

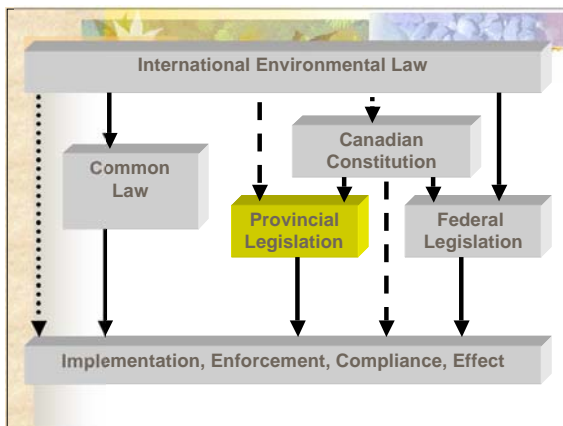
THE LEGAL TOOLKIT: OPTIONS, STRATEGIES AND TACTICS

Understanding Local Environmental Law

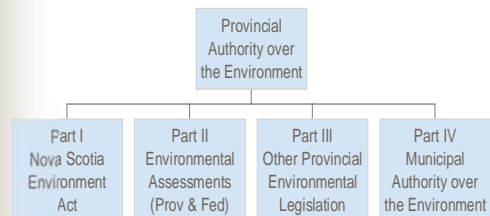
July 2007 - Nova Scotia Workshops

East Coast Environmental Law Association (ECELA)

- ECELA was incorporated in April 2007 and is currently made up of 12 board members.
- ECELA is a non-profit organization whose mission is to provide legal advice to individuals and organizations to ensure environmental laws are effectively used.
- ECELA will serve individuals and community groups on the east coast in 2008.



Outline



Provincial Authority over the Environment

- Provinces have constitutional authority to make legislation with respect to:
 - property and civil rights in the province; and
 - all matters of a local or private nature.
- Provinces have no authority outside of their geographic boundaries.
- Provinces delegate authority to municipalities.
- Provincial authority across Canada is not uniform.

Understanding Legislation

- **Legislative environmental law** at the provincial level includes statutes/acts and regulations.
- **Statutes (House of Assembly)** set out laws by stating broad principles and establishing a general statutory framework to control activities.
- **Regulations (Government or Minister)** are passed under the authority of a particular statute, they interpret the statutes' broad principles and set out the details for how the statutory framework will operate.

Part I

Nova Scotia Environment Act

Environment Act (EA)

Jan. 1, 1995

Purpose:

"... To support and promote the protection, enhancement and prudent use of the environment."

Lead Department & Minister:

Environment and Labour (DEL)

Basic Approach = Command & Control

The EA at a Glance: What it Regulates

- ☞ Release of Substances
- ☞ Air Quality Management
- ☞ Dangerous Goods and Pesticides
- ☞ Water-Resource Management
- ☞ Waste-Resource Management
- ☞ Contaminated Sites
- ☞ Environmental Assessment – Covered in Part II
- ☞ Provincial Enforcement
- ☞ Public Enforcement

Recent Amendments (Bill 3)

- Act was reviewed in 2000
- Amendments introduced in 2006
 - Added a definition of "contaminated site"
 - Removed "significant" from s.67(1)
 - Added power for temporary approvals s.65A
 - Set a new waste goal s.93(1A)
 - Other "housekeeping" matters

1. Release of Substances

Part 6 of the EA
Allows the province to control
pollution generally.

General Release Regulation

- **Command** = it is an offence to release a substance into the environment that causes or may cause an adverse effect without an approval or exceed a level authorized by an approval.
- Prior to amendments in 2006 release had to cause a "significant" adverse effect.

Definition of Environment

- ... the components of the earth, including
- air, land and water
 - the layers of the atmosphere
 - organic and inorganic matter and living organisms
 - interacting natural systems that include components referred to above.

Definitions...

“Adverse Effect”

... an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.

“Release”

...to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place, drain, pump or exhaust.

Duty to Report

- Any **“person responsible”** for the release of a substance that may cause an adverse effect or exceeds an approval, must report the release.

