

Environmental Law Summary Series:

Enforcing Environmental Laws

East Coast Environmental Law publishes a Summary Series on different aspects of environmental law. Volume I entitled, "Overview of Environmental Legislation" outlined some of the key federal and provincial environmental legislation. This Volume provides an overview of how the public can play a role in ensuring that environmental legislation is enforced. The aim is to provide awareness of the possible steps that can be taken to enforce environmental laws.

Please note that this volume cannot cover every possible course of action that can be taken to enforce environmental laws or provide specific guidance on when a particular course of action will be the most appropriate. Each of the steps may not be available in every circumstance. At the end of this volume is a list of definitions for the legal terms used herein.

Please visit our web site for past volumes of our Summary Series and other environmental legal resources: www.ecelaw.ca

What is Enforcement?

Enforcement involves any government or private action taken to determine or respond to non-compliance with environmental laws. Enforcement activities include:

1. Government enforcement;
2. Public enforcement through measures to compel compliance without resorting to formal legal action (i.e. the courts)
3. Public enforcement through measures to compel compliance through the courts

The first step of any enforcement process is to determine which level of government 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. The regulation of the environment is generally divided between the three levels of government as follows:

- Federal - Regulates matters involving environmental issues that cross provincial borders, e.g. Department of Fisheries and Oceans;
- Provincial - Regulates environmental issues that mainly affect the province, e.g. Department of Natural Resources; and
- Municipal - Regulates matters of a local nature, e.g. garbage collection and sewage.

Step 1 – Seek Government Enforcement

Generally, 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.

Report Environmentally Harmful Activity to the Government

What is it?

When you learn of environmentally harmful activity, the first step is to report it to the appropriate government authority responsible, e.g. - if you find oil or some other contaminant in a local stream call the provincial government; if there are fish in the stream you may also need to call the federal government.

Often environmental legislation will allow the Minister or an employee to conduct inspections and/or investigations of

activities that are regulated by the legislation 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.

When is it Available?

There are a variety of mechanisms that may trigger an inspection or investigation, including receipt of information from other departments or a formal public complaint. Some legislation authorizes the government to investigate without a public complaint and some requires a public complaint before an investigation will be done.

The following legislation allows the government to investigate or inspect alleged environmental damage, *without* a formal public complaint:

Provincial - Wildlife Act, Environment Act, Forests Act,

Provincial Parks Act, Occupational Health and Safety Act, Fisheries and Coastal Resources Act, Endangered Species Act, Water Resources Protection Act, Wilderness Areas Protection Act, Nova Scotia Environment Act

Federal - 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?

These tools give the Minister or an employee of the responsible department wide discretion to decide what course of action to take. Further, a government inspection or investigation does not necessarily ensure that the legislation is enforced. They can decide that no violation has occurred and take no further action or find a violation and issue a ministerial order, direction to clean up or remedy the harm, or prosecute.

Pros & Cons

Pros

- No expense to inform the government or issue a complaint asking the government to inspect or investigate
- The government will complete the investigation at its expense

Cons

- Entirely dependent on the government's assessment of whether a violation has occurred
- The government's only obligation is to determine whether an investigation is necessary and respond to the person who made the request within a certain time frame
- There are no guidelines for how the government must make their decision

Step 2 – Compel Compliance through a Legislative Remedy

Ask the Government to Investigate an Activity

As discussed under Step 1, certain legislation allows members of the public to ask the responsible government to inspect or investigate to find out if a violation has occurred. If a violation is found, enforcement measures may be implemented.

If the government will not respond, there are various legislative tools that the public can use to try and stop the activity.

Appeal an Approval Decision

What is it?

Some environmental legislation prohibits environmentally harmful activities outright but allows them to happen if they are approved or permitted. For example, under the *Nova Scotia Environment Act*, activities that are prohibited without approval are listed in the "Activities Designation Regulations" (www.gov.ns.ca/just/regulations/), and include pulp and paper plants; composting facilities; quarries; aquaculture cages; and pipelines. Under the 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 harming the environment, you may be able to appeal the Minister or employee's decision that approved the activity in the first place and have it overturned.

