

Environmental Law Summary Series:

Bringing a Private Prosecution

Volume 3 of the East Coast Environmental Law Summary Series is an overview of how the public can play a role in enforcing environmental laws through private prosecution. It is intended to serve as a brief introduction, so that you can decide whether private prosecution is the appropriate avenue for you. To assist you in reviewing this publication, at the end of the volume there is a list of definitions of legal terms shown in green text and a chart outlining applicable legislation.

Prosecutions: An Overview

There are three levels of government in Canada: federal, provincial (or territorial) and municipal, each of which has the authority to make laws in relation to specific aspects of the environment. See Volume I of our summary series for an explanation on how laws are made and Volume II for information about enforcement of environmental laws (www.ecelaw.ca). These laws include statutes, and the regulations and orders made under a statute. Many laws set out offence provisions making it an offence to violate that law. For example, under s.13 of the Nova Scotia *Endangered Species Act* it is an offence to interfere with endangered

species or their habitat. When these laws are broken, the offender may be prosecuted, i.e. a legal action may be brought against them in court. It is important to remember that a prosecution cannot be brought unless a law has been broken.

The vast majority of prosecutions of environmental laws are **public prosecutions**, initiated by enforcement officials and conducted by Crown counsel, on behalf of the public.

What is a Private Prosecution?

A private prosecution is a legal action brought in **provincial court** by an individual other than a government official (except in his/her capacity as a private citizen). It is primarily the responsibility of the government to enforce its laws by investigating and prosecuting violators; however, where a government has failed to act, it is the right of every citizen to launch a private prosecution. The right of the public to prosecute is a residual common law right, also enshrined in the *Criminal Code* (s. 504).

Private prosecutions versus civil proceedings

When you launch a private prosecution, you are taking action against an individual for violating a law and this is treated as a criminal proceeding. Most environmental laws are regulatory and not considered criminal. Like traffic violations, environment offences are treated procedurally in the same fashion as criminal proceedings, but are not always considered true crimes and may not result in criminal records.

Civil actions are different from private prosecutions, as they arise from wrongs done to you personally. Another important difference between private prosecutions and civil actions is the burden of proof. According to the *Canadian Charter of Rights and Freedoms*, everyone has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." (s.11(d)). In a private prosecution, this means that the prosecutor must prove their case against the accused "beyond a reasonable doubt".

However, as a civil action is essentially a private one between two individuals, s. 11(d) of the *Charter* does not apply (i.e. "guilt" and "innocence" only apply to criminal proceedings; civil actions generally determine "liability" or "fault" rather than "guilt"). In civil actions you need only prove your case

on a "balance of probabilities", a much lower standard. Finally, as a civil action is for a personal wrong, damages will be awarded to the injured party. On the other hand, in a private prosecution, the wrongdoing is considered an offence against the state, so damages are paid to the government, not the private prosecutor. (Note - the *Fisheries Act* provides the sole exception: damages may be split between the government and the private prosecutor.) However, s.738 of the *Criminal Code* allows a court to order restitution to the victims of certain offences.

What can be prosecuted?

Private prosecution may be launched in response to all violations of the *Criminal Code*, federal, provincial, territorial laws or municipal bylaws, unless the particular law specifically does not allow for prosecutions. It does not matter whether the offence occurred on private or public land. The type of offence determines how the case will be litigated:

(i) Criminal offences

The *Criminal Code* is a federal statute that sets out offences that cause harm to people or property. They are not specific environmental offences, but there are several general offences commonly used to prosecute environmental issues. Some examples are criminal negligence (ss. 219-221), common nuisance (s. 180), mischief (s. 430), dangerous (explosive) and offensive volatile substances (ss. 79-81 and 178), disturbing the peace (s.175), and offences against animals (ss. 444-447). For all criminal offences, the mental element (*mens rea*) must be proven along with the specific act or omission (*actus reus*).

