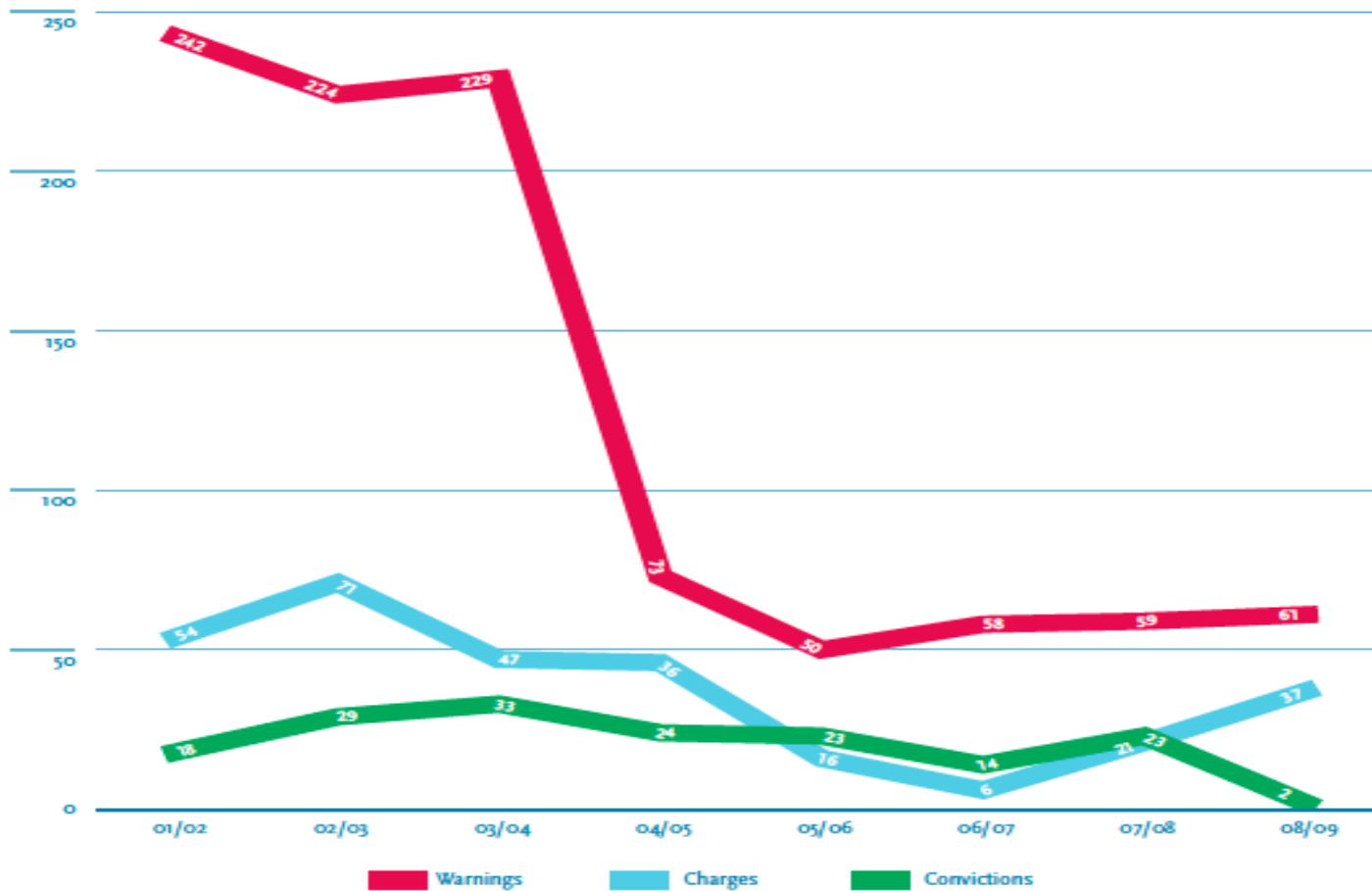
Systematic Assessments

FIGURE 3 | NUMBER OF INVESTIGATIONS, PROSECUTIONS AND CONVICTIONS, 2000-10 (FISCAL YEARS)