Person Responsible

- owner or previous owner of the substance or thing,
- owner or occupier of the land,
- a person who has or had care, management or control of the substance or thing, including control during manufacture, sale, storage, transportation, disposal, etc.
- a successor, assignee, executor, receiver, administrator, etc....of the above.

Report must be made to...

- the Department of Environment,
- the owner of the substance if possible,
- the person having care, management or control of the substance if possible, and
- any other person who may be directly affected by the release.

Issue Specific - Release Regulation

Emergency Spill Regulations

- Specified quantities of substances released must be reported to DEL at **1-800-565-1633**
 - Used oil 100 L
 - Pesticide concentrate 5 L or 5 Kg
 - Sewage into fresh water 100 L
 - Poisonous substances 5 L or 5 Kg

Approvals

Definition of “Approval”

... means an approval issued pursuant to this Act with respect to an activity, and includes the renewal of an approval.

Control: Approval Requirements

Activities Designation Regulations

- Designates over 100 activities that require approval.
 - Construction or maintenance of a wharf
 - Construction of a sewage works
 - Applying pesticides over a surface watercourse

Approvals Procedure Regulations

- Describes how to apply for an approval.

Ministerial Discretion: Approvals

- **The Minister may issue or refuse to issue an approval.**
- **Decision not to approve an activity...**
 - Minister may determine that the proposed activity is not in the public interest, having regard to the purpose of the Act.
 - Minister must consider location of the proposed activity, relevant policies and potential adverse effects.

2. Air Quality Management

Part 11 of the EA

Allows the province to control air pollution.

Air Emissions

- **Definition of Air:**
 - Means open air not enclosed in a building, structure, machine, chimney, stack, flue, tank or pipe.
- **Command** = No specific prohibitions – only general prohibition from causing an adverse effect on the environment.

Control: Air Quality Regulations

- Ambient Air Quality Criteria:
 - Maximum permissible ground level concentrations for carbon monoxide, ozone, etc.
 - Air quality index measures this via monitoring stations across the province.
- Prohibits open burning, without approval, of:
 - tires, used oil, railway ties, wood treated with preservative, material containing plastic/rubber and asphalt shingles.
- Provincial emissions cap on sulphur dioxide.

Provincial Targets

Environmental Goals and Sustainable Prosperity Act

- Sulphur dioxide emissions reduced by 50% by 2010
 - 2001 levels
- Mercury emissions reduced by 70% by 2010
 - Pre-2001 levels
- Nitrogen oxide emissions reduced by 20% by 2009
 - 2000 levels
- CCME standards for ground level ozone and airborne fine-particulate to be met by 2010
- GHG emissions 10% below 1990 levels by 2020

Reflection

■ Minister's Task Force on Clean Air, 1992

- A plan of action to be in place by March 31, 1993 to indicate how the goal of the Nova Scotia Action Strategy on Global Warming to stabilize greenhouse gas emissions at 1990 levels by the year 2000 will be achieved.

3. Dangerous Good and Pesticides

Part 7

Allows the province to control the use, handling and storage of specific dangerous goods.

Dangerous Goods

- **Command** = Dangerous goods, waste dangerous goods and pesticides must be handled in a way that will not result in an adverse effect to the environment.

Dangerous Goods

■ **Control = Dangerous Goods Management Regulations**

- Requires approval to handle, store, etc... dangerous goods.
- Designates dangerous goods, i.e.
 - Explosive -- 50 kg or 50 L.
 - Compressed gas (flammable) -- 5000* L.
 - Poisonous (toxic) substance -- 1000 kg or 1000 L.
- Exempts dangerous goods, which are regulated under their own specific regulation.

Control: Specific Dangerous Goods

Motive Fuel and Fuel Oil Approval Regulations

Petroleum Management Regulations

- Controls petroleum storage tanks depending on the size and location of the tank.

PCB Management Regulations

Asbestos Waste Management Regulations

Used Oil Regulations

Pesticide Regulations

4. Water-Resource Management

Part 10 of the EA

Allows the province to control all “watercourses” in the province and regulate water resources.

Power to Regulate

- All **watercourses** in the province are owned by the Province [s.103].