(ii) Regulatory offences

As explained in Volumes I and II of the Summary Series, all three levels of government tend to pass 'command and

control' legislation that identifies environmentally harmful behavior. A statute provides the general framework of the law, while the regulations provide the practical detail, including how provisions will be implemented. These types of laws create regulatory offences, which are offences not found in the *Criminal Code*, but in either statutes or regulations. Violations of these laws can be privately prosecuted. The majority of environmental offences are regulatory offences. There are three different types of regulatory offences:

- Mens rea offences require proof of a fault element, i.e. that an offence was committed "knowingly" or with "intent".
- Strict liability offences require that the prosecutor prove that the act/omission occurred and then the onus switches to the accused to show that reasonable steps were taken to avoid committing the offence (*due diligence*) or that a mistake of fact was made. The majority of regulatory offences are strict liability offences.
- Absolute liability offences are those where commission of the offense is tantamount to guilt. The defence of *due diligence* is not available; however, defences that relate to the act/omission do exist.

(iii) Summary Conviction, Indictable and Hybrid Offences

Regulatory offences are further subdivided by the procedural rules that will apply at trial as follows:

- Indictable offences (e.g. murder) tend to be more serious, and so are seldom prosecuted privately;
- Summary conviction offences include the vast majority of environmental offences. They tend to be less serious in nature and unless otherwise set out by statute, have a maximum penalty of a \$2,000 fine or 6 months imprisonment. Many environmental statutes set out much higher penalties;
- Hybrid offences are those where the prosecutor can elect which procedure to apply, indictment or summary, depending on the nature and seriousness of the act.

Who can launch a private prosecution?

Any individual who has reasonable grounds to believe that another person has committed an offence may lay an *information* (or a charge) before a *Provincial Court Judge* or *Justice of the Peace*. The individual who lays the *information* is called an informant and becomes the private prosecutor once the process has been issued. While only individuals may lay an *information*, any individual, group, or incorporated body can carry forward the prosecution. Moreover, it is not necessary for that individual to have suffered a personal loss or injury; however, the informant must personally hold the "reasonable" belief that the offence was committed. 'Reasonable grounds to believe' means that a reasonable person, based on the evidence available, would believe that the accused committed the act. Also, it is important that the purpose of laying the *information* is to seek enforcement of the law or stop the activity, and not some other malevolent purpose.

Should You Prosecute?

Bringing a private prosecution is a complex, time-consuming task without any guarantee of a successful outcome. Before deciding to initiate a prosecution, it is best to be informed of the implications and the possible barriers to moving forward (such as the *AG* staying the proceeding). Keep in mind that even unsuccessful private prosecutions can serve to bring attention to illegal activity, highlight failings in government enforcement and can compel governments to enforce its laws.

If it looks as though private prosecution is not the right avenue, see Volume II of our Summary Series, entitled "Enforcing Environmental Laws" for alternative measures.

Power to intervene

Any prosecution initiated by a private party is limited by the power of the *Attorney General* (the "AG") to intervene on behalf of the *Crown*. At any point after an *information* is sworn, the *AG* may intervene and assume conduct of the prosecution, withdraw the charges, or *stay* the proceedings. Absent evidence of "flagrant impropriety", the court will not interfere with the intervention of the *AG*. If the *AG* stays the proceeding, they may review the evidence, call for an official investigation and either recommence prosecution or allow the case to lapse. In rare cases, the *AG* may allow the private prosecution to go forward, but will remain involved in the case by calling, examining and cross-examining witnesses, presenting evidence and making submissions.

An ideal scenario for a private prosecutor would be to put together a sufficiently strong case that the *AG's* office is compelled to take over the case. This would save the private prosecutor a substantial financial burden and will more likely produce the desired result.

Who can be prosecuted?

(i) General Rule (any individual, private entity or government)

Unless a law provides otherwise, you can bring a private prosecution against any person if you have reasonable grounds to believe that that person has committed an offence. The word "person" has a broad definition at law, and can be an individual, the federal or provincial *Crown*, or an organization. A private prosecution may also be brought against any person who has attempted or assisted in the commission of an offence, or encouraged or counseled another to commit an offence.

(ii) Liability of Directors and Officers

Often corporations are involved in violations of environmental statutes, not individuals. At common law, if a director or officer of a corporation fails to prevent an environmental offence from occurring, they may be found personally liable for the commission of that offence, unless they can show *due diligence*. Additionally, some statutes, such as the *Canadian Environmental Protection Act, 1999* (CEPA), have provisions that impose a duty on directors and officers, and address the liability of these individuals if the corporation commits an offence. Where a corporation can be shown to exercise control over the actions of the director or officer in question, the corporation may also be found liable.