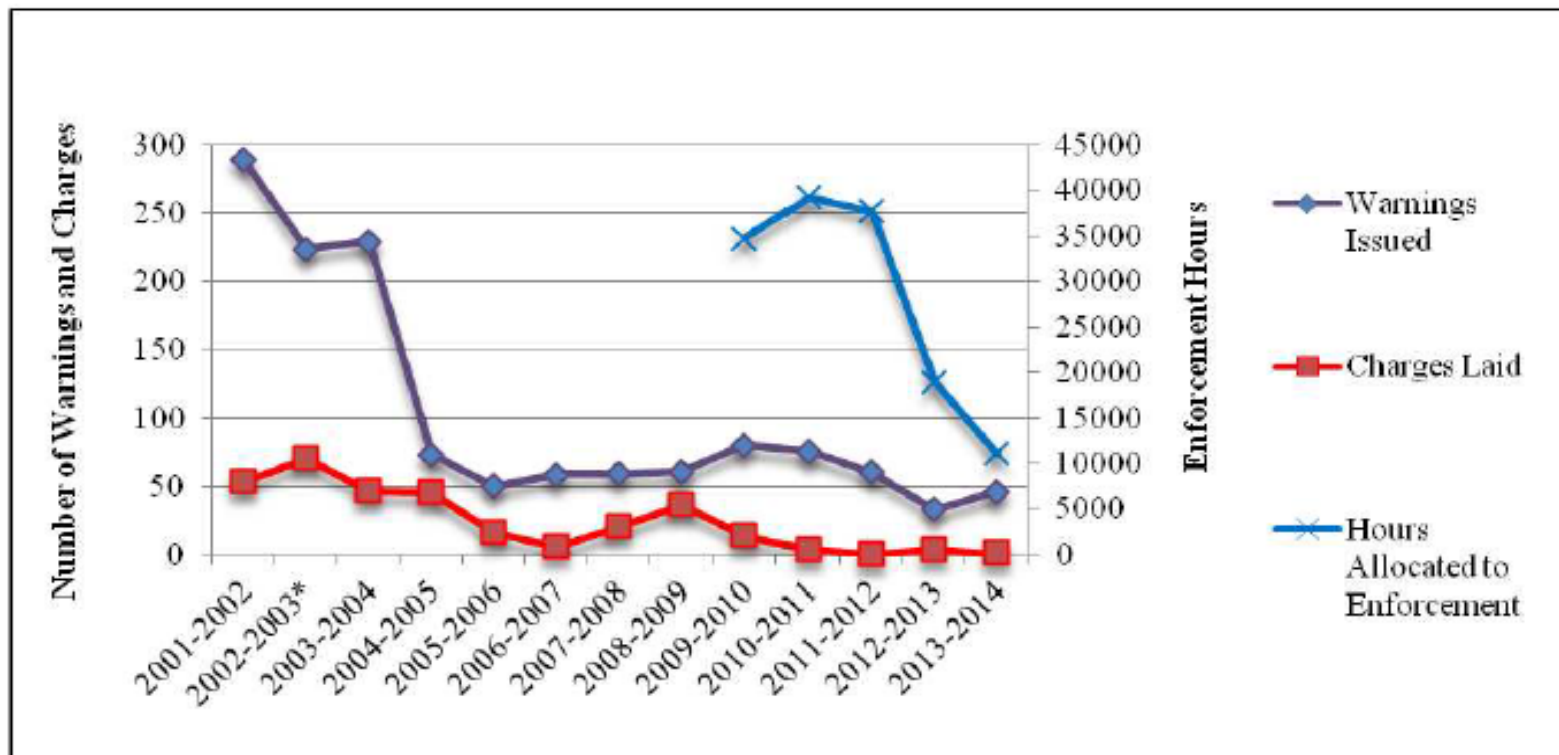
Source: Ecojustice, “Getting Tough on Environmental Crime?” (2011)

FIGURE 5 | FISHERIES ACT WARNINGS, CHARGES, CONVICTIONS BY DFO, 2001-09 (FISCAL YEARS)



