

Enforcement of Environmental Laws

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November 19, 2010

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What is enforcement?

Government or private action taken to determine or respond to non-compliance with environmental laws.

1. Government enforcement
2. Public enforcement through appeal, judicial review and private prosecutions
3. Public enforcement using tort law

Step 1

Seek Government Enforcement

How to seek government enforcement?

Canada's approach to environmental law is to regulate human conduct to keep contamination and damage within "safe and acceptable" limits by enacting "command and control" legislation with built-in enforcement mechanisms.

Command and control legislation:

- identifies types of environmentally harmful activity,
- imposes specific conditions/standards on that activity and
- prohibits forms of the activity that fail to comply with the imposed conditions/standards.

Determine jurisdiction and legislation

- which level of government (federal, provincial, or municipal) is responsible for regulating
- the aspect of the environment you are concerned about (e.g. wildlife, forest, water) and,
- therefore, which piece of environmental legislation applies

Report Environmentally Harmful Activity

Legislation often allows the Minister or an employee to conduct inspections and/or investigations of regulated activities to determine whether the particular activity violates the legislation.

Inspection - Gives government broad powers to verify the compliance of regulated activities before they know a violation has occurred, e.g. police road checks.

Investigation - Gives government the power to seek and gather evidence or information in response to an alleged violation, e.g. police investigation of a crime scene.

Inspection or investigation

Inspection or investigation can occur:

- On receipt of information from other departments
- On receipt of a formal public complaint.
- Without a complaint, e.g.

Canadian Environmental Protection Act, Fisheries Act, Migratory Birds Act, Canada Shipping Act, Canada Wildlife Act, Canadian National Marine Conservation Areas Act, Canada National Parks Act, Species at Risk Act

What is the Outcome?

The Minister or an employee of the responsible department has wide discretion to decide what course of action to take.

Decision could be:

- no violation has occurred & no further action
- a violation has occurred & issue a ministerial order, direction to clean up or remedy the harm,
- prosecute.

Pros & Cons

Pros:

- No expense to complain
- The government will complete the investigation at its expense

Cons:

- Dependent on the government's assessment of whether a violation has occurred

Step 2

Compel Compliance Through
Appeal, Judicial Review or a
Private Prosecution

Appeal

Some environmental legislation prohibits environmentally harmful activities outright UNLESS they are approved or permitted.

e.g. federal *Fisheries Act*, no one can take part in an activity that causes an “alteration, disruption or destruction” of fish habitat unless they have a permit.

If you believe an activity is taking place without the proper approval(s) or the way the approval was issued was wrong, and if the Act provides a right of Appeal you may be able to appeal the Minister’s or employee’s decision that approved the activity and have it overturned by a Court.

Judicial Review

Judicial review is a court's examination of the conduct or decision of an inferior decision-maker, such as a court, tribunal, board, committee or Minister, to ensure that the conduct or decision was proper in law.

Steps for judicial review

- Does the applicable legislation require an activity to be approved?
- Has an approval been granted?
 - See e.g. EA approvals on the website of the PEI Department of Environment, Energy and Forestry
- When was the decision made?
 - The PEI *Judicial Review Act* normally requires an application be filed within 30 days
- You must have “standing” to bring an application
 - you have standing to protect your private interests/ a public interest litigant must be granted standing by the Court

What is the Outcome?

The Court can:

- overturn the decision,
- order the decision-maker to do something (e.g. issue a permit) or
- make a declaration about the state of the law, which proves that the other party is in breach of the law.

Pros and Cons

Pros:

- You could have the decision of the Minister or government employee overturned, which would set a precedent for future conduct by the government

Pros and Cons

Cons:

- Standing may be difficult to obtain
- Expensive, and you may have to pay other party's legal costs
- Judicial review is usually only available when the decision-maker has made an "error in law", i.e. the decision maker has not applied/followed the law properly
- government decision-makers are often given broad authority, which means the Court is likely to defer to the decision-maker

Private Prosecution

Under some environmental legislation, a citizen can bring a private prosecution and charge a person or entity with violating that environmental legislation – e.g. under either the *Fisheries Act* for the offence of causing harmful alteration, disruption or destruction (HADD) of fish habitat or of depositing a deleterious substance.

You must have reasonable grounds to believe that an offence has been committed, which means you have to observe an offence, speak to witnesses and gather evidence.

What is the Outcome?

If successful:

- the offender will be fined, required to clean up the damage or even be imprisoned
- you may get half of the penalty that is imposed

If unsuccessful, the court could require you to pay the other party's costs.

