

4-1-2002

Welcomed Participants' or 'Environmental Vigilantes'? The CEPA Environmental Protection Action and the Role Of Citizen Suits in Federal Environmental Law

Marcia Valiante
University of Windsor

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Environmental Law Commons](#)

Recommended Citation

Marcia Valiante, "Welcomed Participants' or 'Environmental Vigilantes'? The CEPA Environmental Protection Action and the Role Of Citizen Suits in Federal Environmental Law" (2002) 25:1 Dal LJ 81.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Marcia Valiante*

“Welcomed Participants” or
“Environmental Vigilantes”?

The CEPA Environmental Protection Action and the
Role of Citizen Suits in Federal Environmental Law

In the 1999 amendments to the Canadian Environmental Protection Act, the federal government added a new citizen enforcement tool, known as an “environmental protection action.” This was the first “citizen suit” provision in Canadian federal environmental law but it is unlikely to play more than a minor role in advancing enforcement of CEPA and is unlikely to be adopted in other environmental laws. This is because, despite initial interest in and commitment to citizen enforcement, the government was persuaded by industry representatives and others to significantly constrain the action and, shortly afterwards, to drop it entirely from the Species At Risk Act. This article reviews the arguments for and against citizen suits, the experience with them in other jurisdictions and the potential role for citizen suits in federal environmental law. It concludes that citizen suits are in principle consistent with Canadian values and legal traditions and that practical difficulties can be met through careful drafting and administrative efforts. The constraints in CEPA are not necessary and, unless modified, will undermine the potential effectiveness of the citizen suit provision.

Suite aux amendements de 1999 à la Loi canadienne sur la protection de l'environnement, le gouvernement fédéral a muni le citoyen d'un outil lui permettant d'entamer une poursuite dans le cadre de cette loi nommé “Action en protection de l'environnement”. Malgré cette première, cette provision ne jouera qu'un rôle mineur à faire progresser l'application de la LCPE; il est également peu probable qu'elle sera intégrée dans les autres lois portant sur l'environnement. Malgré l'intérêt initial du gouvernement et son engagement envers ses citoyens, les représentants d'industrie et autres ont persuadé le gouvernement à comprimer les mesures et plus tard à même les éliminer de la Loi sur les espèces en péril. L'auteur examine les arguments et l'expérience vécue dans d'autres milieux judiciaires étrangers, ainsi que la possibilité de poursuite dans le cadre de la loi fédérale sur l'environnement. Selon l'auteur, les poursuites entamées par le citoyen reflètent les valeurs canadiennes et les traditions juridiques; le tout peut être réglé par une rédaction soignée et des efforts du point de vue administratif. Les limites imposées par la LCPE ne sont pas nécessaires et à moins que celles-ci soient modifiées, l'efficacité de cette provision sera minée.

* Professor of Law, University of Windsor. The author would like to acknowledge the preliminary research assistance of Laura Gdak Tripp, supported by the Law Foundation of Ontario.

Introduction

- I. *Citizen Suits in Canadian Federal Legislation*
 1. *In—CEPA 1999*
 2. *Out—Species At Risk Act*
- II. *Development of the Environmental Protection Action: Influence of the U.S. Experience with Environmental Citizen Suits*
- III. *Arguments For and Against Citizen Suits*
- IV. *Is the CEPA environmental protection action an appropriate model?*

Conclusion

... Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.¹

The opportunity for one stakeholder group to initiate action that could significantly damage the interests of other stakeholders will do nothing to foster... feelings of cooperation. In fact, the bill encourages the development of environmental vigilantes. This appears to be an attempt to avoid the responsibility and cost of proper policing activities done by the state.²

Introduction

The development of Canadian environmental law over the last 30 years has seen a gradually expanding role for the public. Most aspects of environmental policy-making and implementation have been opened to

1. *Friends of the Earth v. Carey*, 535 F.2d 165 at 172, 6 *Envtl. L. Rep.* 20, 488 (2nd Cir. 1976) [*Friends* cited to F. 2d].

2. *Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 49 (19 November 1996) at para. 42 (Tim Andrew, Canadian Cattlemen's Association), online: Canada's Parliament <http://www.parl.gc.ca/committees352/sust/evidence/49_96-11-19/sust49_blk101.html>. The Committee was reviewing Bill C-65, *An Act respecting the protection of wildlife species in Canada from extirpation or extinction*, 2d Sess., 35th Parl., 1996 (1st reading 31 October 1996) [Bill C-65].

public input, at first informally and more recently through statutory requirements.³ However, with the exception of occasional private prosecutions, enforcement of statutorily mandated requirements has been largely closed to the public and left to government discretion. Recently, “citizen suits,” civil actions brought by members of the public to enforce a statute, were adopted for the first time into Canadian federal environmental law in the *Canadian Environmental Protection Act, 1999*.⁴

Adoption of the *CEPA 1999* “environmental protection action” follows on many years of experience in the United States, two provinces and the territories with allowing citizen enforcement of environmental statutes. In reaction to the U.S. experience and to a pervasive fear of an unfettered right to sue, the *CEPA 1999* section establishes a very limited enforcement opportunity for the public. But even this toehold in federal environmental legislation appears likely to become the high point in civil enforcement, given industry’s successful campaign against inclusion of a comparable provision in the recently enacted species at risk legislation.

The debate over whether to include citizen suits in environmental statutes raises a number of issues about the appropriate roles of governments and citizens in enforcing the law, about the nature of environmental regulation, and about the role of litigation as a tool for environmental protection. This paper considers the arguments for and against adopting citizen suits, reviews their role in environmental law, drawing on the experience of other jurisdictions, and considers their potential value for Canadian federal environmental law.

By way of definition, a citizen suit is an action brought by a member of the public against a party who has breached a statutory or regulatory requirement. It differs from a private prosecution because it is a civil, rather than a criminal, action. Proof of the breach is thus made on the lesser civil standard of proof and, if proved, does not result in criminal penalties. Also, parties are generally subject to the civil costs rule, so that the loser pays the winner’s costs. A citizen suit differs from other civil actions for breach of statute because it does not require that the plaintiff suffer any special loss or damage in order to have standing to sue. As well, damages payable to the plaintiff are not an available remedy. Citizen suits are also different from actions to enforce substantive “environmental rights,” such as that authorized under the *Michigan Environmental Protection Act*, in which citizens enforce a “right” to a healthy environment.⁵ Under those provisions,

3. See e.g. Ontario’s *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28 [EBR, 1993 or EBR].

4. S.C. 1999, c. 33 [CEPA 1999 or CEPA].

5. See Joseph F. Castrilli, “Environmental Rights Statutes in the United States and Canada: Comparing the Michigan and Ontario Experiences” (1998) 9 Vill. Envtl. L.J. 349.

there is not necessarily a statutory violation; rather, an activity is measured against the right of citizens to protect the public resources of the state from pollution, impairment or destruction.

This article first discusses the *CEPA 1999* environmental protection action and the short life of the “endangered species protection action” in Bill C-65, then looks at adoption of the environmental protection action in the context of, and in reaction to, the experience with citizen suits in the United States. The next section discusses whether citizen suits generically have a role to play in federal environmental law through an assessment of the ideological and practical arguments for and against citizen suits. From this assessment, it is concluded that the arguments for citizen suits are consistent with Canadian values and traditions and that citizen suits could have a positive effect on environmental protection. In addition, most of the arguments against citizen suits could be met with carefully crafted legislation. The final section considers whether the *CEPA 1999* action provides the most appropriate model for a Canadian citizen suit, concluding that this model is flawed and, without major changes, will be only rarely used, diminishing its potential positive effect on environmental protection.

I. Citizen Suits in Canadian Federal Legislation

1. In—*CEPA 1999*

The first citizen suit in Canadian federal environmental legislation is the “environmental protection action” in sections 22 to 38 of *CEPA 1999*.⁶ The original *Canadian Environmental Protection Act*, adopted in 1988, had included the right of a member of the public to request an investigation of a violation of the act and the right of a person suffering loss or damage from harm caused by a contravention of the act or regulations to sue,⁷ but did not include a citizen suit.⁸ Inclusion of a citizen suit was recommended

6. *Supra* note 4, ss. 22-38.

7. R.S.C. 1985 (4th Supp.), c. 16, ss. 108, 136, as rep. by *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 355 [*CEPA 1988*]. Several other federal statutes create rights of action for persons harmed by specific types of activities. See *e.g. Fisheries Act*, R.S.C. 1985, c. F-14, s. 42(3); *Canada Shipping Act*, R.S.C. 1985, c. S-9, s. 677(1), as am. by S.C. 1998, c. 6, s. 8, as rep. by S.C. 2001, c. 6, s. 126. For a general discussion of these and similar provisions, see Mario D. Faieta *et al.*, *Environmental Harm: Civil Action and Compensation* (Toronto: Butterworths, 1996).