“Watercourse”

- the bed and shore of every river, stream, lake, creek, pond, spring, lagoon or other natural body of water and the water therein, within the jurisdiction of the Province, whether it contains water or not, and all groundwater.

Water Approvals

Activities Designation Regulations

Command = approvals are required to:

- take greater than 23 000 litres of water from a source in one day
- store greater than 25 000 m³ of water
- divert or alter a watercourse
- place material in a watercourse
- remove material from a watercourse

Control: Water Regulations

Well Construction Regulations

- Regulates how, where, and by whom wells can be drilled and pumps installed.

Water and Wastewater Facilities and Public Drinking Water Supplies Regulation

- Regulates water treatment, water distribution wastewater treatment and wastewater collection facilities.

On-site Sewage Disposal Systems Regulations

- Regulates how, where and by whom systems can be built.

Water-Resource Management Strategy

- 1991 Minister’s Task Force on Clean Water
- Command – Minister shall establish a water-resource management strategy (1995 EA s.105).
 - Draft Water Resource Management Strategy presented to Cabinet September 1999.
 - Walkerton tragedy May 2000.
 - Drinking Water Strategy issued 2003

Drinking Water Strategy Action Plan: By 2005...

- All municipal water utilities have approvals requiring them to meet consistent standards for treatment and operator certification. Must meet approval requirements by 2008.
- Approximately 1800 small public drinking water suppliers have been registered with DEL and must report if health-related guidelines are exceeded.
- Public outreach and education materials for well owners have been produced and distributed.
- Municipalities are developing sources water protection plans as part of approval requirements.
- Municipal water supplies are audited 2x per year and registered water supplies are audited according to a risk model (1500 audits annually).

Provincial Targets

Environmental Goals and Sustainable Prosperity Act

- All municipal drinking-water supplies must meet Province's treatment standards by 2008.
- All wastewater treatment facility discharges must have at least primary treatment by 2017.
- Create a comprehensive water-resource management strategy by 2010.

5. Waste-Resource Management

Part 9 of the EA

Allows the province to control waste management and recycling.

Waste Strategy

- **Commands** the province to maintain a 50% solid waste diversion goal (based on 1989).
- **Commands** the Minister to establish a solid waste resource management strategy.
 - Strategy was adopted October 1995 and includes: bottle deposit/refund system, tire return system, used oil return system and landfill disposal bans.
- Sets waste disposal target for 2015 at 300kg per person per year (s.93(1A)).

Control: Solid Waste Resource Management Regulations

- Establishes Waste Management Requirements, which ban the following from landfill:
 - Waste paint
 - Beverage containers
 - Corrugated cardboard
 - Newsprint, Used tires
 - Compostable organic materials (food, yard)
 - Car batteries, Antifreeze
 - Glass food containers
 - Steel/tin food containers, Select plastics
 - Electronics (coming in soon)

6. Contaminated Sites

Part 8 of the EA

Allows the government to identify and require remediation of contaminated sites.

What is a Contaminated Site?

Unless otherwise defined by regulation, a site with concentrations of a contaminant or contaminants that exceed standards prescribed or adopted by the Minister that has caused, is causing or may cause an adverse effect, or a site designated as a contaminated site by the Minister (s.3).

Definition

“Person responsible for the contaminated site”:

- person responsible for the substance,
- any person contributing to the release,
- current or previous (at time of contamination) owner, occupier or operator of the site, and
- successor, assignee, executor, administrator, receiver, receiver-manager, trustee, principal, agent of the above.

Contaminated Sites Designation

- Designation of Contaminated Sites
 - Minister may designate a site as contaminated – has never happened.
- Site Remediation
 - Voluntary remedial action plans for site cleanup can be developed and agreements reached.

Contaminated Sites Remediation

- Any person responsible for the release of a substance that has caused, may cause or is causing an adverse effect must take all reasonable measures to prevent, reduce and remedy the adverse effects of the substance and rehabilitate the environment (s.71).
- Failure to comply may result in a Ministerial Order.

Provincial Targets

Environmental Goals and Sustainable Prosperity Act

- Development of regulatory tools to stimulate redevelopment of contaminated land.
- Development of Regulations within 24 mos
 - Address application of s.67 to past releases
 - Include consultants in definition of ‘person responsible’
 - Require previously contaminated sites to be reported.