Pros and Cons

Pros:

- You don't need to have standing
- You don't need to wait for government intervention
- Prosecutions usually attract media
- The government may step in and take over the prosecution

Pros and Cons

Cons:

- Limitation periods may apply
- There are costs associated with going to court and gathering evidence
- Legal requirements for collection and preservation of evidence are very rigorous
- You may not be rewarded with any of the monetary penalty
- The Attorney General or responsible Minister may also decide to intervene and stay the charge

Step 3 Using Tort Law

Actions in Nuisance,
Negligence, Strict Liability

Start a Civil Action

If an activity that damages the environment also causes damage to you or your property, consider starting a civil action in court against the responsible party.

You will need a cause of action, i.e. the event or activity that forms the basis of the lawsuit.

i.e. negligence, private nuisance, public nuisance, trespass and strict liability.

Negligence

Any person, entity or the government can be sued for negligence if:

- the party owes you or the thing damaged, a duty of care (or obligation)
- the party breached the standard of care
- there is a causal connection between party's conduct and the alleged injury
- there is actual loss/damages to your interests
- the loss experienced was foreseeable

Nuisance

- *Private Nuisance* - Available only to those who own private property - you don't need to prove a breach of standard of care, but you do need to prove that your damages were foreseeable.
- *Public Nuisance* - The right to bring such an action lies with the government, unless an individual can show "special damages" unique to them and not common to other members of the public. Although an individual does not need private property interest (unlike private nuisance), it is difficult for an individual to establish "special damages."

Trespass and Strict Liability

Trespass - Only the person in possession of the property can bring the suit. You don't need to prove damage to property, breach of standard of care, or fault, but you do need to prove intentional interference with the property. Trespass can be based on a single incident.

Strict Liability - When a person or entity brings a dangerous substance on to their property that escapes and causes damage to the land or goods of someone else, the law holds that person "strictly liable" for any damage the substance causes without proof of intent, negligence or fault.

What is the Outcome?

Damages:

A monetary award to compensate the injured party for its loss. Damages could be nominal, general, special or punitive

Injunction:

A court order prohibiting someone from doing something, or requiring him to do something, while waiting for the court to make a decision. Therefore, it guards against future injuries rather than providing a remedy for past injuries.

Very difficult to obtain because you have to prove that you will suffer irreparable harm if the activity is not stopped

Pros and Cons

Pros:

The offender may have to pay damages and a portion of the cost of your legal fees if you are successful.

Cons: EXPENSIVE!

- You may have to provide security if you are asking for an injunction.
- Lawyer's fees, court fees and gathering evidence can be thousands of dollars.
- You may have to pay other side's legal costs if you are unsuccessful

Step 4

Initiate Legal Action Outside of the Courts

Petition

Petition

A petition is a written application from a person(s) to some governing body or public official asking that some authority be exercised to grant relief.

Options:

Informal

Provincial?

Federal Commissioner

Federal

Commissioner of the Environment and Sustainable Development (CESD) takes public petitions to ensure that Canadians can bring environmental concerns to the attention of federal Ministers and that these concerns are dealt with. Anyone can submit a petition to the CESD about environmental issues that fall within federal jurisdiction.

What is the Outcome?

The CESD decides whether or not to accept or reject the petition.

If accepted, it will be forwarded to the responsible federal department and notice of this will be sent to the petitioner.

A Minister must send a letter to the petitioner within 15 days acknowledging receipt of the petition and must respond within 120 days.

Pros and Cons

Pros :

- Inexpensive
- Can force the government to respond to specific questions based on a particular fact situation
- The CESD prepares a report every year that includes a chapter on all of the petitions that were submitted that year, along with the responses
- In some cases, the CESD may audit an issue that was the subject of a petition and to investigate

Pros and Cons

Cons :

- Not an enforcement process as there is no obligation to respond in a particular way
- The government will not be able to respond to questions that relate to legal proceedings, ask for a legal opinion or relate to a matter that is beyond the department's jurisdiction

Commission for Environmental Cooperation

The Commission for Environmental Cooperation (CEC) is comprised of representatives from Canada, Mexico and the USA. The CEC was established as a side agreement to NAFTA to prevent any unfair trade advantages gained through the non-enforcement of environmental laws. It has a Citizen Submission Process where the public can play an active “whistle-blowing” role when it appears that the government is failing in enforcing environmental laws. The CEC may review and investigate a submission and publish a factual record of its findings. Further details about the Submission Process can be found at: www.cec.org/citizen

What is the Outcome?

If the submission meets the criteria, the CEC may request a response from the offending government. If the response does not satisfy the CEC, a factual record may be created and the Council may make the record public.

Pros and Cons

Pros

- If the CEC makes the factual record public, there may be public pressure on the government to rectify the problem

Cons

- time-consuming, complicated
- If the NAFTA Ministers agree to undertake an investigation, there is no obligation on the government to do anything in response to the recommendations
- No enforcement mechanism beyond public pressure

Enforcement of Environmental Laws

Questions?