8. There was an attempt by two committee members to amend the original bill and add a citizen suit. See *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-74*, No. 26 (15 March 1988) at 147. The proposals were voted down. The reasons of Hon. T. McMillan, Minister of the Environment, for not including a citizen suit in the statute were quoted by a committee member: “I am not sure it is in the public interest and I am sure it is not in the environment’s interest to have law unduly made by judges as opposed to by politicians who can be held accountable at the ballot box and in other democratic ways.” (*Ibid.* at 149 (Pauline Browes)).

during the mandatory five-year review of *CEPA 1988*,⁹ although the government’s interest can be traced to a Liberal Party “Red Book” promise made during the 1993 election.¹⁰

As adopted, the provision allows a person to bring an environmental protection action, if:

1. the person applied to the Minister of the Environment for an investigation under s. 17¹¹;
2. the Minister failed to act on the application within a reasonable time or gave a response that was “unreasonable”¹²;
3. the alleged offence caused “significant harm to the environment”¹³;
4. the action was brought within two years of the plaintiff becoming aware of the conduct (excluding waiting time after an investigation application)¹⁴;
5. the defendant was not convicted of an offence under *CEPA*, or subject to alternative measures, with respect to the impugned conduct¹⁵; *and*
6. the conduct was not taken to mitigate environmental harm or to protect national security and was reasonable and consistent with public safety.¹⁶

In addition, notice of the action must be given to the Minister of the Environment within ten days, then posted on the Environmental Registry. The Attorney General must be served with the documents within 20 days

9. The *CEPA* review was assigned to the House of Commons Standing Committee on Environment and Sustainable Development in June of 1994. See *Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 34 (14 June 1994). The Committee had before it several studies, including Environment Canada, *Issues Overview Paper* (Ottawa: Environment Canada, 1994); Resource Futures International, *Evaluation of the Canadian Environmental Protection Act: Final Report* and eighteen “Issue Elaboration Papers” (Ottawa: Environment Canada, 1993); and Environment Canada, *Response to the CEPA Evaluation Report* (Ottawa: Environment Canada, 1995). As well, the Committee conducted public hearings.

10. Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993). Specifically, the Liberals committed to “use the forthcoming review of the Canadian Environmental Protection Act to examine giving members of the public access to the courts as a last recourse if the federal government persistently fails to enforce an environmental law” (*ibid.* at 69).

11. The applicant for investigation must be an individual, resident in Canada and 18 years or older (*CEPA 1999, supra* note 4, s. 17).

12. *Ibid.*, s. 22(1).

13. *Ibid.*, s. 22(2)(b).

14. *Ibid.*, s. 23.

15. *Ibid.*, s. 25.

16. *Ibid.*, s. 24.

and then has the right to become a party to the action, but is not required to do so. The court has the power to stay the action “if it is in the public interest,” and in making that determination may consider:

- (a) environmental, health, safety, economic and social concerns;
- (b) whether the issues raised in the action would be better resolved in some other way;
- (c) whether the Minister has an adequate plan to correct or mitigate the harm... or otherwise to address the issues raised in the action; and
- (d) any other relevant matter.¹⁷

Defences include due diligence in complying with the statute, statutory authority (either by the federal government or under an agreement under s. 10(3)), and officially-induced mistake of law.¹⁸ The remedies available to a plaintiff in an environmental protection action include a declaration, an order to defendant to refrain from some act that may constitute an offence, an order to the defendant to do something to prevent continuation of an offence, an order to the parties to negotiate a mitigation plan, and “any other appropriate relief, including the costs of the action, but not including damages.”¹⁹ The Standing Committee’s recommendation that damages be payable into a government fund for use in environmental clean-ups was not adopted into law.

2. *Out—Species At Risk Act*

During the time the initial *CEPA* amendments were being considered, the federal government also introduced legislation to protect endangered species. The first bill, Bill C-65, the *Canada Endangered Species Protection Act*, was introduced in October of 1996 and contained a citizen suit similar to that in *CEPA* but known as an “endangered species protection action.”²⁰ Hearings were held by the House Standing Committee but debate was not completed before Parliament was dissolved for an election, and the bill died on the Order Paper.

17. *Ibid.*, s. 32(2).

18. *Ibid.*, s. 30. Other defences are not excluded.

19. *Ibid.*, s. 22(3).

20. *Supra* note 2, ss. 60-76.

Following the failure of the legislation and prior to its re-introduction, environmental and industry groups met to discuss ways to resolve a number of disagreements about the proposals, including the citizen suit. In 1998, the Canadian Wildlife Service (CWS) hired consultants to review the policy issues relevant to citizen suits and to suggest options for amending the provisions. CWS then sponsored discussions with stakeholders and a number of experts over replacement of the citizen suit provision with an "alternative dispute resolution" regime, their preferred option. Again, there was no consensus that the citizen suit should be dropped altogether, but there was agreement to that effect between industry representatives and some environmental group representatives. They believed the federal model of citizen suit was unworkable and, because it was not going to be improved, should be scrapped in favour of a scheme of investigations into violations, followed by mediation if government enforcement was not forthcoming. However, when the new bill was introduced in the 36th Parliament as the *Species At Risk Act*, Bill C-33,²¹ it contained a public right to apply for an investigation but no citizen suit and no mediation provision as an alternative. In addressing the Standing Committee, Environment Minister David Anderson emphasized that the bill "moves us away from the old command-and-control style of government regulation to a more cooperative model." Further, he stated,

We've devised a modern system, emphasizing incentives and education as the best hope for protecting species and their habitats across Canada. From other jurisdictions, we know this is the most practical approach. The United States has a largely legalistic system, and Americans have been struggling for thirty years to move away from the confrontational approach that was sparked by the war in the woods over the spotted owl in the 1980s to something that seeks solutions early and is more effective locally... What we have done is devise a made-in-Canada approach to species protection, one that will maintain and strengthen support for protecting species at risk among Canadians because it includes them in the solutions. There are 'sticks' in the bill, yes, and they're necessary to enforce the law and protect a public value, but success becomes less likely if coercion is seen as the basis of the federal approach.²²

21. Bill C-33, *An Act respecting the protection of wildlife species at risk in Canada*, 2d Sess., 36th Parl., 2000 (1st reading 11 April 2000) [SARA].

22. *Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 45 (19 September 2000) at paras. 68-69 (Hon. David Anderson, Minister of the Environment), online: Canada's Parliament <<http://www.parl.sc.ca/InfoComdoc/36/2/ENVI/Meetings/Evidence/enviev45-e.htm>>.

This bill too died on the Order Paper when the election was called in October 2000. The bill was reintroduced into the 37th Parliament in February 2001, without a citizen suit or mediation but with strong penalty provisions.²³

II. *Development of the Environmental Protection Action: Influence of the U.S. Experience with Environmental Citizen Suits*

The most immediate influence on the design of the *CEPA 1999* environmental protection action was the Ontario *Environmental Bill of Rights*.²⁴ However, the design of both the *CEPA 1999* and the *EBR* actions was greatly influenced by the experience with citizen suits in other jurisdictions, particularly in the United States.²⁵

23. Bill C-5, *An Act respecting the protection of wildlife species at risk in Canada*, 1st Sess., 37th Parl., 2001 (1st reading 2 February 2001), enacted as S.C. 2002, c. C-29.

24. *Supra* note 3, ss. 82-102, the "Right to Sue for Harm to a Public Resource." Section 84 allows a resident of Ontario to bring an action against anyone violating, or about to violate, a prescribed statute, regulation or instrument when that violation has caused, or will imminently cause, "significant harm" to a "public resource" (defined to include "air, water...unimproved public land that is larger than five hectares and is used for recreation, conservation, resource extraction, resource management... and any plant life, animal life or ecological system."). In order to have standing, the plaintiff must first have applied for an investigation under Part V of the act where there is an actual contravention and either not received a response within a reasonable time or received a response that was unreasonable. It is possible to dispense with having to apply for an investigation and await a response if the delay involved would result in significant harm or serious risk to the environment. The onus in the action is on the plaintiff to prove both that a violation has or will occur and that significant harm will result, on the balance of probabilities. The remedies available are an injunction, a declaration or an order to the parties to negotiate a restoration plan. No damages can be ordered, but costs can be ordered. Several defences are available. The court has power to stay the action if it would be in the "public interest" to do so.

25. Citizen suits exist in other Canadian jurisdictions, but these do not appear to have had much influence. The first jurisdiction in Canada to adopt such a provision was Quebec: *Environment Quality Act*, R.S.Q. c. Q-2, ss. 19(1)-(7). See discussion in Lorne Giroux, "Environmental Law in Quebec" in Elaine L. Hughes, Alastair R. Lucas & William A. Tilleman, eds., *Environmental Law and Policy*, 2d ed. (Toronto: Emmond Montgomery Publications Limited, 1998) 137; Yves Corriveau, "Citizen Rights and Litigation in Environmental Law: NGOs as Litigants: Past Experiences and Litigation in Canada" in Sven Deimann & Bernard Dyssli, eds., *Environmental Rights: Law, Litigation & Access to Justice* (London: Cameron May, 1995) 117 at 140-46; H el ene Trudeau, "L'int er et  a poursuivre du citoyen qu eb ecois en droit de l'environnement" (1988) C. de D. 183; Lorne Giroux, "Le droit qu eb ecois de la qualit e de l'environnement et l' equilibre des divers int er ets" in Nicole Dupl e, ed., *Le droit  a la qualit e de l'environnement: un droit en devenir; un droit  a d efiner (Ve conf erence de droit constitutionnel)* (Montr eal: Qu ebec/Am erique, 1988) 395; Jean H etu, "Les recours du citoyen pour la protection de son environnement" (1989) 92 R. du N. 168; Jutta Brunn e, "Individual and Group Enforcement of Environmental Law in Qu ebec" (1992) 41 U.N.B.L.J. 107. A number of cases are found in "Quebec Case Digests" in Alastair R. Lucas & Roger Cotton, eds., *Canadian Environmental Law*, 2d ed., vol. 1 (Toronto: Butterworths, 2001). Two territories also have citizen suit provisions. See *Environmental Rights Act*, R.S.N.W.T. 1988 (Supp.), c. 83, s. 6; *Environment Act*, S.Y. 1991, c. 5, s. 8; and discussion in Elaine L. Hughes & David Iyalomhe, "Substantive Environmental Rights in Canada" (1999) 30 Ottawa L.Rev. 229.

