ENFORCING ENVIRONMENTAL LAW

A Guide to Private Prosecution

SECOND EDITION

Completely revised and expanded, with a proposal for law and policy reform

JAMES S. MALLET
Staff Counsel
Environmental Law Centre

ENVIRONMENTAL LAW CENTRE

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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.

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For more information, contact:

Environmental Law Centre
204, 10709 Jasper Avenue
Edmonton, AB T5J 3N3
Phone: (780) 424-5099
Fax: (780) 424-5133
Toll-free: 1-800-661-4238
E-mail: elc@elc.ab.ca
Website: http://www.elc.ab.ca

For Elke and Martha

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J.S.M.

Alberta LAW FOUNDATION

Preface

Fifteen years ago, when I wrote the first edition of *Enforcing Environmental Law: A Guide to Private Prosecution* for the Environmental Law Centre, private prosecutions had, to that point, been used in a very limited number of cases. Yet the Centre received innumerable requests for information on the rights of citizens to ensure that polluters were brought before the courts. Countless individuals and organizations voiced frustration at the failure of government agencies to investigate their pollution complaints or to prosecute known or repeat violators.

The *Guide* was written to convey information to concerned individuals and communities on how to report suspected environmental violations to appropriate officials and, where no effective action resulted, how to exercise their right to enforce the law through the criminal courts.

A great deal has changed since then, both in terms of public awareness and government priorities. During the past decade we have witnessed a radical scaling-back of environment departments and enforcement capability across Canada. While some governments have made successful environmental prosecutions more likely by appointing special prosecutors, others have disbanded successful investigation and prosecution units. The majority have increased their reliance on industry self-monitoring and reporting, voluntary compliance and post-incident risk evaluations rather than strictly enforcing environmental standards.

The record on advancing citizen rights is, however, not all bleak. A variety of federal, provincial and territorial laws now provide for citizen-initiated enforcement actions ranging from the right to trigger an official investigation and public report to the right to apply for an injunction to force compliance with environmental laws. New and expanded access to information laws have made some government decision-making more transparent and revealed weak or ineffective enforcement. New opportunities have emerged under international agreements, notably the North American Agreement on Environmental Cooperation (NAAEC), to scrutinize governments' records in effectively enforcing their environmental laws.

The emergence of alternative remedies and the renewed commitment of some agencies to enforcement have not, however, diminished the importance of private prosecution as an enforcement tool. It should be recalled that the conviction of Suncor in the early 1980's for polluting Alberta fisheries originated from a private information laid by the Chief of a local Indian band. In the mid-1990's, charges laid in connection with the destruction of fish habitat in the construction of the Oldman Dam, although ultimately unsuccessful, drew significant public attention to enforcement problems in Alberta. In two more recent cases, individuals in Ontario launched private prosecutions to stop harmful landfill leachate from entering fish habitat and to halt mining where the required authorization had not been issued. These and other Ontario cases (all examined in this *Guide*) suggest that new opportunities for well-organized private prosecutors to cooperate with the Attorney General's office in prosecuting offenders may be

possible. The significant number of successful NAAEC citizen submissions documenting failures by Canadian federal and provincial governments to effectively enforce their environmental laws lends additional credence to those who pursue private enforcement.

Recent changes to the *Criminal Code* and an emerging body of case law on private prosecutions underline the need for this second edition of the *Guide*. This revised and expanded *Guide* will provide the public with necessary information on legal procedures for filing complaints of suspected violations, alternatives to private prosecution, the duties of the private prosecutor, and the resources available to support private litigants.

Those who monitor and report pollution or damage to the environment merit our respect. Those who make the additional commitment to prosecute environmental violations when government agencies refuse or fail to act deserve our utmost regard. The task is a daunting and costly one. Yet at the same time it is important for private prosecutors to consider that their actions may establish legal precedents affecting the success of future cases, whether mounted by a government authority or a private citizen. Anyone considering bringing a private prosecution would be well-advised to first consider the information and advice offered in this new *Guide.* Kudos to the Environmental Law Centre for taking the initiative to make this information available to those who choose to take legal action to protect the environment.

Linda F. Duncan

Introduction

Environmental private prosecutions, in which charges are laid by a private individual rather than a *government* official, are rare. Between 1993 and 2004 in Alberta, only 21 private charges were laid under the major federal and provincial pollution control laws.[1] The reasons for this relatively small number are several. Firstly, private prosecution is, in general, not well-understood by either the general public or the legal community. Secondly, although the procedure is relatively straightforward, proving a pollution offence can be complex and expensive. In addition, uncertainty in the law and the broad power of the Attorney General to intervene and stay the proceedings makes private prosecution an unpredictable course. Of the 21 private charges laid in Alberta since 1993, only three have resulted in a conviction.[2]

Although they suggest real challenges, these statistics should not discourage the reader from considering private prosecution as a way to ensure that our environmental laws are enforced. The purpose of this second edition is to provide the Canadian public (and lawyers new to the topic) with the information necessary to take best advantage of this rarely-used tool.

Part I of this book explains what a private prosecution is, what this tool can achieve, when alternative tools may be more appropriate, legal barriers and other potential obstacles, and the role and responsibilities of the private prosecutor. Part I also explains who has the right to launch a private prosecution, the different types of offences, and which parties can be prosecuted.

Part II provides a step-by-step explanation of the procedure for private prosecution, from laying charges to sentencing and appeal (readers seeking a quick overview are referred to *Steps to a private prosecution* (chart), and to Chapter 12, under *Summary conviction proceedings: basic trial steps*.) Chapter 10, *Powers to intervene,* describes the power of the Attorney General to stay the proceedings, withdraw the charges, or take over conduct of the prosecution. The power of the courts to stay or dismiss charges is also examined.

Part III of the book sets out a plan for reform of law and policy affecting private prosecutions. This Part examines the problems with the current law and procedure, and provides recommendations for improving public involvement in environmental law enforcement.

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[1] Letter from Alberta Justice (3 November 2004) concerning private prosecutions in Alberta under the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.) [Repealed S.C. 1999, c. 33, s. 355]; *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33; *Fisheries Act*, R.S.C. 1985, c. F-14; and *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, between January 1, 1993 and September 30, 2004.

[2] *Ibid*.

Lastly, Appendices 1 and 2 explain how to go about obtaining information and evidence when considering or preparing for a private prosecution. Appendix 3 lists organizations that may offer legal and scientific support.

Private prosecution is a powerful tool, and an important way for individuals to get involved in ensuring our laws are enforced. However, it is not a substitute for effective government enforcement. The complexity of many environmental offences, the number and variety of potential offenders, and the limited resources of private citizens make adequate government enforcement critical. Nonetheless, so long as enforcement agencies remain understaffed and underfunded, and offences that threaten the environment go unpunished, private prosecutors will continue to play a crucial role in environmental law enforcement.

Note concerning provincial and territorial legislation

The focus of this book is the right of an individual to commence and carry forward a private prosecution under the *Criminal Code*, and the applicable procedure. However, for offences created by provincial law, territorial law, or municipal bylaw, summary proceedings legislation may provide different procedures. When considering the prosecution of a provincial, territorial or municipal offence, the applicable provincial or territorial legislation should be consulted to determine whether the *Criminal Code* procedures have been modified. A list of these procedural laws is provided in Appendix 4.

References to "provincial" law, legislation or government in this book include territorial law or legislation, etc. unless otherwise noted.