(iii) Liability of the Crown

Unless specifically provided for in the statute, neither the provincial nor the federal *Crown* is bound by law and cannot be prosecuted. However, some statutes expressly bind the *Crown*, such as the *Fisheries Act* and *CEPA*. While federal laws that bind the *Crown* are generally interpreted to bind the provinces as well, there are constitutional limits on the provinces' ability to bind the federal *Crown* with provincial law. If the law binds the federal *Crown*, the *Crown* may be prosecuted for violations of that law.

Shortcomings of the Remedy

In most situations, there will be no financial compensation for the private prosecutor. Any imposed fines are generally paid to the federal, provincial, or territorial government(s). One notable exception is a private prosecution under the *Fisheries Act*, where a portion of the fine, or all of it, may be paid to the informant or private prosecutor. However, judges have broad discretion to apply penalty payments to other areas – i.e. the environmental damages fund.

Evidentiary Requirements

Prior to prosecuting, you should be sure that there is sufficient evidence to prove “beyond a reasonable doubt” that the offender has committed the offence. If there is insufficient evidence, you should consider bringing what you have to the proper authorities, who may have a greater capacity to gather further evidence. If you personally suffered damage as a result of the violation, you may consider a civil suit, as the burden of proof is lower.

Limitation Period

Limitation periods put a time limit on when an action may be brought against the offender. Each particular law usually specifies the limitation period. Most environmental laws set at two years, either from the date the offence was committed, or the date that the designated official first became aware of the offence. In the case of continuing offences, like pollution, which happens over time, the limitation period restarts each day the pollution occurs.

If a prosecution is started after the limitation period has passed, the court no longer has jurisdiction and your case will be dismissed unless you can successfully argue that your situation warrants an extension of time (see the *Limitations of Actions Act*). Therefore, be sure to confirm the applicable limitation period before launching a private prosecution.

Impact on Civil Proceedings

Generally, private prosecutions do not affect civil suits that arise out of the same events (i.e. you can prosecute the offender in provincial court and, if you have personally been affected, bring a civil action for damages in the Supreme Court). Furthermore, evidence of a judgement in your favour in one action can bolster your position in the other. However, it is important to remember that prosecutions and civil suits have different burdens of proof and different procedures. Therefore, a **conviction** in one courtroom will not guarantee

success in the other. Be sure to check whether there are any provisions in the law barring either a civil action or a private prosecution.

Impact of Other Enforcement Actions

An enforcement action includes any steps taken by the designated government authority that compels compliance with a law (see Volume II of our summary series). Many laws have provisions for enforcement actions, such as warnings, fines and administrative orders. You should consult the relevant environmental law to see if any enforcement actions specifically bar private prosecutions.

Expenses

Bringing a legal action is an expensive process. There are several different types of expenses, including the following:

- **Legal fees** - the fees you pay to a lawyer for his or her work. The amount will depend on the lawyer, the nature of the case and the court that hears the case.
- **Disbursements** - the expenses incurred by the lawyer or the individual private prosecutor in preparing for and conducting the prosecution, such as court charges, photocopying and expert witness fees.
- **Costs** - the amount the court requires the losing party to pay. These generally will cover only a portion of the winning party's expenses. This is not an upfront expense as costs are rarely paid in criminal proceedings. However, judges have discretion to award costs when they think it would be just. Costs are more likely to be awarded in favour of the accused than a private prosecutor.

Added to these are the costs incurred by a private prosecutor for data collection and evidence gathering, and the time spent when they would otherwise be engaged in gainful activity (wages, etc.), prior to and during the legal action.

How to prepare your case

As has been explained above, a private prosecutor must prove all elements of the offence ‘beyond a reasonable doubt’. This is a demanding burden of proof. To be successful in bringing a private prosecution, it is important to be familiar with the rules of evidence and different methods for collecting and handling evidence and accessing relevant information.

Rules of evidence

The primary role of the prosecutor is to pursue a just result. A prosecutor has the duty to present all relevant evidence (both for and against your case) to the court. The rules of evidence are complicated. A private prosecutor may require expert assistance with the interpretation and application of these rules. They are governed by both statute and the common law. If you are enforcing federal legislation, see the *Canada Evidence Act*. For provincial legislation or municipal by-laws, see the Evidence Act. The following is an overview of some of the main evidentiary rules:

(i) General rule:

As a general guideline, all material, relevant, reliable, non-privileged information is admissible in a court:

- **Material evidence** is information that relates to the offence, identifies the accused or proves intent.
- **Relevant evidence** is information that is likely to prove or disprove a particular fact at issue before the court (for example, the opinion of a layperson will not often be considered relevant, but the opinion of an expert will).