The citizen suit as a private, civil enforcement action developed in the United States, starting in 1970, with adoption of the federal *Clean Air Act*.²⁶ Born in an atmosphere of heightened environmental awareness, the *Clean Air Act* was the first major building block of modern U.S. federal environmental law. Many members of Congress then shared the widely-held view that federal agencies had not vigorously enforced existing anti-pollution laws, effectively undermining the legislative provisions and the protection of the public. This was also the time when the notion of “regulatory capture” was current, that is, that administrative agencies become unduly influenced by the industries they regulate.²⁷ This led to the view of many that the power of regulated corporations had ensured that agency enforcement “scarcely exists” and that the imbalance of industry’s influence should be tempered by greater public participation rights.

The purposes of including a citizen suit were “to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced,”²⁸ and “to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.”²⁹ The act allows two kinds of

26. 42 U.S.C.A. §7604 (West 1995). However, the citizen suit is the progeny of a long history of private enforcement in the English common law system. Well into the 19th century, the state relied on private individuals “as its main weapon against public disorder and crime” (Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, vol. 2, *The Clash between Private Initiative and Public Interest in the Enforcement of the Law* (London, England: Stevens & Sons, 1956) at 33). With neither organized police forces nor enforcement bureaucracy, incentives were provided to encourage private enforcement. Most often, these incentives were financial rewards for apprehending and prosecuting property-related offences and did not require the complainant to be the victim. Common informers, motivated only by reward, were distrusted and widely criticized, often for good reason. There were many abuses and there were many attempts to curtail the abuses through such mechanisms as penalties and awards of costs against an informer for misuse. Yet, these informers were relied on to bring about enforcement of numerous laws affecting public order. Several factors eventually marginalized the role of private enforcement. The complex social regulation that developed in response to the industrial revolution, the development of concepts such as *mens rea* and the establishment of a centralized bureaucracy to implement regulations and ensure compliance all affected the ability of citizens to pursue enforcement on their own. In both Canada and the U.S., private enforcement gave way to a virtual monopoly of public prosecution. However, in Canada, unlike in the United States, the once “cherished right” of private prosecution never completely disappeared. In the U.S., attempts by a number of environmental groups to use the *qui tam* action to enforce the federal *Refuse Act* in the late 1960s and early 1970s were dismissed on grounds that enforcement was limited to public agencies. However, these failed attempts sparked the development of the environmental citizen suit. See Barry Boyer & Errol Meidinger, “Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws” (1985) 34 *Buff. L. Rev.* 833 at 947. See also “The History and Development of *Qui Tam*” Note [1972] *Wash. U.L.Q.* 81; Philip C. Stenning, *Appearing for the Crown: A legal and historical review of criminal prosecutorial authority in Canada* (Cowansville, Que.: Brown Legal Publications, 1986).

27. As discussed in Boyer & Meidinger, *ibid.* at 843-44.

28. *Natural Resources Defence Council v. Train*, 510 F.2d 692 at 700, 7 ERC 1209 (D.C. Cir. 1974).

29. *Friends*, *supra* note 1 at 173.

actions that reflect these purposes: one by a member of the public against a person considered to be contravening the terms of a statutory standard or limitation, an order or a permit, and one by a member of the public against an agency for failure to perform non-discretionary duties. In both cases, injunctive relief is available and a court may award attorneys' fees and other litigation costs to a successful plaintiff. In order to motivate the agency to be more active in its enforcement, the plaintiff is required to give notice to the agency 60 days prior to the launching of a citizen suit, and if the Agency is "diligently prosecuting" the offender, the action cannot go ahead.³⁰

The *Clean Air Act* citizen suit provision formed the model for nearly all U.S. federal environmental statutes, although there are some differences.³¹ Congress has shown strong support for this tool, not only including it in most federal environmental statutes, but expanding the provisions over time. As well, "[b]oth EPA and the Department of Justice have been strong supporters of citizen suits as a supplement to governmental enforcement."³² Thus, even the most serious critics concede that citizen suits are an entrenched tool in environmental enforcement in the United States.

During the early years after the adoption of citizen suit provisions, they were not used extensively and, when used, were mostly aimed at agency inaction.³³ However, commencing in the early 1980s, resort to citizen suits increased greatly under all of the federal statutes, but most dramatically under the *Clean Water Act*. The usual reason given for this sharp increase was the significant drop in enforcement at U.S. EPA during the early Reagan years. EPA had been restructured, budgets were cut and many officials left, leading to a widespread perception that the Administration was deliberately

30. 42 U.S.C.A. §7604(b) (West 1995).

31. For example, the *Clean Water Act* has long authorized civil penalties paid to the Treasury in addition to injunctions as a remedy; these were only added to the *Clean Air Act* in the 1990 amendments. As well, the *Resource Conservation and Recovery Act* authorizes an action to stop conduct that constitutes an "imminent and substantial endangerment to health or the environment" even if it does not otherwise contravene the statute. See 42 U.S.C.A. §6972(a)(1B) (West 1995).

32. Ann Powers, "Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions" in *American Law Institute-American Bar Association Continuing Legal Education Course of Study Held February 14, 1996* (The American Law Institute, 1996) 815 at 819 (WL). Congressional committee support is referenced in Elizabeth Rae Potts, "A Proposal for an Alternative to the Private Enforcement of Environmental Regulations and Statutes through Citizen Suits: Transferable Property Rights in Common Resources" (1999) 36 *San Diego L. Rev.* 547 at 571-72, nn 133-34.

33. The most comprehensive empirical study of use of citizen suits was carried out by the Environmental Law Institute for the U.S. EPA and is discussed in Jeffrey G. Miller, "Private Enforcement of Federal Pollution Control Laws" (1983) 13 *Env'tl. L. Rep.* 10309 [Miller, "Part I"], (1984) 14 *Env'tl. L. Rep.* 10063 [Miller, "Part II"], 10407 [Miller, "Part III"].

undermining compliance with environmental laws.³⁴ Other reasons include changes to the *Clean Water Act* that allowed for easier identification of noncompliance and the growth and development in national environmental organizations.³⁵

There has been a great deal of litigation around citizen suits, which Boyer and Meidinger have grouped into several categories.³⁶ Since their study, courts have continued to address a number of important jurisdictional issues, such as standing and separation of powers, but then and now most citizen suit litigation is enforcement action aimed at abating pollution. There is a sense in the literature that the courts were generous in accepting citizen suits in the early years,³⁷ but in the last decade, federal courts have become more restrictive.³⁸ Nevertheless, perhaps thousands of suits have been brought, and a voluminous literature debates both the principles and the fine points of citizen suit practice in the U.S.

The Canadian government, in designing the environmental protection action, was both drawn to, and repulsed by, the U.S. model. Many features of the *CEPA 1999* action can be traced to the U.S. legislation, but there are numerous additional features intended to limit use of the action and avoid a flood of litigation. Certainly the Standing Committee was motivated by the perceived need, similar to that in the U.S., to supplement lagging government enforcement and promote the democratic value of public participation:

If such a measure were enacted, it would foster greater public participation. It might also lessen the burden for government and even prod public authorities to enforce the law with increased zeal.³⁹

34. See discussions in Jeannette L. Austin, "The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General" (1987) 81 *Nw. U. L. Rev.* 220 at 232-33; Boyer & Meidinger, *supra* note 26 at 870-80.

35. See *e.g.* Miller, "Part III", *supra* note 33, where he discusses the targeted efforts of the Natural Resources Defense Council to increase use of citizen suits.

36. Boyer & Meidinger, *supra* note 26 at 852-68. Their categories are:

(a) *jurisdictional maneuvering* cases in which the parties are attempting to use citizen suit provisions to expand or contract opportunities for federal court review; (b) *dispute resolution* actions where parties are invoking private enforcement powers in an effort to resolve a two-party dispute over essentially private rights; (c) *impact litigation* in which a plaintiff is trying to compel a policy decision or stop a development project; (d) *enforcement actions* in which the plaintiff seeks to abate pollution; and (e) *fee litigation* over the recovery of costs and attorney's fees provided in the statutes." (*ibid.* at 852-53) [emphasis added].

37. See *e.g.* Adeeb Fadi, "Citizen Suits Against Polluters: Picking Up the Pace" (1985) 9 *Harv. Envtl L. Rev.* 23 at 63-64.

38. Barton H. Thompson, Jr., "The Continuing Innovation of Citizen Enforcement" (2000) *U. Ill. L. Rev.* 185 at 187.

39. House of Commons Standing Committee on Environment and Sustainable Development, *It's About Our Health! Towards Pollution Prevention: CEPA Revisited* (Ottawa: House of Commons, 1995) at 227 [Standing Committee, *It's About Our Health!*].

The Ministers agreed on the importance of public participation as a “common operating principle in democracies such as Canada” and on the need to amend the act to ensure “effective and active participation by members of the public,” including a right for citizens to take civil action against a party who has violated the *CEPA* or its regulations.⁴⁰ However, both the Standing Committee and the government were concerned that a broad citizen suit had the “potential for abuse” and might be unfair to potential defendants, subjecting them to unnecessary or vexatious litigation. They therefore proposed a number of “safeguards,”⁴¹ most of which were adopted.