A word of caution about your use of this book

All information in the Guide is current to January 1, 2004. As you use the Guide, it is important to keep in mind that laws and government policies are subject to change. You may wish to consult a lawyer, or contact one of the organizations listed in Appendix 3, to determine how the law applies to your circumstances. *You should not rely on the information in this Guide as legal advice.*

STEPS TO A

Preliminary Steps

Understand the implications of a private prosecution, and what you can reasonably hope to achieve, the need for legal assistance, how much it will likely cost, etc.
Chapter 1, Chapter 2

Review alternatives to private prosecution
Chapter 3

Determine who can be a prosecutor
Chapter 4

Gather evidence of the offence
Appendix 1 & 2

Determine what offence(s) have been committed, and which can be most practically prosecuted
Chapter 5

Determine which parties can be prosecuted
Chapter 6

Understand the responsibilities and duties of a private prosecutor
Chapter 7

At any stage during or after the preliminary steps, inform the alleged offender of the violation in writing
Chapter 8

If not satisfied with response

File a formal complaint with the relevant government authority
Chapter 8

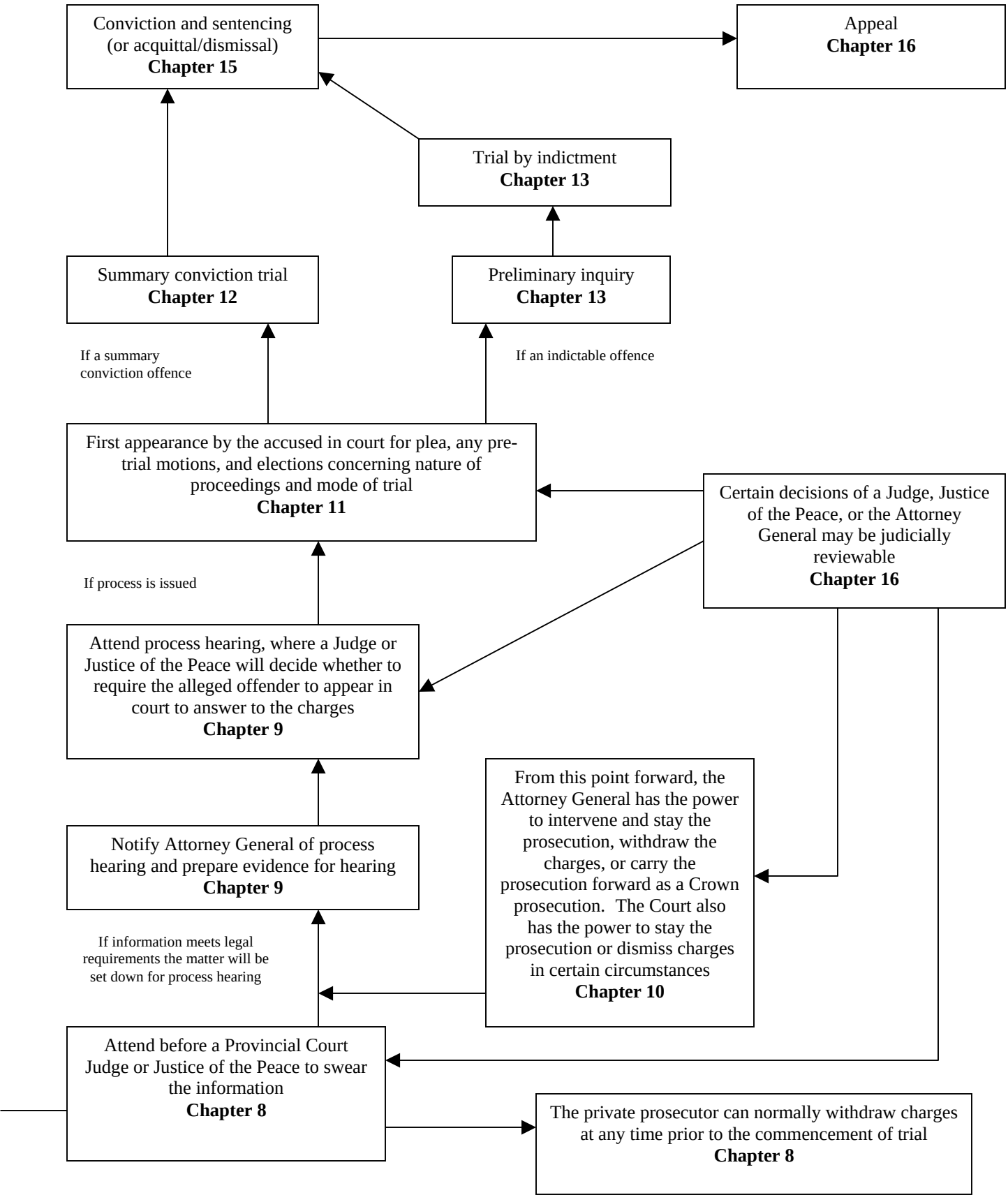
If not satisfied with government response

After the preliminary steps, draft the information to be sworn by an individual with "reasonable grounds to believe" that the alleged offender committed the offence

- obtain legal assistance
- prepare supporting documents

Chapter 8

PRIVATE PROSECUTION



Part I

Before you prosecute

Chapter 1
What is a private prosecution?

What is a prosecution?

A prosecution is a legal action brought in the criminal courts for a violation of the *Criminal Code*[1], another federal or provincial law, or a municipal bylaw. With few exceptions, prosecutions are initiated by enforcement officials and conducted by Crown counsel on behalf of the Attorney General.[2] It is useful to refer to these as Crown prosecutions, to distinguish them from private prosecutions.

With the exception of Nunavut, the Yukon and the Northwest Territories, the provincial Attorneys General are mandated to prosecute *Criminal Code* offences and all provincial offences and municipal bylaws. All federal laws other than the *Criminal Code* are prosecuted by the Attorney General of Canada, unless the administration or enforcement of those acts is specifically delegated.

Each law designates those officials who are responsible for the investigation of offences. For example, under the Alberta *Environmental Protection and Enhancement Act,* investigation and enforcement powers are assigned to a number of officials including the Minister of Environment, directors, inspectors, investigators, and others.[3] An official may be required by law to investigate a reported offence.[4] Otherwise, departmental policy and official discretion will determine what cases are investigated and what enforcement action is taken, if any. Where there is sufficient evidence of an offence, the official may lay charges or, in some cases, refer the matter to the office of the Attorney General or another designated official for pre-charge approval. If charges are laid, the prosecution proceeds under the direction of the Attorney General.

A Crown prosecution is the most serious enforcement action, exposing the accused to the stigma of a possible conviction and carrying penalties that may include imprisonment. Crown prosecutions are therefore generally reserved for serious or flagrant violations or where other efforts to ensure compliance with the law have failed. Other official enforcement responses to offending behaviour include warnings, orders, injunctions, and administrative penalties.

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[1] *Criminal Code*, R.S.C. 1985, c. C-46.

[2] In Nova Scotia, this role is filled by the Director of Public Prosecutions, whose powers are derived from statute: *Public Prosecutions Act*, S.N.S. 1990, c. 21.

[3] *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12, ss. 194-215.

[4] *Ibid.*, s. 196; *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 17.

What is a private prosecution?

A private prosecution is a legal action commenced in the criminal courts by an individual (other than a government official) to enforce the law.[5] The right to launch a private prosecution was inherited from the English common law and is recognized in Canada by statute.[6] In essence, the right ensures that every citizen is able to lay an information (also known as a "charge") regarding an alleged offence before a Provincial Court Judge or Justice of the Peace. The right is subject to statutory restrictions, and has been narrowly interpreted by our courts.

Private prosecutions have a long and distinguished history, but play a very different role today than in the past (see below, *A brief history of private prosecution*). The great majority of private prosecutions relate to offences against the person and property, such as assault or theft. In the environmental context, private prosecutions have been used to bring attention to and halt illegal activity, to highlight failings in government enforcement, and to hold government and government officials accountable for environmental offences or other unlawful actions.