- **Reliable evidence** is trustworthy information from a credible source (for example, evidence made by written statement instead of in person is considered unreliable, because the person has not sworn to its accuracy in court. Also, physical evidence that may have been tampered with is considered unreliable.)
- **Privileged evidence** is that which is barred from admission in court because it is covered by solicitor-client **privilege** or another form of “class” or “blanket” **privilege**, or is information traditionally seen as being “confidential” and which may be deemed **privileged** in some cases. Evidence must be **non-privileged** to be admitted in court.

(ii) Hearsay:

Any statement made to the witness by a third party (anyone who is not present to testify in court) is hearsay. In our court system, the defense has the right to cross-examine a witness but with third party evidence there is no such opportunity. Therefore, a witness will not generally be allowed to testify about information provided to them by a third party. To avoid this rule, it is important to have the third party testify themselves. There are some exceptions to this, such as when it is impossible for that third party to testify (ie. a death bed confession of events witnessed).

(iii) Disclosure:

The accused has the right to review all of the evidence collected, even if it will not be presented in court. However,

the defense does not have to provide access to any evidence to the private prosecutor.

(iv) Continuity of evidence:

This can also be thought of as the 'chain of custody'. When physical evidence is presented in court, the private prosecutor must be able to demonstrate that they have exerted control over it since collection, and that it has not been tampered with. This rule will be especially important during the data collection stage of the prosecution.

Collecting Evidence

In order to mount an effective case, you must have sufficient evidence to prove the facts that establish all of the elements of the offence. This includes the identity and conduct of the accused as well as the circumstances surrounding the offence. As has been previously stated, in private prosecutions this means proving the facts 'beyond a reasonable doubt'. Thus, as a private prosecutor, collecting evidence will be of utmost importance, and so you should seek assistance. Government officials such as fisheries officers, have the technical expertise, equipment and often a right of access beyond that of a common citizen. They may also be willing to provide you with manuals, sampling kits or advice on collection. Another source of help could be local environmental organizations, which may have staff or volunteers with advice and experience in data collection (e.g. the Community-Based Environmental Monitoring Network).

(i) Taking notes

Note taking is an incredibly useful evidentiary tool. While it may seem that you will be able to remember most of what you witness while collecting evidence, a trial may be more than a year into the future and you will be expected to be able to testify in great detail. Notes should be in pen and the pages numbered and dated, to escape accusations that they have been tampered with. They should include the following information:

- Name(s) of person(s) present;
- Date, time, weather, and other environmental conditions;
- Name, address, and/or location of the site you are visiting;
- Name(s) of persons or corporations involved with the site;
- Any identifying signs or marks indicating who is operating at the site, and their location;
- Time and place of any photographs or video taken, along with roll and frame number;
- Your observations of the site, event and type of activity; and
- To demonstrate your objectivity, your observations of any steps that have been taken to mitigate (reduce the impacts of) the problem. (Mallet, p. 150-151)

As your notes will contain almost all of the information integral to your investigation, they must be handled with great care. Keep control over your notes at all times - any evidence that they have been tampered with will affect their reliability.

(ii) Taking physical samples

For many environmental offences, you will want to take physical samples as evidence. Some things you should keep in mind when collecting samples:

- Collect with a partner. This will make collection easier, and they can serve as a witness and be called upon to testify in court;
- Set up a procedure and follow it;
- Label all of your samples as accurately as possible with the time and location each sample was taken;
- Make sure all samples correspond with your notes;
- Keep samples in your possession, preferably in a locked area; and

- Deliver samples to be tested yourself, by using a reputable courier or by registered mail. You should warn a laboratory that the samples will be used in a criminal prosecution; most laboratories have procedures in place for dealing with chain of custody issues.

(iii) Do not trespass

Without proper authorization, a private prosecutor does not have any special right to enter private property. Any uninvited presence on private property could mean that you have broken the law by trespassing. Any information collected while trespassing will be inadmissible in court. If you require evidence from private property, seek the help of someone who has permission to access the property, such as a government official, or ask the owner of the property to take a sample.