The government’s timid steps in the *CEPA* bill were met with strong reactions on all sides of the debate, discussed below. The dramatic rhetoric against citizen suits appears, at first blush, puzzling in light of the constraints in the Act, the low number of government enforcement actions, and the trickle of citizen suits at the provincial and territorial level in Canada.⁴² However, the vociferous resistance by industry makes some sense if seen as a reaction to the prospect of an erosion of power. This backlash against citizens and public interest groups gaining greater influence has become more common in Canadian environmental politics, but it was in the fight over *CEPA 1999* that the highly organized nature of the effort first became publicly apparent.⁴³ The citizen suit provision was not the central issue for industry in its lobbying efforts on the legislation, but it did signal a trend which industry representatives worked hard to limit to the greatest extent possible. With *SARA*, their goal was achieved and citizen suits were dropped, leaving *CEPA 1999* as the only citizen suit in federal environmental law.

40. Environment Canada, CEPA Office, *CEPA Review, The Government Response: Environmental Protection Legislation Designed for the Future A Renewed CEPA, A Proposal* (Ottawa: Environment Canada, CEPA Office, 1995) at 22-23.

41. *Ibid.*; Standing Committee, *It’s About Our Health!*, *supra* note 39 at 228. Most of these are also found in the *EBR*.

42. There have been no actions under either the Yukon or Northwest Territories legislation. In Quebec, there has been steady but modest use of s. 19.1. See *supra* note 25. In Ontario, over the first six years the *EBR* was in force, only two actions were commenced under s. 84, neither of which has been resolved by the courts. During the same period, over 100 applications for investigation were made and six prominent private prosecutions were undertaken. See David McRobert *et al.*, *The EBR Litigation Rights: Six Years of Experience: A Review of the Decisions and Cases 1995-2000* (Environmental Commissioner of Ontario, 2000), online: The Environmental Commissioner of Ontario <<http://www.eco.on.ca/english/publicat/litigat2.pdf>>; Paul McCulloch & David McRobert, *The EBR Litigation Rights: A Survey of Issues and Six-Year Review* (Environmental Commissioner of Ontario, 2000), online: The Environmental Commissioner of Ontario <<http://www.econ.on.ca/english/publicat/litigat3.pdf>>.

43. See comments in *House of Commons Debates* (1 June 1999) at 15661 (Mr. Clifford Lincoln); and *ibid.* at 15682-83 (Mrs. Karen Kraft Sloan), referring to the “precedent setting” “aggressive industrial assault against any environmental measures in Bill C-32,” in the debate over third reading of *CEPA 1999*.

III. *Arguments For and Against Citizen Suits*

At this stage in their evolution in Canada, it is useful to review the arguments for and against citizen suits in order to determine whether they could play a role in Canadian federal environmental law or whether the concept should be abandoned.

One of the most important arguments supporting citizen suits is that empowering citizens in this way will ensure greater enforcement, supplementing the effort of government. The central premise underlying this argument is that there is a legitimate public expectation that statutes will be enforced. When a government fails or refuses to ensure compliance with its statutes, the legislative promise of that statute is not met.⁴⁴

There are many reasons for government under-enforcement in a regulatory scheme. For example, where resources are lacking, detection of offences is inconsistent and, even when offences are detected, prosecution may not follow. Even with sufficient resources, there will be political, economic and technical judgments made about the value of prosecution in individual cases. In addition, there will be legal assessments about the chance of success of a prosecution. Many view the discretion to prosecute as a safety valve, allowing regulators the flexibility to bring enforcement actions only when benefits will outweigh the costs⁴⁵; others view this discretion as a licence for inadequate and inconsistent enforcement. One possible response to chronic under-enforcement is to allow members of the public to step in and press for compliance. What citizens can contribute are additional resources in the detection and prosecution of offences and a check on the potential for inappropriate government decisions not to prosecute.⁴⁶ This benefit has been stressed by the Standing Committee

44. Webb calls this "the cleft between promise and performance" (Kernaghan Webb, "Taking Matters Into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement" (1991) 36 McGill L. J. 770 at 773). In the specific context of *CEPA 1999*, the government's position is that "compliance with the Act and its regulations is mandatory." (Environment Canada, *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999 (CEPA, 1999)* (Ottawa: Environment Canada, 2001) at 5 [Environment Canada, *Compliance and Enforcement Policy*]). Note as well that Canada has promised its NAFTA partners that it will effectively enforce its environmental laws (*North American Agreement on Environmental Cooperation Between the Government of Canada, the Government of Mexico and the Government of the United States*, 14 September 1993, Can. T.S. 1994 No. 3, 32 I.L.M. 1480 (entered into force 1 January 1994)).

45. See Michael S. Greve, "The Private Enforcement of Environmental Law" (1990) 65 Tul. L. Rev. 339 at 344.

46. The exercise of discretion not to prosecute cannot be directly challenged. See *Re Canadians for the Abolition of the Seal Hunt and Minister of Fisheries and the Environment* (1980), [1981] 1 F.C. 733, 111 D.L.R. (3d) 333 (T. D.) and the discussion in Elizabeth J. Swanson & Elaine L. Hughes, *The Price of Pollution: Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990) at 110-12.

and others and has been borne out by U.S. experience.⁴⁷ Certainly the trend in Canada has been a slowing of enforcement by governments.⁴⁸ Without a real threat that environmental laws will be enforced, compliance suffers.⁴⁹

Historically, government prosecutors had no monopoly; in Canada, the private prosecution survives as a testament to this tradition.⁵⁰ The rationale for retaining private prosecutions in Canada echoes this first reason for adopting citizen suits: that for citizens in a democracy, “[t]he power of private prosecution is undoubtedly right and necessary in that it enables [them] to bring even the police or government officials before the criminal courts, where the government itself is unwilling to make the first move.”⁵¹ It also fills some of the gap in under-enforcement; although in practice, the difficulties in obtaining sufficient evidence and the power of the Attorney

47. See Miller, *supra* note 33.

48. See House of Commons Standing Committee on Environment and Sustainable Development, *Enforcing Canada's Pollution Laws: the public interest must come first!: the government response to the third report of the Standing Committee on Environment and Sustainable Development* (Ottawa: Environment Canada, 1995) [Standing Committee, *Enforcing Canada's Pollution Laws*]. In this report, the Committee concludes: “Throughout this report the Committee has stressed the importance of effectively enforcing Canada’s environmental laws. Based on the evidence presented, the Committee concludes that this is not happening. Lack of political will might be partly to blame, but the major cause, in the Committee’s view, is the lack of adequate resources.” (*ibid.* at para. 150). A study of federal and provincial enforcement activities also found that reductions in staff across Canada have resulted in inadequate enforcement levels (Environmental Defence Fund, *Canada's Environmental Enforcement Report Card: A Failure to Act* (1999) [unpublished manuscript]).

49. See Dianne Saxe, “The Impact of Prosecution of Corporations and Their Officers and Directors upon Regulatory Compliance by Corporations” (1991) 1 J. Envtl. L. & Prac. 91; Diane Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, Ont.: Canada Law Book, 1990) at 45-54; John Z. Swaigen, “A Case for Strict Enforcement of Environmental Statutes” in Linda F. Duncan, ed., *Environmental Enforcement* (Edmonton: Environmental Law Centre, 1985). See also a study by Peter Krahn, Head of the Inspections Division for the Pacific and Yukon Region of Environment Canada, where he cites a “compliance rating of 60% versus a 94% average compliance rating” for industrial sectors relying on self-monitoring or voluntary compliance versus those subject to federal inspections and compliance, discussed in Standing Committee, *Enforcing Canada's Pollution Laws*, *ibid.*

50. See Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 19-26.

51. Glanville Williams, “The Power to Prosecute” [1955] Crim. L.Rev. 596 at 599. See also Law Reform Commission of Canada, *ibid.* at 3:

it is our belief that a criminal justice system that makes full provision for private prosecution of criminal and quasi-criminal offences has advantages over one that does not. In any system of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity for a citizen to take his case before a court, especially where a public official has declined to take up the matter, is one way of ensuring such participation.

General to intervene mean that there are relatively few private prosecutions.⁵²

Another important purpose of a citizen suit is the promotion of democratic values.⁵³ The view of the federal government and the Standing Committee appears to be that a citizen suit is a particular form of public participation that is justified on the same grounds as all forms of public participation. That is, environmental protection is not the responsibility solely of government; all citizens share in that responsibility, and various avenues for public participation provide the means for citizens to fulfill that responsibility. In addition, because members of the public, including future generations, bear the burden of decisions that affect the environment, fairness demands that they be allowed to participate when those decisions are being made and to ensure compliance with them. Finally, participation promotes greater acceptability of difficult and value-laden policy choices and enhances government legitimacy.⁵⁴ To play this role, plaintiffs in citizen suits are given standing even if they have not suffered particular harm; they sue because there has been harm to an environment shared by all members of the public, present and future. In this sense, they are among the victims of the noncompliant activity. Bringing an action has a public service function that is meant to be pursued by those motivated by altruism rather than by any financial gain for the individual or group bringing the action. This is why citizen suit plaintiffs are not entitled to recover damages. This purpose has its parallels in the liberalization of standing rules in

52. Note that in some provinces, the Attorney General has a policy to intervene in all private prosecutions. See Webb, *supra* note 44 at 785 and Roger W. Proctor, "Individual Enforcement of Canada's Environmental Protection Laws: The Weak-spirited Need Not Try: An Alberta Example" (1991) 14 Dal. L. J. 112 at 125. Once the A.G. intervenes, it can continue the prosecution, stay it or withdraw the charges, and the citizen initiator has little ability to object. See *Kostuch v. Alberta* (1995), 128 D.L.R. (4th) 440, 101 C.C.C. (3d) 321 (Alta C.A.), leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 512; and *Perks v. Ontario (A.G.)* (1998), 26 C.E.L.R. (N.S.) 251, 57 O.T.C. 21 (Gen. Div.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 89 [*Perks*].