The historical right to commence a private prosecution continues to be an important function of the criminal justice system.[7]

A brief history of private prosecution

In England, private prosecutions have been used by individuals seeking to enforce the criminal law since at least the 14th century.[8] In fact, until the 19th century, most criminal charges were brought by way of private prosecution. Under English common law, bringing offenders to justice by prosecution was considered not only a privilege, but a duty of citizenship.[9] Although the vast majority of early private prosecutions concerned offences against the person and personal property, early public health statutes also provided informants or aggrieved individuals with the right to commence a prosecution.

Until the 18th century, law enforcement in England depended heavily on private prosecutions. The proceedings were relatively straightforward, with some statutes providing that the private prosecutor could be awarded a portion of the penalty imposed.

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[5] Although the individual may represent a group or association, a private prosecution may only be commenced by an individual who swears an information.

[6] *Criminal Code*, *supra* note 1, s. 504.

[7] Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 3.

[8] This discussion is adapted from Kernaghan Webb, "Taking Matters Into Their Own Hands: The Role of the Citizen in Canadian Pollution Control Enforcement" (1991) 36 McGill L.J. 770 at 788 [Webb] and Phillip C. Stenning, *Appearing for the Crown*, (Cowansville, Que.: Brown Legal Publications Inc., 1986) at 8–14 [Stenning].

[9] Peter Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269 at 271.

At the time of the Industrial Revolution in the 18th and 19th centuries, an array of new legislation was enacted to address emerging public health concerns. The scale and complexity of industrial activity to which the new measures were addressed created serious challenges for enforcement. In many cases, individuals on which the state had relied for enforcement of public health laws now lacked the resources and expertise to monitor and prosecute offences.

Over the course of the 19th century, an expanded bureaucracy evolved to address this enforcement dilemma. Gradually, regulatory agencies assumed control and responsibility for the enforcement of social, or public welfare, legislation. Although private prosecution of traditional criminal offences remained relatively common, private prosecutions of public welfare legislation were rare.

The Canadian history of private prosecutions begins in the late 1800's. Although early Canadian statutes maintained the English common law right of an individual to prosecute criminal offences,[10] most were prosecuted by public officials.

Early Canadian environmental laws were straightforward prohibitions on pollution.[11] These provisions were largely unenforced.[12] By the 1960's, however, public recognition of environmental problems and support for measures to control them lead to important legislative reforms. Regulatory controls for pollution became the predominant model, allowing pollution and other harmful activity under restricted circumstances. The regulatory model was supported by an expanded bureaucracy and in many cases entirely new government departments and agencies, including enforcement staff.

The regulatory regimes imposed an increasingly complex array of authorization, monitoring, reporting, and other requirements on potential polluters. Simple prohibitions on pollution were replaced in many cases by regulations and permits specifying what pollutants could be released, where, how often, and in what amounts. Regulators were given new powers to impose conditions and require that specific actions be taken to control pollution.

Canadian law continued to allow for private prosecutions. However, as the pollution control regimes became increasingly complex and technical, decision-making regarding regulatory compliance was increasingly negotiated between the regulators and potential polluters. These less-than-transparent arrangements, along with an increase in informal administrative agreements among governments, departments and agencies, made determining whether an offence had been committed, and gathering evidence to establish a case, increasingly difficult for concerned citizens.

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[10] Stenning, *supra* note 8 at 75-78 and 133-52.

[11] See, for example, *An Act for the Regulation of Fishing and Protection of Fisheries*, S.C. 1867-68, c. 60, s. 14.

[12] Law Reform Commission of Canada, *Pollution Control in Canada: The Regulatory Approach in the 1980's* (Ottawa: Law Reform Commission of Canada, 1988) at 11.

Given the complexity of the new regimes, it is not surprising that, with few exceptions, regulatory offences under modern pollution control legislation have been prosecuted by Crown, or public, prosecutors. However, in spite of the many evidentiary and procedural hurdles, private prosecutors continue to play a vital role in exposing offending behaviour and weak law enforcement to public scrutiny. No longer considered an extension of official efforts to enforce the law, the primary role of private prosecutions now lies in acting as a check on suspect bureaucratic action or inaction.[13]

[13] Webb, *supra* note 8 at 795.

Chapter 2
Is private prosecution the right tool for you?

Environmental private prosecutions are often complex, may require considerable expenditure of time and money, and provide uncertain results, at best. Private prosecutors also face risks, including the possibility of having to pay part of the accused's costs or mount a defence to an action for malicious prosecution. A private prosecutor with a full understanding of the implications and potential costs of a prosecution will be in a better position to plan and carry forward an effective case.

What can a private prosecution accomplish?

The obvious benefit of a successful private prosecution is the conviction of an environmental offender. In general, a conviction will serve to punish the offender, deter the offender and other potential offenders from committing similar offences, and foster confidence that our environmental laws are working. Creative sentencing provisions in some statutes also allow the courts to impose clean-up requirements and other punishments in addition to the traditional sentences of fines and imprisonment (see Chapter 15, *Sentencing*). A conviction can therefore have important benefits for the environment.

However, very few environmental private prosecutions result in a conviction.[1] With notable exceptions, such prosecutions are generally either stayed after intervention by the Attorney General, or ended after charges are withdrawn.[2] However, it is important to realize that prosecutions that fail to result in a conviction may nonetheless achieve significant benefits for the environment. They can draw the attention of both government and the public to gaps in enforcement, and pressure officials to enforce environmental laws. They can draw the attention of industry and other potential polluters to the possibility of private enforcement action, and lead to important changes in corporate attitude and behaviour. They can also provide an avenue for open, public scrutiny of potentially unlawful government actions. Finally, they can demonstrate deficiencies in the laws themselves, and lead to legislative reform.

Due to the complexity and expense of a criminal trial, in most cases the preferred outcome will be the intervention of the Attorney General to carry the prosecution forward. The Crown has the expertise and resources necessary to mount an effective case, while private prosecutors often do not. However, the quality and organization of the private prosecutor's documentation

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[1] See *Introduction.*

[2] Recent exceptions, and the reasons why the Attorney General may have allowed them to proceed, are discussed in Chapter 10, *Powers to intervene* under *Intervention: recent cases*. The reasons why charges are typically stayed or withdrawn by the Attorney General are discussed in Chapter 10 and Appendix 2, *Investigating and documenting your case*.

and evidence may be critical to the decision of the Attorney General to carry the case forward or enter a stay.

There are limitations on what a private prosecution can achieve

In most cases, a private prosecutor will not benefit directly from a conviction or other successful outcome. While some statutes authorize court orders for restitution following a conviction, there are significant obstacles to establishing a right to compensation for environmental harm (see Chapter 15, *Sentencing*).

Subject to exceptions, any fine imposed on conviction goes to the general revenue fund of the federal, provincial or territorial government. The exceptions are private prosecutions under the federal *Fisheries Act* and under specified statutes of the Northwest and Yukon Territories. Under these statutes, part or all of a fine imposed on conviction may, or in some cases must, be paid to the informant[3] or private prosecutor (see Chapter 15, *Sentencing*). Traditionally, small fines have resulted in minimal monetary incentives for private prosecutors in spite of these fine-splitting provisions. However, recent cases suggest an increased willingness of the courts to impose significant fines and award substantial sums to private prosecutors.[4]

Challenges and issues faced by private prosecutors

Do I need a lawyer?