Accessing Information

There are several tools and remedies that may be available for obtaining the necessary information that may be in possession of the alleged offender/government:

- **Search Warrant** – an order issued by a justice that authorizes a search of a specified premises and seizure of evidence. The procedures and forms for obtaining a search warrant are set out in the *Criminal Code*. Judicial officers are hesitant to issue search warrant orders at the request of private individuals, so you may need to obtain the assistance of an experienced criminal lawyer.
- **Subpoena** – an order requiring the person subject to the subpoena to attend court for the trial. When other witnesses are required in addition to the informant, an application for a subpoena should be made before the court in which that evidence will be heard. The application can be made by filling out a blank form, available from the *Provincial Court* Clerk's office and can only be made once the alleged offence is before the courts. The subpoena should be served by a *peace officer*, or other official qualified to serve civil process, such as a Fisheries officer. As the private prosecutor, bring the completed application to the judge that issued process on your *information*; if the witness fails to appear, a warrant for their arrest will be made out.
- **Legal rights to access information** - laws that provide for citizen access to information. Examples include: the federal *Access to Information Act* and the provincial *Freedom of Information and Protection of Privacy Act*. It is important to read this legislation carefully; access to information legislation can overlap with other statutes. Remember that federal access to information legislation prevails over restrictions in other legislation unless a statute or regulation specifically provides that it does not. You should be aware that the government has the right to refuse to disclose certain information if to do so would be contrary to the public interest. This immunity has been incorporated into federal and provincial law, such as the *Canada Evidence Act*.

How to Initiate a Private Prosecution

There are many stages to a private prosecution. The following is a brief description of these stages. It should be noted that for everything beyond making a formal complaint it is recommended that you seek legal advice. While it is not necessary to retain legal counsel to bring a private prosecution, it would be shame to have a case dismissed for procedural errors. Do not forget that at any of these stages the AG can intervene and take over the conduct of the prosecution or stay the prosecution.

Make a Formal Complaint

A complaint must be filed with the department/agency of the level of government (federal, provincial, territorial or municipal) that is responsible for enforcing the law that has allegedly been broken. If a private prosecution goes ahead without the proper government authority having had the opportunity to respond to the charge, the court could dismiss the case, or the government could intervene and dismiss the charges or enter a **stay** of prosecution.

If it is difficult to determine which government department/agency you should contact, it is recommended to contact all of the agencies involved. A summary of environmental legislation and contacts was compiled in Volume I of this series.

Seek Legal Assistance

While a lawyer is not required to launch a private prosecution, seeking legal advice at any stage is advisable. Pursuing legal action is expensive. It will be difficult to find free Legal Aid assistance for environmental offences. However, it is possible to find individual lawyers willing to take on **pro bono** work, as well as some organization that provide funding and/or various forms of legal support such as Ecojustice. Organizations, like East Coast Environmental Law or the Legal Information Society of Nova Scotia, could assist you in finding information and resources.

Lay an Information

An **information** is a written statement of an alleged offence which is sworn before a **Provincial Court Judge/Justice of the Peace**. This is a complete and accurate statement of what you know, or reasonably believe to have transpired, and includes **information** such as your name, and the date and location of the offence. An **information** can ordinarily be typed on blank paper, as long as it is in the wording and format prescribed by the **Criminal Code**, otherwise, forms are available from the court. The information must be laid in the jurisdiction where the alleged offence occurred, which in Canada would be your province or territory. Furthermore, it is customary to lay the **information** with the **provincial court** closest to where the offence occurred. It is important that the **information** is complete and all the details contained therein are accurate, however, it may be possible to make amendments at trial or any other stage of the proceedings.

Obtain a Subpoena

If the Judge/Justice of the Peace finds that a case is made out, they will issue a subpoena requiring the accused to appear before the court at a specified date and time. If a judge refuses to issue a subpoena, it is possible to go before another judge, but you may be required to swear a new **information**. A **peace officer** should serve the subpoena. The private prosecutor should make sure they file an **affidavit** of service with the court showing that the subpoena has been served.

First appearance

The purpose of the first appearance is to read the information (or charge) to the offender and ensure they understand the charges against them. At the first appearance, also known as the arraignment, both the informant (or private prosecutor) and the accused appear before the court. After the **information** is read,

the accused will enter a plea. If he/she pleads guilty, the judge may pass sentence immediately or set a date for a sentencing hearing. If he/she pleads not-guilty, a date will be set for the preliminary hearing, or if one is determined not to be necessary, a date will be set to proceed directly to trial.