7. Environmental Assessments (Covered in Part II)

Part 4 of the EA & the *Canadian Environmental Assessment Act*
Tool for evaluating the potential environmental effects of certain “undertakings”.

8. Provincial Enforcement

Part 13 - allows province to issue orders.
Part 15 - allows province to penalize offences.

Ministerial Powers - Orders

Minister, administrator or inspector may issue control or stop orders:

- Requires action to prevent or remedy an adverse effect to the environment.
- Where one fails to comply with an order, the Minister may carry out the order and recover all reasonable costs.
- An order to pay is then filed as a judgment - exists as a "super lien".

Penalties

- Fines for individuals and corporations between 1,000 and 1 million dollars.
- Prosecutions (quasi-criminal) for violations of EA:
 - Offences are all *mens rea* (committed knowingly) or strict liability (state of mind does not matter).

9. Public Enforcement

Part 12 – allows citizens to apply for investigations.

Part 14 - allows citizens to appeal ministerial decisions.

Inspections and Investigations

- Section 115 allows any person who is of the opinion that an offence has been committed under the EA to apply to DEL to have an investigation of the alleged offence.
- Sets out what is required in an application for an investigation.
- Section 116 sets out how the administrator must respond to the application.

Appeals

- Amendment – Decision of an "official" can be appealed to the Minister (must appeal in 30 days)
- Decisions of the Minister (except a decision on an EA) can be appealed to the Supreme Court of Nova Scotia.
- Examples:
 - Orders
 - Regulation
 - Grant or refusal of a certificate or approval
 - Cancellation of a certificate or approval
- A decision of the Supreme Court is final.

Part II

Environmental Assessments

General EA Process Steps

- Is an EA required at all?
- Choice of process
- Scope of assessment
- EIS
- Review/public participation
- EA report
- Decision
- Follow-up

Provincial Environmental Assessments

- A process by which the environmental effects of an undertaking are predicted and evaluated and a subsequent decision is made on the acceptability of the undertaking.
- No person can start work on an undertaking until the Minister has approved the undertaking.
- Tool for:
 - Evaluating potential environmental effects
 - Involving the public in Decision-making
 - Planning and education
 - Promoting sustainable development

Definitions

What is an “Undertaking”?

... an enterprise, activity, project, structure, work or proposal and may include, in the opinion of the Minister, a policy, plan or program that has an adverse effect or an environmental effect and may include, in the opinion of the Minister, a modification, extension, abandonment, demolition or rehabilitation, as the case may be, of an undertaking.

What is an “Environmental Effect?”

- ... in respect of an undertaking:
- any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance, and
 - any change to the undertaking that may be caused by the environment...

Application of Provincial EA

- Few undertakings are caught by provincial EA.
- The “trigger” for whether EA applies:
 - The minister determines the EA applies (rare)
 - The regulations determine the EA applies

Provincial Registration

Undertakings are listed in Schedule A to the Regulations:

- **Class I** – Intermediate Activities (e.g. construction of a public highway more than 2 km and less than 10 km in length and designed for 4 or more lanes of traffic).
- **Class II** – Big Projects (e.g. a facility for the incineration of municipal solid waste).
- Difference between Class I & II is the extent and scope of EA process.
- If activity does not fall under Class, Minister can order EA (ie. If public concern warrants).

Provincial Registration & Process Decision

- All undertakings must be registered
- Registration process is different for Class I & II
- The Minister will examine the information in the registration and decide (in 25 days):
 - additional information
 - focus report (Class I only)
 - environmental assessment report (always Class II)
 - alternate dispute resolution
 - proceed (Class I only)
 - rejection

Problems with Provincial EA

- Minister's Discretion:
 - Choice of classification
 - Choice of the assessment process:
 - After undertaking registered, Minister examines information and decides next steps.
 - Little decision making criteria
 - No clarity on when rejections of undertakings required.