53. This is discussed in the U.S. context in Thompson, *supra* note 38. He suggests that citizen enforcement permits innovative interpretations of environmental laws to be brought in front of courts and provides an important avenue for democratic participation in the shaping of environmental policy (*ibid.* at 209-11). See also Adam Babich, "Citizen Suits: The Teeth in Public Participation" (1995) 25 *Env'tl. L. Rep.* 10141, where he discusses the role of citizen enforcement in ensuring the legitimacy and integrity of the administrative process.

54. For a discussion of the theory behind participatory democracy in this context, see Thomas Webler & Ortwin Renn, "A Brief Primer on Participation: Philosophy and Practice" in Ortwin Renn, Thomas Webler & Peter Wiedemann, eds., *Fairness and Competence in Citizen Participation: Evaluating Models for Environmental Discourse* (Dordrecht: Kluwer, 1995) 17. See also Robert Paehlke, "Democracy and Environmentalism: Opening a Door to the Administrative State" in Robert Paehlke & Douglas Torgerson, eds., *Managing Leviathan: Environmental Politics and the Administrative State* (Peterborough, Ont.: Broadview Press, 1990) 35; "Environmental challenges to democratic practice" in William M. Lafferty & James Meadowcroft, eds., *Democracy and the Environment: Problems and Prospects* (Brookfield, Vt., U.S.: Edward Elgar, 1996) 18.

constitutional cases and administrative law actions to grant standing to those either directly affected or having a genuine interest as citizens where there is no other reasonable method for getting the issue before a court.⁵⁵

Despite support for these purposes and advantages, what appears on the record is in fact ambivalence about the role of citizen enforcers. This ambivalence stems from suspicion of citizens' motives, a fear of giving up too much control over enforcement to citizens, and a fear of a flood of litigation. As Webb points out, similar opposing reactions are expressed when private prosecutions are brought.⁵⁶

Certainly one of the most pervasive and vehement arguments mounted at the Standing Committee against including a citizen suit in both *CEPA 1999* and *CESPA/SARA* was the argument that it would move Canadian regulation away from a cooperative approach toward a U.S.-style of decision-making characterized by "endless litigation."⁵⁷ For example, a representative of the Canadian Chemical Producers Association stated:

We think Canada should not be making the same mistakes as the United States by adopting a litigation approach to implementing policy. Abdicating government responsibilities to the courts through right-to-sue provisions will not be effective in improving the environment. It may create uncertainty, and we don't believe it's a sufficient replacement for wholehearted recognition of what responsible industry can do through non-regulatory approaches and what government can do through effective enforcement.⁵⁸

This argument is in part an ideological one regarding the appropriate role of litigation, in part reflects a belief that litigation leads to an escalation

55. See Jamie Benidickson, *Environmental Law* (Concord, Ont.: Irwin Law, 1997) at 96-97. Of course, these are different in that they allow challenges of government, not private, actions.

56. See Webb, *supra* note 44 at 772.

57. Industry also raised the argument against allowing litigation in the context of the review of the *Canadian Environmental Assessment Act*, where a proposal to insert a privative clause prohibiting judicial review was floated. See Canadian Environmental Assessment Agency, *Summary Report on the Canada-Wide Public Consultation Sessions* (2000), online: Canadian Environmental Assessment Agency <http://www.ceaa-acee.gc.ca/0007/0002/0004/0002/finalreport_e.htm>.

58. *Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 59 (4 June 1998) at paras. 28-29 (Mr. Richard Paton), online: Canada's Parliament <<http://www.parl.gc.ca/InfoComDoc/36/1/ENSU/Meetings/Evidence/ENSUEV59-E.HTM>>. See also the testimony of Lisa Kozma, Ford Motor Co., representing the Canadian Motor Vehicle Manufacturers Association (*ibid.* at para. 167ff); *Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 64 (16 September 1998) at para. 75ff (Mr. Guy Boucher, Canadian Pulp and Paper Association), online: Canada's Parliament <<http://www.parl.gc.ca/InfoComDoc/36/1/ENSU/Meetings/Evidence/ENSUEV64-E.HTM>>.

of conflict rather than to the resolution of issues, and in part suggests a concern over resources.⁵⁹

This argument presents a caricature of both systems that is not very helpful. In fact, the Canadian regulatory system is open already to both judicial review and private prosecutions, as well as private litigation, and the U.S. system includes negotiations and consultation as well as litigation. Further, some of the reasons for litigation under the U.S. citizen suit provisions have no relevance in the Canadian parliamentary system. For example, there is no equivalent separation of powers doctrine that prohibits the legislature from delegating the executive's enforcement authority. As well, the structure of environmental regulations in the two countries is very different. Nevertheless, one would expect a certain amount of litigation brought to sort out the meaning of new statutory terms, as happens in government enforcement actions, or perhaps to settle a division of powers challenge.⁶⁰ That, however, is far from unleashing a system of "endless litigation."

There are traditional differences between the Canadian and U.S. systems that resulted in different levels of litigiousness, at least until the adoption of the *Charter*. Bogart reviews the core differences between what Charles Taylor has described as a U.S. "rights based" model and a Canadian "participatory" model and then traces the expansion of litigation in Canada and the changing role of courts as facilitators of social change.⁶¹ While litigation is more of a fixture in Canada today than in the past, the argument against fostering litigiousness does strike a chord. It was of great concern to members of the Standing Committee who sought to distance themselves from such a suggestion.⁶² In the context of the debate over adoption of a

59. See e.g. the testimony of Gisèle Jacob, Mining Association of Canada, and Rick Bonar, Weldwood of Canada Ltd. and John Gilbert, Irving Oil both representing the Canadian Pulp and Paper Association (*Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 50 (21 November 1996), online: Canada's Parliament <http://www.parl.gc.ca/committees352/sust/evidence/50_96-11-21/sust-50-cover-e.html>).

60. This is always possible as most federal environmental statutes have been subject to constitutional challenge. In Canada, the creation of civil rights of action is primarily a provincial power. Nevertheless, a number of federal statutes have created civil causes of action that have been challenged and upheld. See *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255; but see *R. v. Zelensky*, [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179; and the discussion in Peter W. Hogg, *Constitutional Law of Canada*, vol. 1, looseleaf (Toronto: Carswell, 2002) at 18-23 to 18-25, regarding the difficulty of upholding a civil right of action in a statute that is federal on the basis of the criminal law power, as is the case with *CEPA*.

61. William A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

62. See e.g. comments of Karen Kraft Sloan (*Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 60 (8 June 1998) at para. 82ff, online: Canada's Parliament <<http://www.parl.gc.ca/InfoComDoc/36/1/ENSU/Meetings/Evidence/ENSUEV60-E.HTM>>).

citizen suit, this concern seems excessive. The purpose of a citizen suit is limited to enforcing compliance with a government-established standard, even when it may be somewhat vague. It is not an attempt to by-pass the legislature and executive and imbue courts with open-ended powers to determine the fundamental values of society and the standards by which industry must operate. It is simply a mechanism to empower “private attorneys general” to step into the shoes of public enforcers.

Even within this more limited context, there is no escaping that an ideological divide exists over the appropriate division of public and private responsibility. On the one side are those who believe that governments alone are responsible for enforcing the laws that they adopt because they alone are ultimately accountable through the ballot box if they fail to discharge this responsibility, leaving no room for individuals to act directly.⁶³ To them, delegating this authority to citizens undermines the legitimacy of the regulatory system. On the other side are those who believe that democratic systems are built on notions of public involvement, both direct and indirect, and that legitimacy of governments is assured only if they act in a way that responds to the needs of those whom legislative programs are designed to protect.⁶⁴ Canada has a long tradition of private prosecution and a system of judicial review that places limits on government. As well, public participation has been accepted as a fundamental value in environmental decision-making in all jurisdictions in Canada and in numerous international agreements. To agree with industry here and reject citizen enforcement on this ground alone would mark an important shift away from the expanding role for the public that has increasingly characterized the development of environmental law since 1970.

The provinces also objected to the citizen suit in CESPAs because of a fear of litigation, but their underlying concern was with the federal-provincial balance of power. “[T]he provinces did not relish the thought of environmental groups forcing the federal government to restrict activities

63. See *e.g.* the testimony of André Duchesne, Quebec Forest Industries Association (*Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 60 (12 December 1996), online: Canada’s Parliament <http://www.parl.gc.ca/committees352/sust/evidence/60_96-12-12/sust60_b1k101.html>).

64. See *e.g.* the testimony of Richard D. Lindgren, Canadian Environmental Law Association (*Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, No. 58 (10 December 1996), online: Canada’s Parliament <http://www.parl.gc.ca/committees352/sust/evidence/58_96-12-10/sust58_b1k101.html>).

on provincial lands to protect transboundary animal species. There was simply too much potential for federal interference in provincial economic development strategies and too little opportunity to work out an intergovernmental compromise when the venue shifts...to the courts."⁶⁵

What of the practical concern over a flood of litigation? Despite similar predictions in the U.S. that citizen suits would overwhelm the courts, this did not happen. There was a dramatic increase that paralleled a dramatic drop in agency enforcement in the early 1980s. However, as agency enforcement actions picked up, citizen suits dropped back to a fairly consistent level. The reasons for this are many:

[T]here are any number of reasons to explain why there has been no flood of litigation. To begin with, complex enforcement litigation is economically costly and emotionally draining; few citizens and/or environmental organizations have the monetary resources, the organizational structure, or the staying power necessary for meritorious efforts, much less for frivolous or duplicative litigation efforts.⁶⁶

In Canada, environmental litigants face the same disincentives. Canadian public interest environmental litigation has gone through similar cycles, rising in the face of government and industry indifference or mismanagement of the environment, but never amounting to a large number of cases.⁶⁷ Given the experience with citizen suits in other Canadian jurisdictions, it is reasonable to expect that there would not be a flood of cases at the federal level, particularly in light of the form of the adopted provisions.