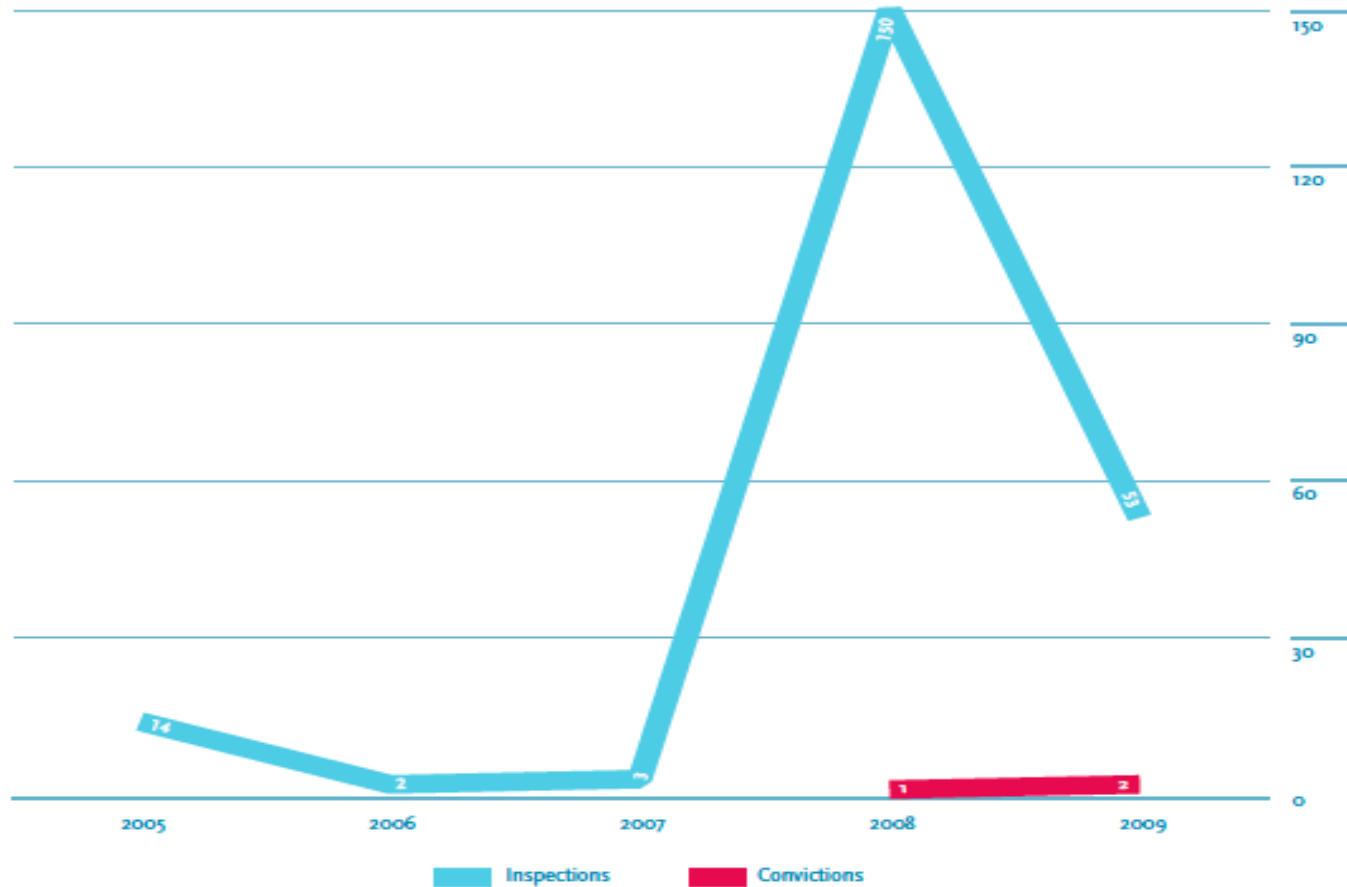
Source: Ecojustice, “Getting Tough on Environmental Crime?” (2011)