Federal EA: Triggers

1. Determine the Application of Canadian Environmental Assessment Act (CEAA)

A. physical work/activity when the federal government is involved because:

- the **proponent** is a federal agency;
- the **project** requires a federal permit;
- the project is **federally funded**; or
- the proposal on **federal land**

Federal EA: Triggers

B. Significant Transboundary Adverse Environmental Effects

- Projects with interprovincial or international effects, ie. power plant

C. Special Regulations

- Crown corporations, harbour commissions, offshore petroleum

Process Selection under CEAA

Screening

- Basic level, a "mini EA"

Comprehensive Study Report

- For projects likely to have significant enviro. effect, ie. Offshore O & G platform, pipelines

Mediation

- Alternative to Panel Review, where project problematic

Panel Review

- Used under certain circumstances, ie. Where uncertainties as to enviro. effects after screening.

Scope of Environmental Assessment

All federal EAs must take into account:

- environmental effects of project,
- cumulative effects
- significance of those effects,
- public comments,
- mitigation measures, and
- other relevant issues.

Scope of Environmental Assessment

Additional Federal EA requirements for comprehensive study, mediation and panel review:

- **purpose** of project,
- **alternative** means of carrying out project,
- follow-up, and
- **impacts** on renewable resources.

Decision after Screening

- Can be given “go” if not likely to cause significant adverse enviro effects
- Must be given “no go” if likely to cause significant adverse enviro effects that aren’t mitigated and cannot be justified
- Can refer project to panel review or mediation where uncertainties, wants to justify or public concern

Decision after Comp Study

- MOE given “lead role” on process, the responsible authority still makes final decision
- Can be given “go” if not likely to cause significant adverse enviro effects or if effects can be justified
- Must be given “no go” if likely to cause significant adverse enviro effects that aren’t mitigated and cannot be justified

Federal Decision after Panel

- May be given “go” if project not likely to cause significant adverse enviro effects or effects can be justified.
- Must be given “no go” where significant adverse enviro effects likely that are not mitigated and cannot be justified.
- ... subject to Governor in Council approval!

Federal EA Facts

Screenings (98.5% of EAs)

- **least comprehensive**
- conducted on projects **not** listed in **comprehensive study list** or **exclusion list**

Comprehensive studies (1.4% of EAs)

- used for projects listed in **comprehensive study list**

Federal EA Fact, cont’d

Mediation and panel reviews (0.1% of EAs)

- used for projects where the screening or comprehensive study
 - has **uncertainty** or **likelihood** that project will cause **significant adverse environmental effects**
 - where **public concerns** warrants
 - Minister requires

Federally Required Public Participation

Mandatory

- comprehensive studies
- panel reviews

Discretionary

- screenings

Resource

- CEEA Registry
(www.ceaa.gc.ca/050/index_e.cfm)

Problems with Federal EA Process

- Application – focused on projects
- Narrow scoping (project and assessment)
- Limited & discretionary public participation for screenings
- Lack of criteria for decision-making
- Lack of independent decision-making
- Limited monitoring or follow-up
- Limited enforcement

Part III

Other Provincial Environmental Legislation

Environmental Goals and Sustainable Prosperity Act, 2007

- A statement of long-term environmental and economic objectives:
 - to demonstrate international leadership by having one of the most sustainable environments in the world by 2020; and
 - to provide certainty to all sectors of the economy through the government's economic development strategy.
- Lists 21 environmental and economic goals.
- There is no legal enforcement mechanism but there is accountability as the Minister must report annually and consult with Round Table.

Endangered Species Act

- Provincial framework for assessing and listing species "at risk" – endangered, threatened or vulnerable.
- Once listed, the government must create a recovery team for the species, and start recovery and conservation efforts.
- Recovery efforts depend on whether the species is listed as endangered, threatened or vulnerable.
- Controls activities that can take place in the habitat of a species at risk.
- Prohibits killing or disturbing a species at risk.

Fisheries and Coastal Resources Act

- Encourages and promotes programs to sustain and improve the fishery.
- Regulates fisheries and aquaculture training, technology and development, lending for fisheries and aquaculture development, sea plant harvesting, licensing and inspecting of fish and fish products, and recreational fishing.
- Regulates aquaculture practices and the licencing/leasing of aquaculture operations.