Attend Preliminary Hearing

The purpose of the preliminary hearing is to determine if the case is strong enough to proceed to trial. At the preliminary hearing, the prosecutor will present their evidence. At this stage, it is only necessary to present sufficient evidence that, if believed, could result in **conviction**. It also serves to enter evidence into the court record, which may otherwise be lost. If there is insufficient evidence, the court will dismiss the case without proceeding to trial.

Attend Trial

The purpose of the trial is to determine if the offender is guilty of the charge laid against them. At trial, the private prosecutor presents his or her case first and calls their witnesses. The private prosecutor may also submit exhibits – any physical evidence or documents collected – at this time. After the private prosecutor has complete direct examination, the defence lawyer can then cross-examine. The private prosecutor has the right to redirect (ask further questions to clarify).

The defence may present its case after the private prosecutor has presented all its evidence and closed its case. The defence does not have to present any evidence for the accused. If the defence presents evidence, the private prosecutor will then have the opportunity to cross-examine.

If it is a jury trial, prior to calling witnesses, the private prosecutor and the defence will have an opportunity to make an opening and closing statements. In the closing statement, it is important to refer only to evidence established in your case.

Attend sentencing hearing

If the defendant is found guilty, the judge will determine an appropriate sentence. The overall purpose of the sentence is the protection of society and not to exact revenge. The sentence is intended to discourage the offender and others from committing crimes and to rehabilitate or reform the offender. At this stage, the private prosecutor will be able to present evidence regarding the extent of the harm caused by the actions of the defendant.

Make an appeal

If either the prosecutor or the offender disagrees with the results of a trial, they may be able to launch an appeal to either the Supreme Court or the Court of Appeal, depending on the offence. Bringing an appeal is a complicated process that involves an appearance before a judge in chambers and strict guidelines for submitting written argument and evidence. Appeals are usually limited to errors of law or fact and you need special permission from the Court to introduce any new evidence. Therefore, it is advisable to consult a lawyer before bringing an appeal. Please visit the court's website for further information on bringing an appeal (www.courts.ns.ca/appeals).