This is not to say that citizen suits are without their difficulties as a tool for taking up the slack when governments fail to act. If one accepts that citizen suits should not be rejected on the provocative but unproved ground that they promote litigiousness, one must still address the practical difficulties of designing an action that meets the other arguments against it.

65. William Amos, Kathryn Harrison and George Hoberg, "In Search of a Minimum Winning Coalition: The Politics of Species-at-Risk Legislation in Canada," in Karen Beazley and Robert Boardman, *Politics of the Wild: Canada and Endangered Species* (Don Mills, Ont.: Oxford University Press, 2001) 137 at 155.

66. Orlando E. Delogu, "Citizen Suits to Protect the Environment: The U.S. Experience May Suggest a Canadian Model" (1992) 41 U.N.B.L.J. 124 at 128.

67. See Stewart A.G. Elgie, "Environmental Groups and the Courts: 1970-1992" in Geoffrey Thompson, Moira L. McConnell & Lynne B. Huestis, eds., *Environmental Law and Business in Canada* (Aurora, Ont.: Canada Law Book, 1993) 185. This is also true with private prosecutions, even under the *Fisheries Act*, where a private plaintiff recovers one-half of the fine imposed. Under *CEPA* itself, there were only 2 requests for investigation during the 10 years it was in force prior to the 1999 amendments.

One of these arguments is that allowing citizen enforcement might in some cases risk overlap or interference with a regulatory scheme. For example, where regulators and an individual industry have reached an agreement about how to bring about compliance with particular regulations, an enforcement action could interfere with implementation of that agreement and result in unnecessary costs. Similarly, where regulations are ambiguous or over-inclusive, regulators may have worked out a consistent approach to compliance with all companies in a sector. To allow citizen enforcement action would open that approach up to court scrutiny and possibly result in inconsistency among facilities. The discretion of a government agency to limit enforcement action in the face of unenforceable or overly ambitious laws allows for "efficient" or "optimal" compliance.⁶⁸ That is, the choice not to enforce reflects a value judgment about the use of scarce resources and what is likely to be accomplished by proceeding with court action.⁶⁹ This discretion is particularly important in the U.S. system where most federal regulations were drafted with no expectation of full compliance 100% of the time.⁷⁰ In Canada, however, given the availability of the due diligence defence in all of the existing citizen suit provisions and the different regulatory approach, it is not clear that allowing citizens to determine when to enforce the law would be unfair to regulated industry.⁷¹ Any inconsistency arising from interference with an informal agency-industry arrangement could be addressed in the design of legislation, regulations and permits to ensure that they are enforceable, in the establishment of regulatory arrangements by including public consultation. Citizen suit provisions could include appropriate defences and requirements for coordination between citizen enforcers and regulators. Examples of sections in *CEPA 1999* addressing this concern include the Attorney General's right to be a party to every action and the court's wide powers to

68. Greve, *supra* note 45 at 344, makes the argument that full enforcement is inefficient.

69. This issue is discussed in Michael P. Healy, "Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits" (1997) 24 *Ecology L.Q.* 393 at 452.

70. Ross Macfarlane & Lori Terry, "Citizen Suits: Impacts on Permitting and Agency Enforcement" *Natural Resources & Environment* 11:4 (1997) 20 at 24. See also Theodore L. Garrett, "Pros and Cons of Citizen Enforcement: Citizens Suits: A Defense Perspective" (1986) 16 *Envtl. L. Rep.* 10162.

71. Macfarlane & Terry, *ibid.*, point out that, in the U.S., when companies violate a permit requirement, they are strictly liable. In Canada, defendants can avoid liability if they can prove they acted with "reasonable care" to prevent the commission of the offence or if they can show "officially induced error." In *Perks*, *supra* note 52, a private prosecution was attempted but was taken over and the charges withdrawn by the Ontario Attorney General on the grounds that an informal arrangement with the Ministry of the Environment not to prosecute would provide the defendant with several viable defences. Therefore, there was no reasonable prospect of conviction. This decision was upheld by the Ontario Court, General Division.

stay on grounds that would cover such situations. These seem adequate protection for defendants and regulators but an amended Compliance Policy could spell out the steps for coordination in more detail.⁷²

Another important argument raised against citizen suits is the potential for misuse by individuals or groups with an "agenda." This is the fear of the "environmental vigilante," which became the dominant issue in the debates over whether to include a citizen suit in Bill C-65 and is the reason the action was dropped in the second version of the bill. While of particular concern to the large resource extraction industries,⁷³ the debate focused on the unfairness of citizen enforcement on private land, where farmers and small landholders would face legal sanctions for previously routine and lawful activities. With respect to dropping the citizen suit, Environment Minister David Anderson said:

We listened to the recommendations of the species at risk working group who said that civil suit provisions should not be part of this act. The notion that individual farmers or ranchers could be targeted by citizens' groups not for major transgressions, but for simply letting their cattle into the wrong field struck directly at Canadians' sense of fairness. However, we did retain the elements from Bill C-65 that enabled individuals to request a formal investigation ...⁷⁴

In the abstract, where there are no standing requirements limiting plaintiffs to those who have been personally harmed by a statutory violation, a citizen suit could be threatened or commenced, not in the public interest, but to harass certain industries, companies or individuals. To accept this argument, however, one has to presume that going to court is easy, inexpensive and low-risk for such plaintiffs, which is simply untrue. Most importantly, however, courts have traditionally been well able to control the use of their processes and protect defendants from frivolous or vexatious litigation, particularly through costs powers, summary judgment procedures

72. Environment Canada, *Compliance and Enforcement Policy*, *supra* note 44, does not now address this issue.

73. For example, Jack Munro of the Forest Sector Advisory Council claimed that the U.S. "spotted owl" litigation (which sought to stop logging of old growth forests to protect an endangered species) had been a "scam"; to add a citizen suit to the Canadian legislation would allow "groups with other agendas to use endangered species as a tool to accomplish what their real objective is. In many parts of Canada, the real objective is to shut down the forest industry." See also *Minutes of Proceedings and Evidence of the Standing Committee on Environment and Sustainable Development*, *supra* note 63 at para. 190. See also John Donihee, "The New Species at Risk Act and Resource Development" (2000) 70 *Resources* 1 at 6, where the author cites the desire of large oil, mining and forestry companies to protect their resource development activities from "a potential proliferation of litigation."

74. *Supra* note 22 at para. 80.

and actions for, or the defence of, abuse of process. In the U.S., the experience has been that “principled motivations” have dominated.⁷⁵ While it may not always be possible to limit plaintiffs to the truly altruistic,⁷⁶ it is possible to restrict the cases that proceed through the courts to the ones advancing *bona fide* claims. Again, this is not so much an argument against permitting citizen suits *per se* as it is for establishing limits to ensure they are only used for legitimate ends. The key is having sufficient incentives to encourage legitimate actions and sufficient disincentives to discourage the vigilantes.

Another argument raised at the Parliamentary hearings was that citizen suits will not be effective at improving environmental protection. This is perhaps the most difficult issue posed by the critics of citizen enforcement. It is difficult because there is little empirical evidence to prove one view or the other. Certainly Rosenberg and others conclude that litigation generally has not been an important factor contributing to environmental improvements⁷⁷; rather, what litigation has done best has been “to preserve victories achieved in the political realm from attack.”⁷⁸ Others who have looked specifically at the effectiveness of citizen suits in the U.S. and private prosecutions in Canada have concluded that such actions have “demonstrably improved environmental law” and have influenced positive change in regulated companies.⁷⁹ It is also hard to make the argument that citizen enforcement is ineffective without making a similar argument about *all* enforcement of environmental regulations. Thus, if one accepts that

75. Boyer & Meidinger, *supra* note 26 at 840. See also Stephen Fotis, “Private Enforcement of the Clean Air Act and the Clean Water Act” (1985) 35 Am. U. L. Rev. 127 study showed that only one defendant ever asked for costs against a plaintiff and the court refused.

76. In the U.S., plaintiffs have been allowed to negotiate monetary settlements that are directed to specific projects, despite the lack of damages available. Greve, *supra* note 45, suggests that this has seriously distorted the motives of those bringing such suits. In Canada, it is not yet clear whether this will surface as a problem, but other benefits may accrue, such as the right to bring an action providing a significant degree of bargaining power to citizens in their other avenues of participation, that might motivate an individual or group to threaten to sue. See Babich, *supra* note 53 at para. 8ff. In his view, the realistic ability to litigate gives citizens “negotiating clout without actually filing great numbers of lawsuits.”

77. See Bogart, *supra* note 61; Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Joel F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (New York: Academic Press, 1978).

78. Rosenberg, *ibid.* at 292. He suggests in his review of environmental cases that most victories were procedural rather than substantive and that substantive change occurred more readily through political, not legal, action. Others disagree that courts have been ineffective. See e.g. Lois J. Schiffer & Timothy J. Dowling, “Remark: Reflections on the Role of the Courts in Environmental Law” (1997) 27 *Envtl. L.* 327.