Private prosecutions of many environmental offences may be initiated and carried through by non-lawyers (see Chapter 8, *Initiating a private prosecution*, and Chapter 12, *Prosecution of summary conviction offences*). However, the private prosecutor is strongly advised to seek assistance from a lawyer, preferably with a criminal or environmental background. At minimum, a lawyer's assistance should be obtained when drafting the information and when preparing for trial or appeal. Neglecting to do so may result in the failure of an otherwise well-founded case.

Advice from individuals and groups who have experience with private prosecutions may also be very useful, and save time and resources (see Appendix 3, *Finding assistance*).

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[3] An individual who commences a private prosecution is called an "informant": *Criminal Code*, s. 785.

[4] In *R. v. Hamilton (City)* (18 September 2000), 001/134/073 (Ont. C.J. (Prov. Div.)), the informant was awarded half of a $300,000 fine. In *Fletcher v. Kingston (City),* (1998), 28 C.E.L.R. (N.S.) 229 (Ont. Ct. Prov. Div.), var'd [2002] O.J. No. 2324 (Ont. S.C.J.)(QL), var'd [2004] O.J. No. 1940 (C.A.)(QL), the informant was awarded half of the $120,000 fine. However, a new trial has been ordered in *Fletcher*.

How much will it cost?

Your expenses as private prosecutor can be divided into three categories: legal fees, disbursements, and costs. Legal fees are the fees charged by your lawyer for his or her work on the case. These fees may be reduced or waived entirely, depending on the lawyer and the particular case. The fees charged by a lawyer will depend on his or her years of experience, the nature of the proceedings (e.g., summary conviction or indictable offence), and the court that hears your case.

What is an indictable offence?

Indictable offences are the most serious offences, and carry the heaviest penalties. Most environmental offences are summary conviction offences, to which simpler procedures apply. See Chapters 12 and 13 for more on these offences and procedures.

Disbursements are the expenses required to mount and prosecute your case, including evidence gathering, testing of samples, photocopying, court filing charges, postage, etc. Also included in disbursements are fees paid to expert witness. Disbursements will vary depending on the complexity of your case and the court that hears it.

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 proceedings. Before laying an information, however, you should be aware of the circumstances that could attract an award of costs (see Chapter 14, *Costs)*.

It is important to realize that a case which appears straightforward at the outset may become more complex as the trial proceeds. Credible evidence and, typically, qualified experts must be presented to prove a case. Any evidence put forward by the defence must be countered, and unexpected issues may arise that require applications by a lawyer in court. As a result, your lawyer's fees and disbursements may be higher than planned. Where lab work and expert testimony is required, a trial of a summary conviction offence can easily cost several thousand dollars, even where the lawyer's fees are waived.

In addition to the expenses described above, a private prosecution involves personal costs in terms of time and energy. You may wish to speak to an individual who has been through the process about these personal costs.

Several non-profit groups offer support to private prosecutors. Some of these groups restrict their assistance to high-profile, precedent-setting or test cases. They may provide legal and technical assistance directly or help you to find a lawyer and experts willing to work for a reduced fee. They may also refer you to non-lawyers with experience in private prosecutions (see Appendix 3, *Finding assistance*).

Statutory and other barriers

Before you launch a private prosecution, it is important to be aware of potential legal barriers.

A small number of *Criminal Code* offences require the consent of the Attorney General before charges can be laid (see *Statutory and other legal barriers to prosecution* in Chapter 5, *What offences can be prosecuted?*). Although the consent requirement is unlikely to arise in connection with an environmental offence, where consent is required it should be obtained before investing considerable resources in the preparation of your case.

For the prosecution of an indictable offence, the intervention and concurrence of the Attorney General may be required before the court will allow a private prosecutor to proceed. In addition, the *Criminal Code* requires that consent of the court be obtained before a private prosecutor can prefer an indictment (see Chapter 13, *Prosecution of indictable offences*).

It is also important to become familiar with the policy and practices of the Attorney General regarding intervention to stay or take over conduct of private prosecutions (see Chapter 10, *Powers to intervene*). These policies can help you determine the likely result of your private prosecution, and decide whether private prosecution will accomplish what you hope to achieve.

Burden of proof: the strength of your case

The burden of proof in a criminal action requires that a case be made "beyond a reasonable doubt" that the accused committed the alleged offence. This is a far more onerous burden than that required in a civil action where a case must only be proven "on a balance of probabilities" (see Chapter 7, *The role of the private prosecutor*).

A well-organized case built on credible evidence is essential to any prosecution. Many private prosecutions fail to result in a conviction or are stayed after intervention by the Attorney General due to insufficient evidence or the presence of a strong defence. Before commencing a prosecution, speak to an experienced lawyer regarding the strength of your case. In the absence of sufficient evidence or in the face of a strong defence, private prosecution may not be an appropriate route.

Limitation periods

A prosecution may be commenced only during the time period prescribed by statute. Outside this period, a court has no jurisdiction to hear the case. The majority of environmental statutes specify a two-year limitation period.[5] Depending on the statute, the limitation period begins

[5] *Fisheries Act*, R.S.C. 1985, c. F-14, s. 82; *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 275; British Columbia *Waste Management Act*, R.S.B.C. 1996, c. 482, s. 54.1; Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 226; Saskatchewan *Environmental Management and Protection Act, 2002,* S.S. 2002, c. E-10.21, s. 76; Ontario *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 195; Quebec

from either the date the offence was committed or the date on which a designated official became aware of evidence of the offence.

In those instances where a federal statute does not specify a limitation period for a federal summary conviction offence, the *Criminal Code* imposes a six-month general limitation period from the date when the subject matter of the proceedings arose.[6] For provincial offences and municipal bylaws for which no limitation is specified, Quebec and Newfoundland provide a one-year limitation.[7] The other provinces and territories either adopt the *Criminal Code* six-month limitation or specify a limitation of six months.[8] All limitation periods are subject to amendment, and should be confirmed before commencing a private prosecution.

There is no *Criminal Code* limitation period of general application for the prosecution of indictable offences. As a result, such proceedings may generally be commenced no matter how much time has passed since the commission of the alleged offence. However, an environmental statute may specify a limitation period for indictable offences created by that Act. If not, an accused may rely on the Charter right to be tried within a reasonable time and protected from undue delays in prosecution.[9]

For a continuing offence, a court will hear the matter if any part of the time of the offence falls within the allowed limitation period.[10] For continuing pollution offences, the courts have held that the offence continues so long as there is a risk.[11] Generally speaking, the limitation period begins again for each day of a continuing offence. The scope of a continuing offence and the applicable limitation will, however, depend on the wording of the statute in question.

Environment Quality Act, R.S.Q. c. Q-2, s. 110.1; Nova Scotia *Environment Act*, S.N.S 1994-1995, c. 1, s. 157; New Brunswick *Clean Environment Act*, R.S.N.B. 1973, c. C-6, s. 35; Prince Edward Island *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9, s. 32(7); Yukon *Environment Act*, R.S.Y. 2002, c. 76, s. 186. The Manitoba *Environment Act*, C.C.S.M c. E-125, s. 39 specifies a one-year limitation. The Northwest Territories *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, s. 15 provides a three-year limitation.

[6] *Criminal Code*, R.S.C. 1985, c. C-46, s. 786(2).

[7] Quebec *Code of Penal Procedure*, R.S.Q. c. C-25.1, s. 14; Newfoundland *Provincial Offences Act*, S.N.L. 1995, c. P-31.1, s. 7.