Law	Purpose	Example of a Possible Offence	Penalty	Special Provisions	Department Contact
Canada Shipping Act	To govern the activities of vessels within Canadian waters and control marine pollution	Regulations regarding control of pollution: Oil Pollution Prevention, Pollutant Substance, Garbage Pollution Prevention	s.40(2): makes contravention of the Regulations a summary conviction offence with a fine of <\$10,000	s.217(2) if a complaint is made without reasonable grounds, the individual who made the complaint may be liable for the cost of the investigation.	Transport Canada (T) 613-990-2309 Web: www.tc.gc.ca OR: Fisheries and Oceans Canada (T) 902-426-3550 (F) 902-426-5995 Web: www.dfo-mpo.gc.ca/Contact-eng.htm
Canadian Environmental Protection Act	To prevent pollution and control toxic substances	s.95 makes the release of a toxic substance in contravention of a previously made order or regulation	Penalties include: Injunction, mitigation, ordered prevention, appropriate relief, including costs, not including damages	ss.22-38 provide for any individual to bring an environmental protection action	Environment Canada (T) 1-800-668-6767 Email: CEPARegistry@ec.gc.ca or enviroinfo@ec.gc.ca Web: www.ec.gc.ca/CEPARegistry
Canada National Marine Conservation Areas Act	To establish a system of National Marine Conservation Areas	s.14(1) prohibits the disposal of substances in waters considered a marine conservation area, except as authorized by the Act, or by the CEPA	s.24: on summary conviction, fine <\$100,000; indictable offence, fine <\$500,000	Under s.27, the court may order the defendant to remedy any harm caused to the ecosystem	Parks Canada Email: information@pc.gc.ca Web: www.pc.gc.ca
Fisheries Act	To protect fish and their habitat	s.35 prohibits harmful alteration, disruption or destruction of fish habitat; s.36 prohibits the allowance of deleterious substances to enter the watercourse by throwing over board, leaving or depositing	s.40: on summary conviction, fine <\$300,000 for 1st offence; indictable offence, fine <\$1,000,000	When a private prosecution is brought, the fine may be shared between the Crown and the private prosecutor	Fisheries and Oceans Canada (T) 902-426-3550 (F) 902-426-5995 Web: www.dfo-mpo.gc.ca/Contact-eng.htm
Oceans Act	To regulate exploration, exploitation, management and conservation of Canada's oceans	It is an offence to contravene orders and Regulations made under s.35 or s.36 regarding marine protection zones	s.37: on summary conviction, fine <\$100,000; indictable offence, fine <\$500,000	s.33(2) provides for the Minister to consult with coastal communities and interested parties when putting integrated management plans in place	Fisheries and Oceans Canada (T) 902-426-3550 (F) 902-426-5995 Web: www.dfo-mpo.gc.ca/Contact-eng.htm
Species at Risk Act	To prevent species from becoming extinct	s.32(1) prohibits the killing, harassing, capturing or taking of an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species	s.97: on summary conviction: corporation, fine <\$300,000; individual, fine <\$50,000; indictable offence: corporation, fine <\$1,000,000; individual, fine <\$250,000	The Minister can rule that the Migratory Birds Convention Act applies in certain situations	Fisheries and Oceans Canada (T) 902-426-3550 (F) 902-426-5995 Web: www.dfo-mpo.gc.ca/Contact-eng.htm
Beaches Act	To protect the beaches and associated dune systems of NS for the public	s.6(1) prohibits any person from willfully taking or removing any sand, gravel, stone or other material from a beach without the permission of the Minister s.8 lists prohibited activities	s.10(1): on summary conviction, fine <\$2,000 in default of payment, imprisonment for not more than ninety days	The Minister may grant permission to take sand and nothing in the Act affects a fisherman's taking rocks to use as ballast in lobster traps	Department of Natural Resources- Land Services Branch (T) 902-424-5935 Web: www.gov.ns.ca/natr/
Endangered Species Act	To protect species at risk from extinction	s.13 prohibits interfering with endangered species or inferring or attempting to interfere with their habitat	s.22: on summary conviction: corporation, fine <\$1,000,000; individual <\$500,000; and/or imprisonment for 6 months	s. 23 addresses prosecutions and burdens of proof for corporations	Nova Scotia Department of Natural Resources – Wildlife Division (T) 902-679-6091 Web: www.gov.ns.ca/natr/
Environment Act	Set the overarching environmental scheme in NS, prevails over all other environment related provincial acts	Lists a variety of offences, including commencing work without an environmental assessment where one is required	s.159: penalties vary between fines of \$1,000 and \$1,000,000; and/or imprisonment <2 years	s. 160 provides for a defence of due diligence	Nova Scotia Environment (T) 902-424-5300 Email: emc@gov.ns.ca Web: www.gov.ns.ca/nse/
Fisheries and Coastal Resources Act	To encourage, promote and implement programs that will sustain and improve the fisheries and aquaculture	Lists a variety of offences, including carrying on aquaculture, harvesting sea plants or fishing recreationally without a license	s.116: fine of <\$100,000, and/or imprisonment <90 days	s.118 provides an appeal process for anyone aggrieved by a decision or order	Department of Fisheries and Aquaculture (T) 902-424-4560 Web: www.gov.ns.ca/dfs/
Water Resources Protection Act	To regulate large-scale removal of water from NS major water system, the "Atlantic Drainage Basin"	s. 4 prohibits drilling or removing water for the Atlantic Drainage Basin	s.7: fines between \$1,000 and \$1,000,000 and/or <2 years imprisonment	The director or officer of the corporation can be found guilty regardless of whether or not the corporation is prosecuted	Nova Scotia Environment (T) 902-424-5300 Email: emc@gov.ns.ca Web: www.gov.ns.ca/nse/

Federal

Provincial

Common Legal Definitions used in this volume

Acquit – to set free or judicially discharge from an accusation of suspicion of guilt. An individual is **acquitted** either when a verdict of not guilty has been rendered at the close of trial or when an appellate court decision has absolved him of the charge that were the bases of the action.

Actus reus – Latin: loosely, the criminal act; more properly the guilty act or deed of crime. Every criminal offence has two elements, the physical **actus reus** and the mental **mens rea**. The **actus reus** is the actual conduct of the accused that falls within the definition of the act proscribed.

Affidavit – a written statement in the name of the person known as the deponent who signs and swears to its veracity; a written statement made or taken under oath before an officer of the court or a notary public or other person who has been duly authorized to certify the statement.