When is it Available?

Follow these steps to determine if an appeal of an approval is available in your circumstance:

- Check whether the applicable legislation requires the activity to be approved or have a permit
- If so, find out if an approval or permit has been granted by either checking the Environmental Registry (if there is one) or by making a request for information, e.g. under the Nova Scotia Freedom of Information and Protection

of Privacy Act (FOIPOP): <http://www.foipop.ns.ca/>

- If there is an approval or permit, find out when it was granted to see whether you missed the deadline for appealing
- Determine if you qualify as a "person aggrieved" by the approval decision, i.e. to appeal an approval decision, the decision must affect you

What is the Outcome?

- An appeal of an approval by a government employee or a Minister is time-sensitive
- The Minister will usually have to notify you within 60 days of the decision
 - *Note* - The Minister has the absolute discretion to dismiss the appeal, to allow the appeal and revoke the approval, to submit the appeal to alternative dispute resolution or to make any other order - there are no guidelines for how the Minister must make an appeal decision
- An appeal of an approval decision of the Minister to the court - the court could overturn the Minister's decision, affirm it, or make any other order
- An appeal of a decision of a municipal council or a municipal employee to an administrative board - the board will consider whether the decision is in line with certain policies and either affirm or overturn the decision or direct the employee to take certain actions

Pros & Cons

Pros

- Inexpensive to appeal under the legislation to a Minister
- If the Minister, the court or the board finds the approval decision was wrong, it will overturn it

Cons

- Expensive to appeal to a court or board
- You have to qualify as a "person aggrieved" to appeal, which will be defined in the legislation
- There may be a limitation period of 30 days from the decision
- If you appeal a Minister's decision to the courts or a municipal council's decision to the board, the judge or adjudicator is likely to grant deference to the decision-maker, i.e. is not likely to overturn the decision out of respect for the Minister's initial/original decision

Start a Private Prosecution: A Quasi-Criminal Court Action

What is it?

When you become aware of an environmental offence, you can inform the Crown prosecutor of the appropriate level of government and let the prosecutor decide whether to prosecute the offender. If the Crown decides not to prosecute, you may be able to bring a private, quasi-criminal prosecution.

When is it Available?

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 could also bring a prosecution under the Canadian Environmental Protection Act (CEPA) for the release of a toxic substance listed in Schedule 1 of the Act.

To bring a prosecution, 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, you may get half of the penalty that is imposed and the offender will be fined, required to clean up the damage or maybe even face prison time. However, if unsuccessful, the court could require you to pay the other party's costs

Pros & Cons

Pros

- You don't need to have standing
- You don't need to wait for government intervention
- You may be entitled to part of the monetary penalty
- Prosecutions usually attract media

Cons

- Limitation periods may apply
- There are costs associated with going to court and gathering evidence
- 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 – Compel Compliance Through a Formal Court Action

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. To do this, you will need a cause of action, i.e. the event or activity that forms the basis of the lawsuit.

What is it?

The most common types of environmental lawsuits are tort actions based on the following causes of action: negligence, private nuisance, public nuisance, trespass and strict liability.

When is it Available?

Negligence - Any person entity or even the government can be sued for negligence. You don't need to have a property interest. To be successful in proving a party or entity was negligent, you must prove:

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

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 - 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. However, only the person in possession of the property can bring the suit.

Strict Liability - this tort will be available 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 people who bring dangerous substances on their property will be held "strictly liable" for any damage the substance causes without proof of intent, negligence or fault. You just have to prove that it was the person or entity's object that escaped caused damage to the environment.

What is the Outcome?

There are really two remedies available for civil actions:

- *Damages* - Monetary award made by the court 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 forcing him or her 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
- If you get an injunction during a trial, you may have to post security to cover the other party's costs/damages in case your suit fails

Pros & Cons

Pros

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

Cons

- If the matter proceeds to trial, the cost of lawyer's fees, court fees and gathering evidence can be thousands of dollars
- If you lose, you may have to pay a portion of the winning party's legal fees
- The evidence may be difficult to gather and you will have to prove that you have experienced damage, which can be hard to quantify
- Be aware that other parties may be involved
- Limitation period may apply

Intervene in Another Civil Action

What is it?

