

**FACT SHEET:
Private Prosecution and Environmental Law**

This fact sheet is intended to provide answers to common questions that members of the public may have about private prosecution and how this may be used to enforce environmental laws.

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What is prosecution?

A prosecution is a legal action brought in the criminal courts for a violation of the *Criminal Code* or another law. Prosecutions are usually started by government officials and are conducted by Crown counsel on behalf of the Attorney General.

What is private prosecution?

Private prosecution is a legal action brought in the criminal courts by an individual (rather than a government official) to enforce a law.

Can private prosecution be used to address environmental harms?

Private prosecution can be used to address environmental harms that are considered “offences”. Most environmental statutes prohibit certain activities that harm the environment. Undertaking a prohibited activity can be considered an “offence” under that statute. For example, the federal *Fisheries Act* prohibits the destruction of fish habitat and any such destruction is considered an offence under this statute. Alberta’s *Environmental Protection and Enhancement Act* (EPEA) prohibits the release of a substance into the environment that causes a significant adverse affect and makes it an offence to make such a release. If the *Fisheries Act* or EPEA are disobeyed and it is considered an offence, a prosecution can be brought to enforce the statute or to stop the offending activity.

Why is private prosecution necessary?

In some cases, the government decides not to prosecute an environmental offence. Private prosecution allows an individual start an action in order to enforce a statute and or to stop the offending activity from degrading the environment.

What can private prosecution accomplish?

A successful private prosecution can result in the conviction of the offender who disobeyed the law. A conviction can result in fines or even jail time. Courts also have the power to impose clean-up requirements and other punishments on the offender. A private prosecution is meant to punish the offender and deter others from committing similar crimes.

Are private prosecutions usually successful?

Very few environmental private prosecutions result in a conviction. Prosecutions are either stayed (stopped) by the Attorney General, or ended after the charges are withdrawn. It is important to realize that even prosecutions that fail to result in a conviction can still achieve positive benefits for the environment. They can draw the attention of both government and the public to

gaps in enforcement, and put pressure on officials to enforce environmental statutes.

Many environmental statutes, including *EPEA*, prevent a prosecution where government officials have opted to impose an “administrative penalty” rather than prosecute, and the penalty has been paid. An administrative penalty is a small fine. It is important to keep this in mind before starting a private prosecution.

Do I need a lawyer?

Private prosecutions may be started and carried out by non-lawyers. However, these actions are often complex so a private prosecutor is strongly advised to seek assistance from a lawyer in order to lay the charge correctly and prepare his or her case.

How much will it cost?

Your expenses as a private prosecutor can be divided into three categories:

- legal fees;
- disbursements; and
- costs.

Legal fees are the fees charged by a lawyer if you hire one to handle the case. The amount of legal fees will depend on the lawyer’s years of experience and the complexity of the case. You should ask the lawyer for an estimate of the legal fees at the beginning of the case.

Disbursements are the expenses required to start and prosecute your case. This includes money for services such as postage, photocopying, court filing charges, and any fees paid to expert witnesses. If you hire a lawyer, the lawyer will charge you for both legal fees and disbursements. If you do not hire a lawyer, you will still have to pay for certain disbursements such as court filing charges. Disbursement amounts will vary depending on the complexity of the case.

Costs are an amount awarded by the court to the successful party to cover a portion of his or her expenses in prosecuting or defending the case. Costs are rarely granted in criminal cases. Cost awards against a prosecutor are rare as long as the prosecution was not brought for an improper purpose. Examples of improper purpose would be trying to influence the outcome of a civil law suit by getting a conviction through prosecution, or bringing a private prosecution based on vindictiveness rather than to enforce the law.

What is the “threat of prosecution” or “malicious prosecution”?

It is important to keep in mind that it is a criminal offence to threaten to prosecute someone in order to get that person to do or stop doing anything. There is nothing wrong with informing someone of the law and pointing out that, on the basis of information obtained by you, the person has violated the law. However, you cannot threaten to prosecute someone in order to induce that person to take certain action.

If a prosecution does not result in a conviction, a private prosecutor could be sued for “malicious prosecution” or wrongful prosecution. This legal action can only be brought if the accused can show that the private prosecutor did not have reasonable and probable grounds for laying the charge and acted with malice or with an improper motive (such as vindictiveness).

Can I receive compensation as a prosecutor?

You should be aware that a private prosecutor does not receive compensation or monetary damages as a result of a conviction. Typically, any fine imposed on conviction goes to the general revenue fund of the government. In order to sue someone for monetary damages, you must start a civil lawsuit against that person.

The court can award costs to the successful party to cover a portion of his or her expenses in prosecuting the case. However, this rarely occurs in criminal cases. As a prosecutor, you should be prepared to bear the costs of your prosecution.

What should I do before I start a private prosecution?

You may wish to notify the alleged offender of the problem and indicate you believe their activity violates the law. In doing so, you should not threaten to prosecute them or bring criminal action because this, itself, is a criminal offence.