[8] The following statutes specify a six-month limitation: Alberta *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, s. 4; British Columbia *Offence Act*, R.S.B.C. 1996, c. 338, s. 3(2); Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 76; Saskatchewan *Summary Offences Procedure Act*, *1990*, S.S. 1990-91, c. S-63.1, s. 4(3); Northwest Territories *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c. S-15, s. 3; New Brunswick *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1, s. 95. The following statutes adopt the *Criminal Code* six-month limitation: Prince Edward Island *Summary Proceedings Act*, R.S.P.E.I. 1988, c. S-9, s. 4; Manitoba *Summary Convictions Act*, C.C.S.M. c. S230, s. 3; Nova Scotia *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, s. 7; *Summary Convictions Act*, R.S.Y. 2002, c. 210, s. 7.

[9] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 11(b).

[10] *R. v. Belgal Holdings Ltd.*, [1967] 3 C.C.C. 34 (Ont. H.C.J.).

[11] *R. v. Bata Industries Ltd.* (1992), 70 C.C.C. (3d) 394 (Ont. Ct. Prov. Div.), var'd (1993), 14 O.R. (3d) 354 (Gen. Div.), rev'd on other grounds (1995), 101 C.C.C. (3d) 86 (C.A.).

Access to information

Unlike civil actions, in a prosecution the accused is under no general duty to disclose information relating to the case. Past private prosecutions have demonstrated that obtaining information from defendants and government can be a major challenge requiring considerable investments of time and patience (see Appendix 1, *Accessing information*).

Warning against threat of prosecution and wrongful prosecution

Offence of extortion

It is important to keep in mind that it is an offence to threaten to prosecute someone for a criminal offence in order to get that person to do or stop doing anything.[12] The offence of extortion applies to any threat or accusation intended to induce a person to take certain action, where there is no reasonable justification or excuse.

However, 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 that law.

Suit for malicious prosecution

An informant may be exposed to a civil suit for damages for the tort of malicious prosecution where the prosecution does not result in a conviction. The informant is potentially liable regardless of whether the accused is ultimately acquitted or the charges are subsequently withdrawn or stayed. However, to prove a case of malicious prosecution, the accused must establish that the informant did not have reasonable and probable grounds for laying the charge and that the informant acted with malice or an improper motive.[13] Such a suit is extremely unlikely to succeed so long as the prosecution is launched without malice or vindictiveness and for the purpose of enforcing a law that the informant reasonably believes the accused has violated.

Impact of a prosecution on civil proceedings

You may be considering or have initiated a civil suit in connection with the events that constitute an offence. The *Criminal Code* and a variety of environmental statutes provide that civil suits are not affected by criminal proceedings arising from the same events.[14] In fact, some environmental statutes explicitly provide a person who suffers loss as a result of the offence

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[12] *Criminal Code*, *supra* note 6, s. 346.
[13] *Berman v. Jenson* (1989), 77 Sask. R. 161 (Q.B.). Regarding reasonable and probable grounds, see Chapter 4, *Who can launch a private prosecution*, under *Reasonable grounds*.
[14] *Criminal Code*, *supra* note 6, s. 11; see also, for example, *Canadian Environmental Protection Act*, *1999*, *supra* note 5, s. 42 and Alberta *Environmental Protection and Enhancement Act*, *supra* note 5, s. 217.

with the right to sue and recover compensation from that person.[15] A few statutes, however, provide that a statutory violation does not give rise to a civil action, preventing recovery of damages through a lawsuit. It is important to check for a provision concerning civil actions in the legislation containing the offence in question.

Evidence of conviction or a finding of guilt for a violation of a law or municipal bylaw is normally admissible in subsequent civil proceedings to establish the commission of the offence.[16] Likewise, evidence of judgment in a civil action is generally admissible in a subsequent prosecution, but will be given less weight.[17] In extraordinary cases, the courts will stay civil proceedings until the conclusion of a criminal trial relating to the same facts, typically to ensure that the accused obtains a fair trial.[18]

Impact of other enforcement actions on a prosecution

The issuance of control orders or directives by government officials does not necessarily preclude the prosecution of an offence.[19] However, some laws provide that certain enforcement actions, such as the issuance of an administrative penalty that is subsequently paid by the offender, are a bar to prosecution.[20] The statute creating the offence should be reviewed to determine whether any such bars exist. In some circumstances, contradictory or inconsistent enforcement action may allow the accused to raise a defence of abuse of process (see Chapter 10, *Powers to intervene,* under *Abuse of process)*.

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[15] See, for example, Alberta *Environmental Protection and Enhancement Act, ibid*., s. 219 and *Canadian Environmental Protection Act, 1999, ibid*., s. 40.
[16] John Sopinka, Sidney N. Lederman, and Alan Bryant, *The Law of Evidence in Canada,* 2nd ed. (Toronto: Butterworths, 1999) at 19.148ff.
[17] *Ibid.* at 19.155.
[18] *British Acceptance Corporation Ltd. v. Belzberg* (1962), 36 D.L.R. (2d) 587 (Alta. S.C. (T.D.)).
[19] See, for example, *Canadian Environmental Protection Act, 1999, supra* note 5, s. 238(2) (issuance of or compliance with an enforcement order is no bar to proceedings in relation to an offence).
[20] See, for example, Alberta *Environmental Protection and Enhancement Act*, *supra* note 5, s. 237(3).

Chapter 3
Alternatives to private prosecution and supplementary action

Having considered the factors discussed in the previous chapter, you may decide that private prosecution is not an appropriate route, or that it is unlikely, on its own, to provide the result you are seeking. In general, the limitations of private prosecution mean that it is best considered as part of a multi-faceted strategy to address an environmental problem. Other avenues to explore include civil actions, submitting concerns to government decision makers and participating in hearings, judicial review of administrative decisions by officials, lobbying elected representatives, media campaigns, and others. Some of these alternatives are described below. For further explanations of these and other remedies, the reader is referred to *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, and *The Citizen's Guide to Environmental Investigation and Private Prosecution*.[1]

Make a formal complaint

See Chapter 8, *Initiating a private prosecution*, under *Making a formal complaint*.

Ask authorizing agency to revoke or suspend authorization

Many activities that affect the environment require a permit, license, approval, or other authorization from a government department or agency. Where there is an environmental problem, the company responsible for the activity (such as drilling for oil or gas, obstructing a water body, or operating an industrial facility) may not be in compliance with the law or the terms and conditions of its authorization. In this case, consider formally asking the authorizing department or agency to suspend or cancel the authorization, or to impose stricter conditions. The response you may expect from such a complaint will vary depending on the applicable legislation and government policy as it applies to different types of activities.

Right to have a government investigation conducted

The *Canadian Environmental Protection Act, 1999* and various provincial and territorial statutes provide residents with the right to have an official investigation conducted where they believe specified environmental laws have been violated.[2] The statute may also require the relevant

[1] David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed. (Toronto: Emond Montgomery Publications Ltd., 1993) c. 3; Environmental Bureau of Investigation, *The Citizen's Guide to Environmental Investigation and Private Prosecution* (Toronto: Earthscan Canada, 2000), online: EBI <http://www.e-b-i.net/ebi/index.cfm>.

[2] *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, ss. 17-21; *Species at Risk Act*, S.C. 2002, c. 29, ss. 93-96; Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, E-12, ss. 196-197;

Minister to notify the applicant of the outcome of the investigation, and give the applicant the right to bring a civil action in court if the Minister's response is unreasonable or should the Minister fail to investigate and report in a reasonable time.[3]

Other statutory remedies

Many environmental statutes also provide that a person who suffers loss or injury as a result of an offence may bring a civil action for an injunction or damages.[4]

Legislation may also provide a separate statutory right to bring a civil action against a polluter, or to apply for an injunction to prohibit non-compliance with environmental laws.[5] While normally a claimant must show a specific right or property interest in a matter to bring a civil action, these statutes extend standing to allow those not directly affected by the offence to sue. Available remedies may include damages, or an injunction, declaration, or other order including an order for costs.