If you or your group feels that you could provide meaningful contribution to a case that is coming before the courts that you are not directly involved in, you can get the court's permission to become an intervenor. This is a common way for environmental groups to get their views before the court.

When is it Available?

In order to receive permission to intervene, you need to: (1) have an interest in the outcome of the court proceeding, (2) make a useful contribution, or (3) offer a perspective that is different from the parties involved in the case.

What is the Outcome?

A positive outcome would be for the court to recognize the intervenor's interest or to pick up on the view the intervenor provides. However, the court may not take your views into account in reaching a decision.

Pros & Cons

Pros

- You have the opportunity to change the law by showing a judge that the environment should be considered in his or her decision

Cons

- The judge may not take an intervenor's views into account
- To be effective, you should hire a lawyer, however, you will not be able to recover any of part of your legal fees because you are not a party

Bring an Application for Judicial Review

What is it?

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.

When is it Available?

When the applicable legislation does not explicitly allow for the appeal or review of a decision (as discussed above). Courts always maintain the authority to review the decision.

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. A declaration is a powerful remedy against the government as it will clarify or interpret the legislation, and the government does not want to be seen 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

Cons

- You must have standing
- There are significant costs involved in bringing a court case and you may have to pay the other party's legal costs if you are not successful
- It is very difficult to be successful on a judicial review application because government decision-makers are often given broad authority, which leaves little room for a court to find that their decision was wrong
- The results may not be satisfactory, as the entity causing harm to the environment may be able to repeat their actions as long as they pay closer attention to the procedural rules

Step 4 – Initiate Legal Action Outside of the Courts

There are various legal tools available that do not involve going to court. While these types of tools will not result in enforcement, in the sense that the offender will have to repair the environmental damage or pay a fine, they can be powerful in swaying public opinion.

Petition

What is it?

A petition is a written application from a person or persons to some governing body or public official asking that some authority be exercised to grant relief, favors or privileges.

Provincial - The Office of the Ombudsman handles complaints against provincial or municipal government departments, agencies, boards and commissions.

Federal - The Auditor General has established a Commissioner of the Environment and Sustainable Development, which takes public petitions to ensure that Canadians can bring environmental concerns to the attention of federal Ministers and that these concerns are dealt with in a timely manner.

When is it Available?

Provincial- Any person, group, society or company with a complaint against a provincial or municipal government department, agency, board or commission can make a petition to the Ombudsman.

Federal - Anyone can submit a petition to the Commissioner about environmental issues that fall within federal jurisdiction.

What is the Outcome?

Provincial- The Ombudsman will assess the complaint to decide how to proceed. Most often, an administrative review will be conducted rather than an investigation. If an investigation is done, both parties will be advised of the outcome and recommendations may be made.

Federal- The Commissioner 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 & Cons

Pros - Provincial

- The request is inexpensive
- Administrative reviews can clarify miscommunication or misunderstanding of a government policy or procedure
- Investigations can result in the Ombudsman making recommendations that can require the government body to review how it handled the complaint, change its policies or procedures, or improve how it communicates with the public and other government bodies

Pros - Federal

- Inexpensive and can force the government to respond to specific questions based on a particular fact situation
- The Commissioner 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 Commissioner may choose to audit an issue that was the subject of a petition and to investigate

Cons – Provincial & Federal -

- While the information received may be useful, neither the provincial nor the federal petition process is 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 (CEC)

What is it?

The Commission for Environmental Cooperation (CEC) is an international organization 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 (<http://www.cec.org/citizen/>).

b) When is it Available?

Under the North American Agreement on Environmental Cooperation, any NGO or person residing in Canada, Mexico or the USA can submit a claim directed against a governmental party to the CEC. A submission must assert that a government is failing to effectively enforce an environmental law, by identifying the applicable statute, regulation, or provision, and showing how the omission causes harm. You must have previously communicated the omission to the relevant governmental party.

What is the Outcome?