79. See Babich, *supra* note 53, citing specific examples at footnote 43. See also Webb, *supra* note 44 at 815-17, commenting that significant pollution abatement took place following private prosecutions in his case studies.

command and control regulation and its enforcement is an effective mechanism for furthering environmental protection (which many do not),⁸⁰ it can be effective regardless of whether brought by an agency or a citizen.

One charge against U.S. citizen suit plaintiffs has been that they choose their cases on the basis of which ones are easiest to win, regardless of the social costs, rather than which ones are most environmentally significant.⁸¹ Likelihood of a conviction is also a factor in government enforcement choices, and there is so little enforcement action (particularly at the federal level) that many environmentally significant problems are left alone.⁸² Compliance is mandatory and any noncompliance subjects the actor to government intervention. When environmental regulations are set and certificates of approval issued, the presumption in the Canadian system is that noncompliance means harm can result. To disallow citizen enforcement because some noncompliance problems are more significant than others is to undermine the basis on which particular regulations and approvals have been established.

There are also concerns that litigation as a strategy for public interest groups will divert scarce resources away from education, lobbying and other public participation efforts and undermine their grassroots decision-making base in favour of experts such as lawyers.⁸³ For the few environmental groups established with a mandate to use legal mechanisms to pursue environmental objectives, this is of little concern. For others, given the resources required for litigation, it is unlikely that they would change their strategy and pursue more than an occasional action against a significant local industry. On the other hand, what could be particularly important for environmental groups is the clout that an effective citizen suit provides them in influencing the outcome in their other activities. It could help to shift some of the balance of power toward citizens, ensuring

80. This is an important debate in environmental law which will not be discussed here. Boyer & Meidinger, *supra* note 26 at 880-95, summarizing some of the competing perspectives in the context of citizen suits.

81. See Greve, *supra* note 45 and Potts, *supra* note 32. With *CEPA 1999*, the Standing Committee's own consultant expressed the opinion that the "large number of hurdles in the face of a potential litigant" found in the bill was justified so that suits would not be too easy to pursue. In his view, if litigation was too easy it would result in a distortion of environmental priorities, that is, cases would be chosen on the basis of which ones could be won, rather than which ones would result in improvements to the environment. See the testimony of John Moffet, Resource Futures International, *supra* note 62 at para. 30ff.

82. See evidence of federal enforcement staff discussing the fact that only about half of the federal regulations are enforced at all, due to staff and resource cuts, in Standing Committee, *Enforcing Canada's Pollution Laws*, *supra* note 48.

83. There is a strong movement away from legal approaches to environmental problems toward grass roots organizing and community-based solutions. See William A. Shutkin, *The Land That Could Be: Environmentalism and Democracy in the Twenty-First Century* (Cambridge, Mass.: MIT Press, 2000).

that their views will be taken more seriously at an earlier stage in order to avoid enforcement action later.

Clearly, there are serious disagreements over whether citizen suits are an appropriate mechanism in the Canadian legal system. There can be no easy resolution to the ideological debate, but the arguments in favour of citizen suits appear to be more consistent with the traditions and values underpinning Canadian environmental and criminal law. The practical arguments against citizen suits are not borne out by the experience in other jurisdictions, or they are of the sort that could be readily addressed in the design of legislation, regulations and instruments. Therefore, in principle, a well-designed citizen suit should be able to operate effectively in achieving greater compliance with environmental requirements, while fostering greater public acceptance of the regulatory regime and protecting defendants from frivolous or vexatious actions.

Unfortunately, even those in the government who support public participation remain ambivalent about giving real power to citizens to take court action, particularly against other citizens. This ambivalence translated into the constrained provisions of *CEPA 1999* and fed the view that to include such rights in *SARA* would be fundamentally “unfair”—even though a private prosecution could be brought by a private individual in the same circumstances. Given this situation, it is hard to be optimistic that this new “right” will spark much activity or prompt much positive change in environmental protection in Canada.

IV. *Is the CEPA environmental protection action an appropriate model?*

Even though the politics of the moment suggest that citizen suits will not be adopted in other federal environmental statutes, there are a number of issues that should be carefully considered before *CEPA* is reviewed or the next piece of environmental legislation comes forward.

First, the relevance of the Ontario model should be directly confronted. The citizen suit provisions in *CEPA 1999* were modeled closely on the Ontario *Environmental Bill of Rights*, with some important differences.⁸⁴ Two things make this selective borrowing from the Ontario statute particularly problematic. One, while the form of the Ontario action resulted

84. These differences include: (1) unlike *EBR*, the *CEPA* action can only be brought after the fact, when significant environmental harm has already occurred, not in anticipation of imminent harm; (2) there is no provision for dispensing with the obligation to first apply for an investigation, even in an emergency; (3) there are some differences in the available defences; (4) the significant harm caused by the breach that must be proved must be caused to the “environment,” rather than to a “public resource,” a broader range of potential harms.

from a carefully balanced exploration of, and consensus on, the appropriate roles of government, the public and the courts,⁸⁵ the *CEPA* action was adopted without the government articulating its views on the appropriate balance of government, judicial and private action. The Ontario *EBR* is based on the principle that *government* has the primary responsibility for environmental protection and the citizen action is a mechanism to motivate government to carry out that responsibility. The limitations on use of the action (in particular, limiting it to circumstances where the Minister has been unreasonable) flowed directly from that principle. By contrast, *CEPA 1999* was stated to be based on the principle that government has no greater responsibility for environmental protection than other Canadians.⁸⁶ This implies more of a philosophy of sharing the tasks of designing, interpreting and enforcing environmental protection than exists in the *EBR*. While government will still play a central role, it does not necessarily follow from such a principle that citizen action should only be available after government fails to act reasonably.⁸⁷

Two, while the Ontario *EBR* is a general statute applying to the activities of 14 provincial ministries operating under a number of existing statutes and regulations creating a range of offences, *CEPA* is but one statute, the heart of which addresses the regulation of toxic substances. Some of the limitations on the citizen suit in the Ontario act, such as the need to have *both* a violation of a statute and significant environmental harm in order to bring an action, are arguably necessary because of *EBR*'s broad application. There is no similar need in the case of a single statute, even one covering a range of activities as *CEPA* does, but particularly where toxic substances are concerned. In order to be regulated under *CEPA*, a substance must first meet an onerous test of being declared "toxic," defined to mean a substance

85. The multistakeholder *EBR* Task Force accepted that the government has the primary responsibility for protecting the environment and the role of the legislation should be to empower the public to help the government meet this responsibility. With the public more involved in administrative decisions and with oversight by the Environmental Commissioner, the expectation was better decisions and greater accountability. A civil action was seen as a last resort: "... in some circumstances political accountability may be insufficient. Government's failure to protect the environment and, in particular, our public resources, should involve more than political risk. It should result in the ability of the public to trigger an examination of government's failure to protect the environment." See Task Force on the Ontario Environmental Bill of Rights, *Report of the Task Force on the Ontario Environmental Bill of Rights: Supplementary Recommendations* (Toronto: Environment Ontario, 1992) at 83-84.

86. According to the Standing Committee, "[t]he government alone cannot—nor should it be expected to—protect the environment. Everyone has a stake in a healthy, clean and safe environment; everyone, therefore has a part to play in ensuring its well-being." (*It's About Our Health!*, *supra* note 39 at 203).

87. This hurdle is not there in the Québec, Northwest Territories, Yukon or U.S. legislation.

entering the environment “in a quantity or concentration or under conditions” that

- (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
- (b) constitute or may constitute a danger to the environment on which life depends; or
- (c) constitute or may constitute a danger in Canada to human life or health.⁸⁸

Clearly, all parts of this definition incorporate the risk of significant harm to the environment or human health. To add the requirement of proof that a violation of the act in fact caused “significant harm” seems an overabundance of caution in the *CEPA* context and an added burden on a plaintiff. Another way to address this concern would have been to limit the right to bring an action to violations of specified sections of the statute which, by their nature, involve the potential for significant harm.

A second issue is the need to review the *CEPA 1999* provisions in light of the purposes they are intended to achieve, to see whether or not these purposes can be met and, if not, to suggest changes that will bring their achievement within reach. There were two purposes enunciated by the government and the Standing Committee: to enhance public participation and to achieve greater enforcement. Looking at the sections in detail shows that the *CEPA 1999* provisions are unlikely to achieve either purpose to any significant degree.

Pursuant to the first purpose, one would expect there to be broad standing for initiation of the environmental protection action. That broad standing is there,⁸⁹ and it is a broader notion of standing than in the Québec legislation, which limits standing to those who “frequent” an affected area.

However, standing is only one factor. To promote public participation, one would also have expected incentives for the public to bring an action, or at least removal of some of the traditional disincentives. On the one hand, as a civil action, the requirements of proof are reduced from those for a criminal action. On the other hand, there is the added requirement on the plaintiff to prove that “significant harm” has actually resulted from the statutory violation. Having one or the other (significant harm or a statutory violation) as the substance of the action would better achieve the

88. *CEPA 1999*, *supra* note 4, s. 64.

89. *Ibid.*, s. 22, allows “an individual who has applied for an investigation” to bring the action. In order to apply for an investigation, an individual need only be resident in Canada and at least 18 years of age (*ibid.*, s. 17(1)).

government’s stated purposes; having both only further limits the number of potential actions, despite the fact that both must be proved on a balance of probabilities. Ironically, if one were to bring a private prosecution, one would not have to prove “significant harm,” only that the statute had been violated.