Civil action (where not provided for by statute)

As indicated in the previous chapter, a private prosecution does not generally affect your right to pursue civil remedies such as an injunction and damages. The cause of action, or basis of your claim, may be nuisance, trespass, negligence, riparian rights, strict liability for the escape of a harmful substance, or a combination of these. Normally, to bring such an action, the plaintiff must show a personal loss or injury, an interference with his or her property rights, or some other special damage suffered.

Remedies available through a civil action include damages and an injunction. The loser is normally required to pay a substantial part of the winner's costs.

Saskatchewan *Environmental Management and Protection Act*, *2002*, S.S. 2002, c. E-10.21, ss. 63-64; Ontario *Environmental Bill of Rights, 1993,* S.O. 1993, c. 28, ss. 74-81; Nova Scotia *Environment Act,* S.N.S. 1994-95, c. 1, s. 115; Newfoundland *Environmental Protection Act*, S.N.L. 2002, c. E-14.2, s. 91; Yukon *Environment Act*, R.S.Y. 2002, c. 76, ss. 14-18; Northwest Territories *Environmental Rights Act,* R.S.N.W.T. 1988, c. 83 (Supp.), s. 4.

[3] See, for example, *Canadian Environmental Protection Act, 1999, ibid*., s. 22; Ontario *Environmental Bill of Rights, 1993*, *ibid.*, s. 84.

[4] See, for example, *Canadian Environmental Protection Act, 1999*, *ibid*., s. 39-40; Alberta *Environmental Protection and Enhancement Act*, *supra* note 2, s. 219 (damages only).

[5] See, for example, Northwest Territories *Environmental Rights Act*, *supra* note 2, s. 6; Quebec *Environment Quality Act*, R.S.Q. c. Q-2, s. 19.2-19.3; Yukon *Environment Act*, *supra* note 2, ss. 8-13.

Judicial review

Most actions of government officials are reviewable by the courts. This includes a decision the official was not authorized to make, a refusal to make a decision as required by law, and a decision based on irrelevant considerations, among others. In most cases officials are also required to be impartial and to adhere to principles of fairness in decision-making. A court may grant an order to set aside, or "quash", the decision, to compel the official to decide the matter according to law, or to declare the rights of the parties, among other remedies.

Any person directly affected by an administrative action may bring an application for judicial review. Public interest standing may also be granted where there is a serious or triable issue, the applicant has a genuine interest in the matter, and there are no other persons more directly affected who might reasonably be expected to bring the application.[6] The courts generally refuse to hear a judicial review application unless other avenues of appeal have been exhausted.

Concerning judicial review within the context of a private prosecution, see Chapter 16, *Appeal and judicial review.*

The provincial and federal Auditors General

Both the Alberta and the federal governments have independent auditors who are responsible for evaluating whether public programs and resources are being properly managed. The Auditors General do not investigate individual complaints, but may use comments provided by the public to focus their reviews of public programs.

Environmental petition

In contrast to the limited role of the Auditors General, the federal Commissioner of the Environment and Sustainable Development is mandated under the *Auditor General Act* to receive and administer petitions on environmental matters. Some provinces have also established environmental commissioners to respond to or administer public inquiries, suggestions and complaints.[7]

Under the federal procedure, any resident of Canada, including an organization or corporation, can submit a petition dealing with an environmental matter to the Commissioner in Ottawa.[8] The matters raised must fall within the responsibility of at least one of the 25 federal departments and agencies that are subject to the petition process. The Commissioner is required to forward the petition to the relevant federal minister(s), after which the minister(s)

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[6] *Finlay v. Canada (Minister of Finance),* [1986] 2 S.C.R. 607; *Reese v. Alberta (Minister of Forestry, Lands & Wildlife)* (1992), 7 C.E.L.R. (N.S.) 89 (Alta. Q.B.).

[7] See, for example, Ontario *Environmental Bill of Rights, 1993, supra* note 2, Part 3.

[8] *Auditor General Act*, R.S.C. 1985, c. A-17, s. 22.

must reply directly to the petitioner within a specified period.[9] Examples of petition topics include:

- an investigation into possible non-compliance with, or non-enforcement of, a federal law;
- clarification of federal policy related to environmental matters;
- a review of existing environmental laws, regulation or policies. It is also open to petitioners to suggest improvements or changes to existing laws, regulations and policies;
- steps that have been taken to meet a commitment made by a minister or department on an environmental matter or issue; and
- the environmental integrity of a federal department's own operations.

Ombudsman

Most provinces and territories have an ombudsman. The ombudsman's legislated role is to respond to concerns and complaints about government decision-making. As an example, the Alberta Ombudsman is empowered to conduct investigations into official actions, and to report findings and make recommendations to government officials, ministers, Cabinet and, finally, the Legislature. Complainants are entitled to know the results of the investigation.[10]

The scope of the Ombudsman's authority is limited. In Alberta, the Ombudsman is not authorized to review any decision, recommendation, act or omission of government lawyers. The Ombudsman is also prevented from investigating any matter until all avenues of appeal have been exhausted or any appeal periods have expired.[11]

Submission to the North American Commission on Environmental Cooperation (NACEC)

The *North American Agreement on Environmental Cooperation* provides a process allowing residents of Canada, Mexico and the US to file submissions alleging that a party to the agreement (Canada, Mexico or the US) is failing to effectively enforce its environmental laws.

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[9] For further information on this process, see the website of the Commissioner of the Environment and Sustainable Development, online: <http://www.oag-bvg.gc.ca/domino/oag-vg.nsf/html/environment.html>.

[10] Alberta *Ombudsman Act*, R.S.A. 2000, c. O-8, ss. 12, 21 and 22.

[11] *Ibid.*, s. 13.

The Secretariat of the NACEC administers the process, which can lead to the publication of a factual record.[12]

Publicity campaigns, boycotts and other tools

Publicity campaigns and other efforts designed to encourage a public response to environmental concerns are vital to positive environmental change. They may also be used effectively in conjunction with any of the alternatives listed above. However, in the context of a private prosecution, publicity raises important issues that have the potential to undermine the prosecution and, in some cases, lead to a costs award against the prosecutor. An informant or private prosecutor should therefore carefully avoid involvement in publicity or any other activity that the defence could argue shows an improper purpose. Failure to do so may provide the defence with evidence that your primary purpose is not to stop offending behaviour (the proper purpose for a prosecution), but to draw public attention to an environmental issue.

Concerning publicity, see also Chapter 10, *Powers to intervene*, under *Abuse of process,* and Chapter 14, *Costs.*

[12] Commission for Environmental Cooperation, *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation* 2000 (Montreal, Que.: The Commission, 2000), online: CEC <http://www.cec.org/files/PDF/SEM/BringingFacts.pdf>.

Chapter 4
Who can launch a private prosecution?

The right to launch a prosecution

The *Criminal Code*, which regulates proceedings before the criminal courts, specifically provides that anyone with reasonable grounds to believe that a person has committed an offence may lay an information (or "charge") before a Provincial Court Judge or Justice of the Peace.[1] The right of any person to launch a private prosecution in this manner is virtually unrestricted, subject only to any requirements or barriers specified in legislation.[2] Provincial legislation that interferes or is inconsistent with the right under the *Criminal Code* to lay an information for a federal offence has been held to be inoperative.[3]

The right to launch a private prosecution for a provincial offence or municipal bylaw is also provided by provincial and territorial legislation. These statutes either expressly provide the right or adopt the provisions of the *Criminal Code*.[4]

The informant and the private prosecutor

A person who lays an information is called an "informant".[5] If the information is complete and properly sworn a process hearing will be scheduled to review the available evidence. If at the process hearing the Provincial Court Judge or Justice of the Peace finds there to be sufficient evidence of the offence, he or she will require the accused to attend before the court to answer the charge. Once process has issued requiring the accused to appear, the informant also becomes a private prosecutor. However, these terms are often used interchangeably.