Attorney General – the chief law officer of the **Crown**; the minister in the Cabinet responsible for the public prosecution of criminal offenders and for advising the government with respect to legal matters.

Convict – 1. one who has been determined by the court to be guilty of the crime charged. 2. To determine such guilt. One is convicted upon a valid plea of guilty or a verdict of guilty and judgment of conviction entered thereupon.

Criminal Code – A federal statute, first enacted in 1892 (currently R.S.C. 1985, c.C-46), which substantially embodies the criminal law of Canada. It is amended, usually more than once in each session of Parliament, to take account of necessary changes and innovations in the criminal law. The Criminal Code is not, however, a complete delimitation of the criminal law of Canada and has no privileged status other than as a statute.

Crown – The **Crown** includes the federal and provincial governments, Ministers and other government officials, as well as employees and agents who are acting within their authority and towards a **Crown** purpose; it may include **Crown** corporations as well.

Due diligence – the degree of prudence and carefulness that would be exercised by a reasonable person in similar circumstance. **Due diligence** operates as a defence to strict liability offences. It allows the accused to prove on a balance of probabilities that he or she exercised reasonable care and was not negligent.

Information – a statement by which a magistrate is informed of the offence for which a summons or warrant is required. In general, any person may lay an **information**, unless there is a statutory rule to the contrary. An **information** will suffice if it merely describes the alleged offence in ordinary, non-technical language. It is usually in writing and may be substantiated on oath.

Justice of the Peace – Justices of the Peace assist the Provincial Court by swearing **informations** and **affidavits**, issuing summonses and subpoenas, receiving pleas and, in relation to summary offences, imposing minimum penalties. When judges are not available, presiding Justices of the Peace at the Justice of the Peace Centre deal with the release or detention of arrested individuals across the province, and also with arrest warrant and search warrant applications. In Halifax, Dartmouth and Sydney, presiding Justices of the Peace hear provincial offence trials in Night Court.

Mens rea – Latin: a guilty mind. A culpable state of mind. **Mens rea** indicates the mental element of intent required for the commission of a criminal act. **Mens rea** encompasses several criminal states of mind: intention, knowledge, recklessness, wilful blindness, fraudulence, and malice.

Peace officer – a person employed for the preservation and maintenance of the public peace or for the service or execution of civil process; under s. 2 of the Criminal Code, the term includes mayors, wardens, Reeves, sheriffs, deputy sheriffs, sheriffs officers, justice of the peace, prison officials, police officers, customs officials, fisheries officers, pilots in command of aircraft and members of the armed forces under certain conditions. A **peace officer** is limited territorially by the jurisdiction of the authority that appoints him or her.

Public prosecution – the act of pursuing a criminal trial by the **Crown**. Where the **Crown** fails to move the case towards final resolution or trial as required by the court schedule, the matter may be dismissed for “want of prosecution”.

Pro bono – Latin.: for the good of; i.e., pro bono publico: for the public good or welfare.

Privilege – a particular advantage or benefit enjoyed by a person, company or class, beyond the common advantages of other citizens; “an advantage conferred over and above ordinary law.” Ex. **Crown privilege**.

Provincial Court – The Provincial Court has jurisdiction to try almost all indictable offence charges under the *Criminal Code* (a charge of murder by an adult accused being the main exception) and has exclusive jurisdiction over all summary offence charges under provincial and federal statutes and regulations. If an accused person elects or is subject to trial in the Supreme Court, the Provincial Court holds a preliminary inquiry.

Stay – A halt in a judicial proceeding where, by its order, the court will not take further action until the occurrence of some event. Inherent jurisdiction rests with the court to **stay** all proceedings that are, for example, frivolous or vexatious or an abuse of the process of the court. A **stay** may be temporary or permanent.

Please note that this volume cannot cover all of the evidential and procedural detail required for launching a private prosecution. Nor should it be interpreted as legal advice.

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).

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, visit:

Canadian Legal Information Institute: www.canlii.ca

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

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

In Nova Scotia, you can contact the Legal Information Society by phone: 902.455.3135/1.800.665.9779 or on-line www.legalinfo.org for more information on environmental legislation.

On-line resources for frequently asked questions:

Nova Scotia Department of Justice: www.gov.ns.ca

Self-Represented Litigants Project: www.gov.ns.ca/just/srl/tips/tips_EN.asp

The Courts of Nova Scotia: www.courts.ns.ca

Further Reading

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