One of the traditional barriers to public interest litigation has been the Canadian “two-way” costs rule. For plaintiffs with no financial stake in the litigation, the risk of losing and incurring an adverse costs award is a significant disincentive to bringing an action.⁹⁰ The *CEPA* sections leave the civil costs rule intact, specifying only that when deciding whether to award costs, a court may consider “any special circumstances, including whether the action is a test case or raises a novel point of law.”⁹¹ The effect of these sections is tangibly to discourage frivolous actions but also to indicate that a well-founded though unsuccessful action might not be punished by an adverse costs award. Whether this is sufficient to temper the costs barrier is unclear but, given the Ontario experience with an identical provision, it seems insufficient.

Another traditional obstacle to private prosecutions and public interest litigation has been the difficulty of proving the harm. With complex environmental problems, detecting and proving a statutory breach is often quite difficult, requiring assistance from experts and specialized tests. One of the reasons U.S. *Clean Water Act* citizen suits have been so numerous and so often successful has been the public availability of regular “discharge monitoring reports” from every facility which, when compared to statutory standards, make it easy to detect and prove a violation.⁹² In *CEPA 1999*, one finds no mechanism to assist citizens in obtaining comprehensible and usable evidence. As well, neither the act nor the *CEPA Compliance Policy* addresses the appropriate assistance government intends to provide to citizen enforcers, whether under an environmental protection action or a private prosecution.⁹³ Without greater certainty about the assistance available, many plaintiffs will be discouraged from proceeding.

Pursuant to the second purpose, encouraging greater enforcement, one would have expected the section to work both to goad greater government enforcement and to serve as a ready tool for citizens to step in when

90. See discussion in Marcia Valiante & Paul R. Muldoon, “A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice” in Steven A. Kennett, ed., *Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources Law* (Calgary: Canadian Institute of Resources Law, 1993) 142.

91. *Supra* note 4, s. 38. Costs are in the discretion of the court and this section probably adds no powers to a judge in deciding when and how to award costs.

92. Fadil, *supra* note 37 at 37.

93. Many private prosecutions have been successful because of expert assistance provided by government. See Webb, *supra* note 44 at 824-25.

government action is not forthcoming. Priority is given to government enforcement through the requirement that a citizen first apply for an investigation and wait for a response. However, the Minister has discretion to decide not to proceed with an investigation and not initiate enforcement action⁹⁴; it is only if a plaintiff can prove to a court that this decision is “unreasonable” (again, no criteria are identified) that a citizen action may be initiated in lieu of government action. Even if this can be proved, citizens cannot bring an action when there is imminent harm; only if the harm has already occurred, and there is no ability to by-pass this requirement when an emergency situation arises. Giving the government a reasonable opportunity to respond to noncompliance would alleviate the risk of over-enforcement but it seems overly restrictive to prohibit citizen action in every case unless the citizen can prove the government’s response to be “unreasonable,” particularly in light of the government’s poor record on enforcement. A broad interpretation of concepts such as “unreasonable” and “significant harm” would help relieve some of this dampening effect; however, the structural obstacles remain. Failing to allow an action in the face of imminent harm seems to run counter to the very purpose of pursuing greater enforcement, preventing environmental harm. The environmental protection action offers remedies that could prevent environmental harm, rather than simply stopping continuing contamination or cleaning up an already contaminated site.

Other limitations were built in to the sections to try to control the potential for abuse by “environmental vigilantes.” One of these is the lack of damages as a remedy, to discourage the bounty hunter. However, as suggested by the Standing Committee, damages payable into a public fund would both discourage a bounty hunter and provide much needed money for remediation or site improvements to prevent contamination. It would also operate to bring home the seriousness of the offence in the same way that criminal penalties do. Another mechanism for controlling vigilantes is the ability of a court to stay or dismiss the action “if it is in the public interest to do so” based on a number of specified considerations.⁹⁵ Some of these considerations, such as “economic and social concerns,” are quite broad and could encompass a range of issues not ordinarily relevant to enforcement decisions. Defendants are further protected from double jeopardy and by way of a number of defences. All of these protections

94. The investigation may be discontinued if the Minister “is of the opinion that” either the alleged offence “does not require further investigation” or an offence is not substantiated. This discretion is untempered by any criteria. (*CEPA 1999, supra* note 4, s. 21.)

95. *Ibid.*, s. 32.

against abuse are on top of the traditional judicial controls discussed above. Unfortunately, while the effect will be to discourage vexatious claims, legitimate claims may be discouraged as well.

A third issue, so far left out of the debate but deserving considered attention, is the relationship between private prosecutions and citizen suits. This is not an issue in the U.S., where criminal enforcement actions for statutory violations are the exception (and are only brought by the government); there, citizen suits are an alternative to civil enforcement by government.⁹⁶ In Canada, all environmental enforcement actions are “criminal,” even though most are offences of strict liability, and civil penalties are not an option. Yet, *CEPA 1999* adopts this U.S. model with little thought as to the desirability or impact of having two mechanisms for citizens seeking to enforce compliance with statutory provisions. With private prosecutions in Canada, there is no procedural pre-requisite of having to first apply for an investigation and to wait for an unreasonable response, and there is no requirement to prove “significant harm” in addition to proving a statutory violation. As well, criminal procedure is followed, including the need to prove the statutory violation at the criminal level of proof, the remedies are limited to the penalties set out in the statute for “offences,” the civil costs rule does not apply and the Attorney General has the right to intervene. Despite these differences, both actions allow parallel rights to seek enforcement of statutory violations. There have been recommendations to reform private prosecution rights⁹⁷ that have not been acted on. Certainly some aspects of private prosecutions and some aspects of citizen suits, if combined, might make a more workable, more effective tool for citizens seeking to bring about increased compliance with statutory provisions than either the present *CEPA 1999* model or the existing rights to bring private prosecutions.

In light of what it is supposed to accomplish, the *CEPA 1999* environmental protection action is a model of confused signals and half-hearted drafting, reflecting a fear that citizen enforcers will spark a flood of U.S.-style litigiousness and vigilanteism. The drafters, in running from their perception of the U.S. model, embraced the Ontario model and ignored

96. See Frank P. Grad, *Treatise on Environmental Law*, vol. 1, looseleaf (New York: Matthew Bender, 2002). While criminal sanctions have increased under recent amendments to U.S. environmental statutes, they apply only to knowing or negligent violations that result in endangerment to others. “It is clearly anticipated in the law that civil abatement actions will be the remedy primarily relied on for enforcement.” (*ibid.* at 2-450). In both countries, administrative responses are also available and more common than court action.

97. Law Reform Commission of Canada, *supra* note 50, recommends changes to increase the use of private prosecutions. Environmental protection was flagged as one area where increased private enforcement was appropriate and expected. See also Webb, *supra* note 44 at 824-28.

that from Quebec. In doing so, they created an action that will only be used rarely, and they missed an opportunity to craft a more effective action. Nevertheless, time will tell how successful the action is. It is important to track its use and the policies and interpretations that flow from such use in order to give a better assessment of its utility in furthering the ultimate goal of environmental protection.

Conclusion

With the adoption of *CEPA 1999*, a citizen suit has made its first appearance in Canadian federal environmental law. There are strong arguments for including such an action as part of the enforcement repertoire. In principle, a citizen suit is consistent with the evolving importance of citizen participation in all aspects of environmental decision-making and with the continuing tradition of private prosecution. There are many practical problems that could arise, but these seem to be largely manageable through design of the requirements in regulations and permits, and the design of the citizen suit provisions so that defendants are treated fairly.

There are many who opposed the adoption of the environmental protection action on grounds of both principle and practical difficulty. Their arguments persuaded the government to constrain the *CEPA 1999* action and to drop the concept entirely from the species at risk bills. In doing so, the government paid little heed to their own objectives or to the empirical experience with similar provisions elsewhere in Canada. Instead, fears about what might be unleashed by the adoption of a citizen suit drove the form of the action that resulted and ensured its absence from *SARA*. This form, borrowed out of different regulatory contexts, seems to contradict the very reasons for adopting the action in the first place.

Is there a role for citizen suits in federal environmental law? A citizen suit could allow individuals and groups concerned about the environment to play a role in ensuring greater enforcement. Improving on the *CEPA 1999* model would make citizen action more effective as an alternative to declining government enforcement action and would truly recognize the key role of the public in the future of environmental quality in Canada. However, unless the *CEPA 1999* model is modified dramatically by removing traditional disincentives to citizen action and including positive incentives, the potential importance of citizen suits at the federal level in Canada should not be overstated. Such actions will likely only ever play a minor supplemental role to government enforcement. Moreover, as the relevance of federal regulatory standards decreases with the increasing reliance on

provincial enforcement under the *Harmonization Accord*⁹⁸ and the increasing number of “voluntary” compliance and self-regulation schemes, there is a risk that few new standards will make it into *CEPA*, making enforcement by anyone a non-issue. This is not an argument for excluding citizen suits from federal environmental law or for not working to improve what is there. It is only a caveat that their adoption into *CEPA 1999* comes at a time when the regulatory context is changing in ways that threaten the usefulness of old models of enforcement and participation. If this happens, citizen suits will have a small impact on improvements to the environment in the long run but could form the foundation for new models of making citizens “welcomed participants” in the future of environmental protection.

98. Canadian Council of Ministers of the Environment, *Canada-Wide Accord on Environmental Harmonization* (Toronto, Ont.: CCME, 1996) (entered into force 29 January 1998).