Beaches Act

- Dedicates the beaches of Nova Scotia to the public.
- Provides for the protection of beaches and associated dune systems & the regulation of land-use activities on beaches.
- Establishes how beach areas are determined.
- Prohibits the removal of gravel, stone or other material from a beach without permission.
- Prohibits destroying natural resources found adjacent to a beach or dumping garbage on a beach.

Conservation Easements Act

- Creates an option for protecting and preserving private land, land that is not owned by the government.
- A conservation easement is an agreement between a land-owner and an organization. The agreement gives the organization rights over the land-owner's land that it would not otherwise have, and can last for a few years or forever.
- The purpose for the agreement must be to protect, restore or enhance land.

Forests Act

- Makes the government responsible for developing forest management programs - to ensure that wildlife, wildlife habitat, the diversity and stability of the forest ecosystems, and water supply watersheds "are managed".
- Regulates forest nurseries, forest research, training of silviculture workers, and the prevention and suppression of forest fires.
- Wildlife Habitat and Watercourses Protection Regulations - aimed to protect water quality and some elements of wildlife habitat in forested areas.

Agricultural Marshland Conservation Act

- Allows Minister to designate marshlands.
- Establishes the Agricultural Marshland Conservation Commission which can establish "marsh bodies".
- The executive committee of a "marsh body" can enter land within marshland section for any purpose relating to construction, maintenance or repair of "works".
- "works" are dykes, breakwaters, canals, ditches.. improvements or protection of marshland to "a standard appropriate for agricultural purposes".

Wilderness Areas Protection Act

- Designates "Wilderness Areas" as representative examples of Nova Scotia's landscapes and provincially significant areas.
- Provides a legal framework for establishing, planning, managing and protecting "Wilderness Areas".
- There are currently 11 "Wilderness Areas" designated under the Regulations.
- "Wilderness Areas" can be used for scientific research, education, and some recreation and nature-tourism related activities.

Water Resources Protection Act

- Regulates large-scale removal of water from the province's major water system, the "Atlantic Drainage Basin".
- **Command** - No person can remove water from the geographic area that drains into the Atlantic Ocean unless the use of the water is specifically allowed under the Act.

Dangerous Goods Transportation Act

- “dangerous goods” defined in Regulations – explosives, gases, flammable solids, oxidizing substances, poisons substances, corrosives, and miscellaneous products.
- Prohibits the movement of hazardous substances on public highways unless all safety measures set out in the Regulations are met.
- Minister can grant exemptions.
- Establishes power to inspect vehicles/trucks.

Mineral Resources Act

- Purpose is to support and promote responsible mineral resource management and provide framework for mineral rights administration.
- Grants the Province all mineral rights.
- Establishes framework for acquiring mineral rights, exploration licences, mineral leases, surface rights permit.
- Allows for investigations and inspections of operations.
- Regulates royalties.

Petroleum Resources Act

- “petroleum” - Includes mineral oil and any natural gas, but does not include coal or bituminous shales...
- Grants the province the rights to petroleum.
- Controls the grant of petroleum rights to individuals/organizations: exploration licensing, production leases, and coal gas agreements.

Wildlife Act

- Regulates hunting, fishing, possession and sale of wildlife.
- The province has the property rights in all wildlife, unless granted to individuals through licences or permits.
- Determines how hunting/fishing license are distributed.
- Allows the government to make wildlife sanctuaries, wildlife management areas or wildlife parks.

Part IV

Municipal Authority over the Environment

Role of Municipalities

- Role for municipalities in environmental regulation is increasing.
- Local government seen as the most in touch with community needs.
- Given the authority to regulate in relation to the health and safety of inhabitants and the environment within municipal boundaries.



Municipal Government Act

- Provincial statute that grants powers to municipalities in Nova Scotia.
- Municipalities can make by-laws dealing with the following environmental issues:
 - Air and water pollution
 - Nuisances
 - Noise
 - Obnoxious industries
 - Environmentally sensitive areas
 - Land use (zoning and development control)
 - Dangerous substances (pesticides, HRM)

THANK YOU

For more information:



Watch for the start of ECELA's operations in 2008.