If the submission meets the certain 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 & Cons

Pros

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

Cons

- May be quite time-consuming, complicated and even if the CEC's secretariat recommends an investigation, there is no obligation that one be undertaken
- If the Ministers of the three NAFTA signatories agree to undertake an investigation, there is no obligation on the governmental party to do anything in response to the recommendations
- Does not embody any enforcement mechanism beyond public pressure

Ongoing Informal Options

These options are always available and should be done at the same time as any of the above options.

- Write letters to the government and to the Minister in charge, other local politicians, the critics for the other political parties, and the company or individual causing the situation
- Start a petition among local residents
- Talk to local and national media to raise public awareness about the issue
- Research the effects of similar projects or situations

- Contact other local or national advocacy groups for support and information
- Call a public meeting
- Make a Freedom of Information request to the provincial Department of Environment or an Access to Information request to the federal ministry involved
- Become involved in law reform efforts to attempt to convince the government to change the existing law
- Work on land acquisition and conservation easements

Comparison Chart: How Various Enforcement Measures Stack Up

	Availability	Cost	Time	Lawyer Suggested	Court	Best Outcome	Worst Outcome
Report to Government to Inspect/ Investigate	Based on applicable legislation	Low	Low	No	No	The government may inspect, investigate and enforce	The government may decide there is no violation and take no further action
Require Government to Inspect/ Investigate	Based on applicable legislation	\$	Low	Useful but not suggested	No	The government may inspect and then enforce.	The government may decide that an investigation is not required and take no further action
Appeal Approval Decision	Based on applicable legislation	\$-\$\$\$	Med-High	Yes	Maybe	The Minister or the court may overturn the decision approving the activity	The Minister or the court could uphold the approval decision
Private Prosecution	Based on applicable legislation	\$\$\$	High	Yes	Yes	The offender may be charged under the Act and you may get part of monetary penalty	The offender may not be charged or the A.G. may stay the prosecution and you may have to pay costs
Civil Action	Based on the facts of the case and whether there is enough evidence to prove a cause of action, i.e. negligence	\$\$\$\$	High	Yes	Yes	The offender may be liable for the environmental harm and have to pay damages or repair the harm. The court could also issue an injunction stopping the harm	The action could fail and you will have to pay costs to the other party
Intervene in a Civil Action	If the court grants you permission	\$-\$\$\$	High	Yes	Yes	The court may rely on your view of the law	The court may not consider your point of view on the case
Judicial Review of a Decision	Based on legislation and the type of decision being reviewed	\$\$\$\$	High	Yes	Yes	The court may overturn the decision, require the decision-maker to do something or make a declaration about the state of the law	The court could uphold the decision and they could award costs against you
Petition	Based on whether the subject falls under federal or provincial jurisdiction	\$	Med-High	No	No	The Commissioner, Attorney General or Ombudsmen may investigate and write a report about the government's actions	The request could be refused No cost implications
Commission for Environmental Cooperation (CEC)	When a governmental party is causing harm by failing to effectively enforce an environmental law	\$\$	High	Yes	No	A factual record will be made public and the governmental party will accept the recommendations	An investigation may not be undertaken or a factual record could be made but not acted on by the government
Ongoing	Anytime	\$	Constant	No	No	Effect change.	Could fall on deaf ears

Common Legal Definitions used in this Summary Series

Action - A case or lawsuit; a legal and formal demand for enforcement of one's rights against another party asserted in a court of justice.

Alternative Dispute Resolution - Procedures for settling disputes outside of going to court.

Appeal - Timely resort by an unsuccessful party in a lawsuit or administrative proceeding to an appropriate superior court empowered to review a final decision on the grounds that it was based upon an erroneous application of law.

Civil Action - An action brought to enforce or protect private rights - not a criminal proceeding.

Common Law - A type of legal system in which the law is created or refined by judicial decisions. There is no authoritative statement of the law; rather judges create it by making precedents.

Costs - Fees and charges required by law to be paid to the courts or their officers, the amount of which is specified by court rule or statute. A monetary allowance, granted by the court to a prevailing party and recoverable from the unsuccessful party, for expenses incurred in instituting or defending an action or a separate proceeding within an action.