If you have not already done so, you should file a formal complaint in writing with the government authority responsible for enforcing that law. For example, if it is a *Fisheries Act* offence, you should report the offence to the federal Department of Fisheries and Oceans and Environment Canada. If it is an offence under *EPEA*, you should report the offence to Alberta Environment. This may trigger an investigation by the government authority.

You should be aware that some laws, such as *EPEA*, include a formal complaint procedure. *EPEA* provides residents with the right to have an official investigation conducted where they believe the law has been violated. Any two adult residents of Alberta, over the age of 18, can apply to Alberta Environment to investigate an alleged offence. The application must contain a statutory declaration. This is an oath made before a commissioner and includes the names of the applicants, the alleged offence and offender(s), and a statement of the facts and evidence supporting the allegation. Alberta Environment must investigate any matters arising from an application and must report to the applicants on the progress within 90 days.

You may also consider going to the media or using other tactics to encourage a public response to your environmental concern. In the context of private prosecution, you should be aware that publicity raises important issues about the potential to undermine the prosecution and, in some cases, lead to a costs award against the prosecutor. This can occur if a court decides that the prosecution was brought for an improper purpose. For example, evidence that the court process was used to draw public attention to an issue may indicate an improper purpose.

How do I start a private prosecution?

A private prosecution is started by “laying an information” (or laying the charge). An information is a written statement of an alleged offence sworn before a Provincial Court Judge or Justice of the Peace (JP). It is important that the information be complete before you appear before a Judge or JP. It is advisable at this stage to seek the assistance of a lawyer to help you draft the information. The Environmental Law Centre also has a book entitled *Enforcing Environmental Law: A Guide to Private Prosecution* (2nd edition) that can assist you in this process.

What happens after the charge is laid?

After the information is laid, the next step is called a process hearing. The purpose of the hearing is for the Judge or JP to determine whether there is evidence to support the charge.

If the Judge or JP is satisfied with the evidence and that the charges were not brought for an improper purpose, he or she will issue “process” compelling the appearance of the accused. This is done by issuing a summons requiring the accused to appear before the Court at a specified date and time to answer to the charges. If possible, it is strongly advisable to have a lawyer present at the process hearing to present your evidence and answer any questions.

What does it mean if the Attorney General intervenes?

The Attorney General is the Crown’s (or government’s) representative before the courts. The Attorney General is authorized to intervene in a private prosecution, which means the Attorney General has the power to take over the case. The Attorney General may conduct the prosecution, withdraw the charges or direct a stay of proceedings (stopping the prosecution).

Are there time limits for bringing a prosecution?

There are time limits to bringing a private prosecution. This is called the “limitation period.” A prosecution may be brought only during the limitation period set out in the statute. Most environmental statutes set a two year period to start a prosecution. The limitation period starts running from the date of the offence. If the offence continues over a period of time, generally the limitation period begins again for each day of the offence.

Where can I get more information?

For more information on private prosecutions for environmental harms, please contact the Environmental Law Centre. As noted below, the Centre has a publication on private prosecutions entitled *Enforcing Environmental Law: A Guide to Private Prosecution* (2nd edition) which is available for purchase or from our library. Further resources are included below.

Environmental Law Centre Library Resources and Online Catalogue:

Berger, Stanley David. *The Prosecution and Defence of Environmental Offences*, looseleaf (Aurora: Canada Law Book, Inc., 2003).

Mallet, James S. *Enforcing Environmental Law: A Guide to Private Prosecution*, 2nd ed. (Edmonton: Environmental Law Centre (Alberta) Society, 2004).

Articles:

Cartwright, Ian. “A Private Prosecution in Alberta – A Painful Process” (1990) 1 J.E.L.P. 110.

Ferguson, Keith. “Challenging the Intervention and Stay of an Environmental Private Prosecution” (2004) 13 J.E.L.P. 153.

Online Articles:

Mallet, James. "Launching a private prosecution" (2004) 19:3
Environmental Law Centre News Brief 11, online: Environmental Law
Center <<http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?ID=819>>.

A word of caution about your use of this material

The information provided in this fact sheet is current to December 31, 2006. While every effort has been made to ensure the accuracy and timeliness of the information, the information provided is of a general nature and is not a substitute for legal advice. The Environmental Law Centre encourages individuals to seek specific advice on matters of concern and not to rely solely on the information in this document.

The Environmental Law Centre

The Environmental Law Centre (Alberta) Society is a registered charitable organization that was incorporated in 1982 to provide Albertans with an objective source of information on environmental and natural resources law. The Centre, which is staffed by four full-time lawyers, a librarian and a small support staff, provides services in environmental law education, assistance, research and law reform. The Centre maintains an extensive library of environmental law materials that is accessible by the public free of charge.

Funding for the Environmental Law Centre is provided by the Alberta Law Foundation and through the generous support of the public. The Centre also accepts private and government research contracts for work relevant to and consistent with the Centre's objectives.

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