A prosecution may be initiated by an individual, group, or incorporated body such as a society. The information itself, however, must be sworn by an individual who may be a member,

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[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 504, concerning indictable offences. This provision applies to summary offences as well: s. 795.
[2] *R. v. Sacobie and Paul* (1979), 51 C.C.C (2d) 430 at 442-443 (N.B.C.A.), aff'd (1983), 1 C.C.C. (3d) 446 (S.C.C.).
[3] *Attorney General of Quebec v. Lechasseur et al.* (1981), 63 C.C.C. (2d) 301 (S.C.C.).
[4] The following statutes provide an express right to commence a private prosecution: *Offence Act*, R.S.B.C. 1996, c. 338, s. 25; *Environment Act*, C.C.S.M. c. E125, s. 38; *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 23; *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1, s. 3; *Environmental Rights Act*, R.S.N.W.T. 1988, c. 83 (Supp.), s. 5; *Environment Act*, R.S.Y. 2002, c. 76, s. 19. The right in Quebec is more limited: *Code of Penal Procedure*, R.S.Q. c. C-25.1, s. 9-10.
[5] *Criminal Code*, *supra* note 1, s. 785.

director, agent or employee of the organization.[6] The person laying the information need not have suffered any personal injury or loss.

Reasonable grounds

"Reasonable grounds to believe" or "reasonable and probable grounds to believe"[7] means that a reasonable person would, on the basis of the available evidence, believe that the accused party did (or, in the latter case, probably did) the alleged act at the stated time and place.[8] It is preferable for the information to be laid by a person with first-hand knowledge of the alleged offence. However, a person who has received credible evidence of a suspected offence from a person who does have personal knowledge, or from reasonable, authentic documents such as monitoring results, may also have "reasonable grounds to believe". Once the information is laid, the informant is not required to testify or be further involved in the prosecution if others are available to do so.[9]

As an informant, it is important to be confident that the evidence you are relying on is credible. You should also ensure that your purpose in laying the charge is to seek enforcement of the law or to stop an offending activity, and not another, improper purpose (see Chapter 2, under *Suit for malicious prosecution,* and Chapter 3, under *Publicity campaigns, boycotts and other tools*).

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[6] Peter Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269 at 283.

[7] This wording is used in some provincial summary proceedings legislation. See, for example, Ontario *Provincial Offences Act*, *supra* note 4, s. 23.

[8] *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 (S.C.C.).

[9] David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed. (Toronto: Emond Montgomery Publications Ltd., 1993) at 829.

Chapter 5
What offences can be prosecuted?

The right to launch a private prosecution set out in the *Criminal Code* applies to all federal offences unless the legislation creating the offence expressly provides that the provisions of the *Criminal Code* do not apply.[1] Provincial offences and municipal bylaws may also be privately prosecuted, subject to any restrictions specified by provincial statute.

Environmental offences

The most well-known environmental offences are general prohibitions on activities that may harm the environment, such as the anti-pollution provisions in the federal *Fisheries Act* and the Alberta *Environmental Protection and Enhancement Act*.[2] In addition to these, a variety of federal and provincial statutes make it an offence to fail to comply with regulatory requirements or obtain or comply with necessary authorizations. Other common offences include failing to comply with reporting or remediation requirements in the event of an unauthorized release, and providing false information.

This chapter is intended to provide an overview of the different types of offences set out in federal and provincial legislation and regulations, and in municipal bylaws. The nature of the offence will determine the scope of the right to privately prosecute, the applicable procedures, what the private prosecutor must prove to establish his or her case, and rights of appeal.

Application of laws to public and private lands

Unless otherwise specifically provided, federal and provincial laws apply to both public and private land within a province. Municipal bylaws apply to public and private land within the corporate limits of the municipality. This means that a private prosecution may be commenced regardless of where the alleged offence occurred, provided only that it occurred within the jurisdiction of the authority that created the offence.

Types of offences

***Criminal Code* offences**

Criminal Code offences generally focus on harm to persons or property interests, and were not designed to address environmental harm. In spite of a strong recommendation from the Law Reform Commission of Canada, crimes relating specifically to the environment have not been

[1] *Lynk v. Ratchford* (1995), 142 N.S.R. (2d) 399 (C.A.).
[2] *Fisheries Act*, R.S.C. 1985, c. F-14, s. 36; *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 109.

included in the *Criminal Code*.[3] A number of *Criminal Code* offences may, however, be applicable to the environment in some cases:[4]

Criminal negligence (sections 219 to 221)

- An act or, where under a legal duty to act, an omission that shows wanton or reckless disregard for the lives or safety of other persons;

Common nuisance (section 180)

- An unlawful act, or failure to discharge a legal duty, that endangers the lives, safety or health of the public, causes physical injury to any person, or prevents the public from enjoying a public right;

Mischief (section 430)

- Willfully causing damage to property or interfering with its operation, use or enjoyment;

Dangerous (explosive) and offensive volatile substances (sections 79 to 81 and 178)

- Failing to use reasonable care or mishandling an explosive substance, or possessing or mishandling an offensive volatile substance;

Disturbing the peace (section 175)

- This section applies to some forms of noise pollution;

Offences against animals (sections 444 to 447).

Under the *Criminal Code*, it is an offence to attempt to commit any offence with the intention of carrying through with the offence.[5] It is also an offence to assist or encourage any one to commit an offence.[6]

In some instances, another federal statute may provide that an offender is subject to prosecution and punishment under the *Criminal Code*. For example, the *Canadian Environmental Protection Act, 1999* provides that where a contravention of the Act "shows wanton or reckless disregard

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[3] Law Reform Commission of Canada, *Crimes Against the Environment* (Working Paper 44) (Ottawa: Law Reform Commission of Canada, 1985) at 65.
[4] *Ibid.* at 51. These are summaries only. For the full text see the *Criminal Code* R.S.C. 1985, c. C-46.
[5] *Criminal Code*, *ibid.*, s. 24.
[6] *Ibid.*, s. 21.

for the lives or safety of other persons and thereby causes death or bodily harm to another person" it may be prosecuted as an offence of criminal negligence.[7]

Criminal Code offences require the prosecution to prove *mens rea* (the mental element of intent, knowledge or criminal negligence) on the part of the accused, in addition to the *actus reus* (the actions or omissions constituting the offence). They may be either indictable or summary conviction offences (this distinction is explained in Chapters 12 and 13).

The facts constituting the offence

An offence provision in a statute, regulation or bylaw will specify the act or omission that constitutes the offence (the *actus reus*). For all offences (*Criminal Code* and regulatory), the prosecutor must establish all components of the *actus reus*, in addition to any *mens rea* requirement (see Chapter 7, *The role of the private prosecutor*).

Regulatory or public welfare offences

The great majority of environmental prosecutions are based on regulatory offences established to control specific types of activities, such as waste management, destruction of fish habitat, pesticide application, and industrial activities that affect the environment. Regulatory statutes such as the federal *Fisheries Act* and the Alberta *Environmental Protection and Enhancement Act* establish acceptable standards of conduct, and make it an offence to violate these standards.[8] Municipal bylaws are also regulatory offences.