Damages - Monetary compensation that is awarded by a court in a civil action to an individual who has been injured through the wrongful conduct of another party.

Defence - A legal response to a complainant, denial of truth or validity of the plaintiff's charge or claim.

Defendant - Defending or denying the party against whom relief or recovery is sought in an action, or the accused in a criminal case.

Injunction - A court order by which an individual is required to perform, or is restrained from performing, a particular act. A writ framed according to the circumstances of the individual case.

Judicial Review - A court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles.

Legislation (Statue/Act) - The preparation and enactment of laws by a legislative body.

Limitation Period - A designated timeframe in which an appeal or a court action can be brought against a party, which are usually set out in the Limitations Act of Nova Scotia or other specific acts. Note that the time may start to run from when the damage happens or is discovered.
Negligence - An action for a civil wrong available for a loss that is caused by an individual's accidental or careless behaviour.

Permit - A license or document given by an authorized public official to allow a person or entity to perform certain acts.

Party - Any person involved in a transaction or proceeding. Plaintiffs and defendants are parties in lawsuits.

Plaintiff - A person who brings a legal action.

Private Nuisance - Available where an act or omission results in an unreasonable interference with the use or enjoyment of one's land. The act or omission can be intentional, unintentional or even negligent, but it must be a substantial interference and damage must be foreseeable. The list of potential nuisances is not closed and includes: vibrations, noise, dust, odours, air and water pollution.

Prosecution - The act of pursuing a criminal trial by the crown.

Public Nuisance - A quasi-criminal offence available for widespread actual or potential interference with public convenience or welfare, such as damage to health, safety, morality, or comfort (e.g. pollution of public property, like a beach).

Standing - The legally protectable stake or interest that an individual has in a dispute that entitles him or her to bring the controversy before the court to obtain judicial relief.

Strict Liability - Strict Liability: This term applies to two types of legal doctrines:

- (1) a form of tort liability, discussed in this Summary Series under "Start of Civil Action", that makes a person responsible for the damage and loss caused by his or her acts and omissions by the collection of dangerous things on his or her property that are likely to do mischief, regardless of culpability, i.e. intent, fault or negligence; and
- (2) a type of quasi-criminal offence that is created by legislation, for which there is no necessity for the prosecution (i.e. the crown or a member of the public through a private prosecution) to prove that the offender intended to cause the harm. Essentially, by doing the act that the legislation prohibits, the person or entity has committed the offence. However, the offender can present a "due diligence" defence to strict liability offences by advancing evidence that he/she/it took all reasonable measures to avoid the offence being committed. The defence of "due diligence" will be available if the offender reasonably believed in a mistaken set of facts, which, if true, would render the act or omission innocent, or he took all reasonable steps to avoid the particular event.

Stay - The act of temporarily stopping a judicial proceeding through the order of a court.

Tort - Negligent or intentional acts which result in harm.
Trespass - Available for unjustifiable interference with another's possession of land. Must be an intentional action, i.e. falling on to another's property would not count. It also must be direct and physical. There is no need to prove actual harm.

For More Information

Please visit www.ecelaw.ca - for other legal resources and information library..

To find the full text of the federal and provincial Acts and Regulations go to the:

Canadian Legal Information Institute: www.canlii.ca,

Federal Department of Justice: <http://laws.justice.gc.ca/en/>,

Nova Scotia House of Assembly: www.gov.ns.ca/legislature/legc/

East Coast Environmental Law Association

This guide was developed by East Coast Environmental Law Association (ECELAW), a non-profit organization whose mission is to provide legal advice to individuals and organizations to ensure environmental laws are effectively used. ECELAW also conducts research and offers advice on how to improve environmental laws that affect this region. ECELAW delivers these services through collaboration among students, academics and practitioners (www.ecelaw.ca). The [Environmental Law Students' Society](#) at Dalhousie Law School and the [Nova Scotia Environmental Network](#) (NSEN) supported the creation of the Volume by providing research assistance. NSEN is a provincial, non-partisan umbrella organization which strives to connect environmental and health organizations to conserve and enhance our natural environment and to achieve a sustainable future for Nova Scotia (www.nsen.ca).

Further Reading

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