**Figure 6: Habitat/Fisheries Protection Enforcement Activities
(2001/02–2013/14)**



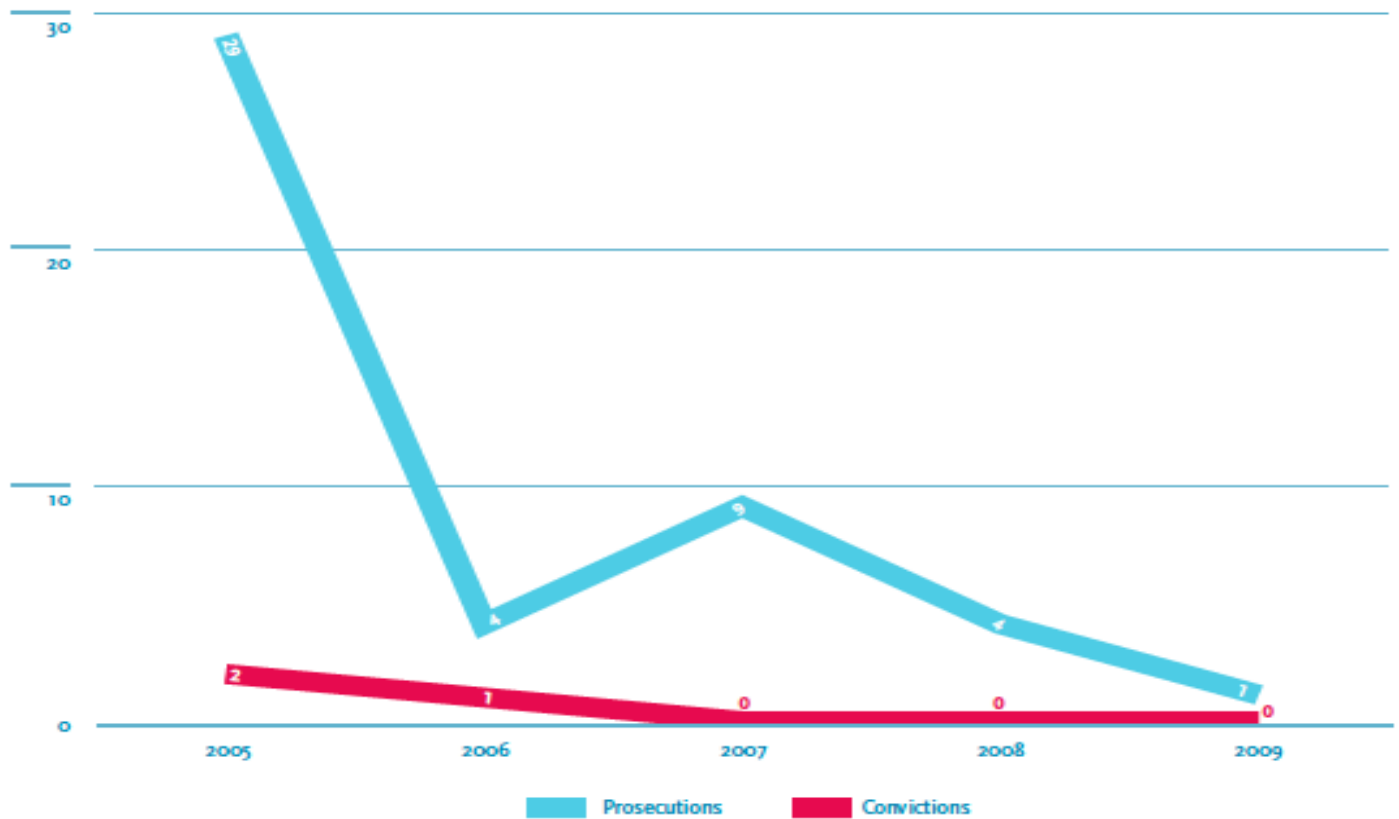
Source: Martin Olszynski, "From Badly Wrong to Worse: Canada's New Approach to Fish Habitat Protection Laws" (2015) 28(1) J. Env. L. & Prac. 1

FIGURE 9 | NUMBER OF INSPECTIONS AND CONVICTIONS 2005-09



Source: Ecojustice, “Getting Tough on Environmental Crime?” (2011)

FIGURE 12 | NUMBER OF PROSECUTIONS AND CONVICTIONS 2005-09



Source: Ecojustice, “Getting Tough on Environmental Crime?” (2011)

- Assessing Ontario's 1990s experiment with "smart regulation," DeMarco and Vigod observed a correlation **b/w decreased emphasis on enforcement measures and/or capacity and increase in pollution exceedances.**
 - "Smarter Regulation: The Case for Enforcement and Transparency" (2007) 17 J. Env. L. & Prac. 85.

Relationship b/w Enforcement & Deterrence?

- After surveying approx. **100 major Canadian corporations w/r/t environmental performance** and how it might be affected by various enforcement policies, Dr Diane Saxe's results **"support...giving greater emphasis to prosecution**, both of corporations and of their officers and directors."
 - "The Impact of Prosecution of Corporations and their Officers and Directors upon Regulatory Compliance by Corps" (1990) 1 J.E.L.P 91

- **Reports of the Commissioner for the Environment and Sustainable Development (CESD):**
 - Protecting Fish Habitat (2009 Report)
 - Fisheries and Oceans Canada
 - Enforcing the *Canadian Environmental Protection Act, 1999* (2011 Report)
 - Environment Canada
 - Transportation of Dangerous Products (2011 Report)
 - Transport Canada and National Energy Board
 - Oversight of Federally Regulated Pipelines (2015 Report)
 - National Energy Board

- Diffuse nature of problem suggests that it is rooted in systemic deficiencies:
 - Usual suspects: budget cuts, personnel constraints, political interference and associated morale issues
 - Others?

- Compliance and enforcement are difficult, especially pursuant to risk-based approaches:
 - Risk-based approaches are inherently complex, requiring continuous assimilation of new information:
 - Robert Baldwin & Julia Black, “Really Responsive Regulation” (2008) 71:1 Mod L Rev 59

Fracking lawsuit rejected by Alberta court Supreme Court in Charter test

Jessica Ernst wants to sue over contaminated well water but Alberta claims rejected on immuni

CBC News Posted: Jan 12, 2016 7:43 AM MT | Last Updated: Jan 12, 2016 1:13 PM MT