***Mens rea* offences, or offences with a mental element**

Some regulatory offences are *mens rea* offences. Such offences must contain wording indicating that wrongful intention must be proved, such as "with intent", "knowingly", or "willfully". For example, the Alberta *Environmental Protection and Enhancement Act* provides that:

> No person shall knowingly release or permit the release of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly prescribed by an approval or the regulations.[9]

A person who commits this or any of several *mens rea* offences provided by the Act faces potentially severe penalties:

> (a) in the case of an individual, to a fine of not more than $100,000 or to imprisonment for a period of not more than 2 years or to both fine and imprisonment, or
>
> (b) in the case of a corporation, to a fine of not more than $1,000,000.[10]

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[7] *Canadian Environmental Protection Act, 1999,* S.C. 1999, c. 33, s. 274(2).
[8] *Supra* note 2.
[9] *Environmental Protection and Enhancement Act, supra* note 2, s. 108(1).
[10] *Ibid.*, s. 228(1).

Federal regulatory legislation also creates *mens rea* offences. For example, the *Canadian Environmental Protection Act, 1999* provides heavy penalties for an intentional or reckless contravention of the Act, its regulations or an order or agreement issued under the Act, where the contravention leads to an environmental disaster.[11]

It is important to note that prosecutions of *Criminal Code* offences and the *mens rea* offences under regulatory legislation account for a very small number of environmental prosecutions. This is owing to the difficulties faced by the prosecutor in proving *mens rea* beyond a reasonable doubt, and to the availability and suitability of regulatory offences where *mens rea* need not be proved. These latter offences are generally easier to establish and often carry significant penalties as well.

Strict liability offences

For most regulatory offences, the prosecutor is not required to prove *mens rea* (intent to commit the offence). In the absence of wording such as "with intent", "knowingly" or other words indicating *mens rea*, a regulatory offence is generally a strict liability offence.[12] For these offences, once the prosecutor has proven the actions or omissions constituting the offence, the onus is on the accused to show that he took all reasonable steps to avoid committing the offence (due diligence), or that he made a reasonable mistake of fact.[13] If the accused fails to establish due diligence or mistake of fact, a conviction may result.

Absolute liability offences

A small number of regulatory offences are absolute liability offences, meaning that *mens rea* need not be proved and the due diligence defence is not available. Normally, express wording or other clear evidence of legislative intent is required to deprive the accused of the due diligence defence.[14]

Municipal offences

Unlike the federal and provincial governments, municipalities have no constitutional power to pass bylaws or create offences. Municipalities derive their power to pass and enforce bylaws from provincial legislation, such as the Alberta *Municipal Government Act*[15] and *Dangerous Goods Transportation and Handling Act*.[16]

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[11] *Supra* note 7, s. 274.
[12] *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 at 374 (S.C.C.); *R. v. Brown* (1982), 69 C.C.C. (2d) 301 (Alta. C.A.), leave to appeal to S.C.C. refused (1982), 40 A.R. 450.
[13] *Ibid*.
[14] *Ibid.*; *R v. Nickel City Transport (Sudbury) Ltd.* (1993), 82 C.C.C. (3d) 541 (Ont. C.A.).
[15] R.S.A. 2000, c. M-26, ss. 7-8.
[16] R.S.A. 2000, c. D-4, s. 17.

Municipal bylaws may create offences relating to an array of subjects that affect the environment, including noise, litter, development, and the licensing of businesses and activities. Municipal offences are regulatory offences (see above).[17]

A note on pollution offences

In Quebec, the general prohibition on the release of harmful substances provided by the *Environment Quality Act* does not apply where discharge of the contaminant is specifically regulated.[18] Although the wording of such provisions differs from jurisdiction to jurisdiction, persons considering prosecuting a polluter under a general prohibition should examine whether the contaminant is already regulated. If so, a defence based on the applicability of the general prohibition may be raised. Most environmental laws make it an offence not to comply with applicable regulations. Therefore, as an alternative, the prosecutor may lay charges under the applicable regulation.

Offences relating to requirements incorporated into law by reference

An offence can only be created by legislation, regulation or bylaw. A standard or rule established by guideline or policy is generally not legally enforceable. However, such requirements may be made enforceable by incorporation into law. For example, the Alberta *Substance Release Regulation* requires that operators of certain types of facilities comply with industry-specific Codes of Practice, which are policy documents.[19] The Regulation makes failure to comply with the relevant Code of Practice an offence.[20]

Many environmental offences involve the violation of environmental standards established outside of legislation or regulations. For example, the Alberta *Environmental Protection and Enhancement Act* makes it an offence to violate the terms of an approval issued under the Act.[21] In such a case, the approval itself, and not the statute or the regulations, must be examined to determine whether an offence has occurred. In general, when an authorization issued under legislation imposes terms and conditions or establishes maximum levels for any release, failure to comply will constitute an offence.

Penalties

The law may establish separate offences and penalties for a prohibited or regulated activity. For example, the federal *Fisheries Act* provides that:

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[17] For further information on municipal offences and enforcement, see Ian M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., looseleaf (Toronto: Carswell, 1971) at para. 81.1.
[18] *Alex Couture Inc. v. Piette* (1990), 5 C.E.L.R. (N.S.) 314 (Que. C.A.).
[19] Alta. Reg. 124/93, s. 14.1.
[20] *Ibid.*, s. 16.1.
[21] *Environmental Protection and Enhancement Act, supra* note 2, s. 227(e).

> (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.
>
> (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.[22]

The Act specifies a penalty for this offence:

> Every person who contravenes subsection 35(1) is guilty of
>
> (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or
>
> (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both.[23]

Continuing offences

Many environmental statutes provide that, for each day during which an offence continues, the offender is liable for a separate offence. Other statutes provide that the offender is liable on conviction for each day or part of a day on which the offence continues. Potential penalties for such offences are much higher.

Where there is no specific offence provision for the activity, the law will normally include a general offence provision making it an offence to violate any of the requirements set out in the statute or specified regulations. For example, the Alberta *Provincial Parks Act* provides that:

> A person who contravenes this Act or the regulations is guilty of an offence and liable to a fine of not more than $2000 or to imprisonment for a term of not more than 6 months or to both fine and imprisonment.[24]

Statutory and other legal barriers to prosecution

Equivalency agreements

The *Canadian Environmental Protection Act, 1999* (CEPA) authorizes federal Cabinet to order that specified regulations under the Act do not apply in a province or territory.[25] The federal Minister of the Environment must first agree with the provincial or territorial government that equivalent laws and

[22] *Fisheries Act, supra* note 2, s. 35.
[23] *Ibid*., s. 40(1).
[24] R.S.A. 2000, c. P-35, s. 19.
[25] *Supra* note 7, s. 10.

enforcement mechanisms are provided by the laws of that jurisdiction. Before laying an information for a CEPA offence, the private prosecutor should ensure that the offence is not subject to an equivalency agreement.

Currently, the only province subject to an equivalency order is Alberta. In that province, the following CEPA regulations do not apply:[26]

- *Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations*[27] (all sections),
- *Pulp and Paper Mill Defoamer and Wood Chips Regulations*[28] (Sections 4(1), 6(2), 6(3)(b), 7 and 9 only),
- *Secondary Lead Smelter Release Regulations*[29] (all sections), and
- *Vinyl Chloride Release Regulations*[30] (all sections).

As a result, no person or other entity can be charged under these provisions in Alberta. Charges must be laid under equivalent provisions of the Alberta *Environmental Protection and Enhancement Act* or other federal or provincial law.

Limitation periods

Remember that an expired limitation period will bar any prosecution. See *Limitation periods* in Chapter 2, *Is private prosecution the right tool for you?*

Consent of the Attorney General to initiate a prosecution

Under the *Criminal Code*, certain offences require an informant to obtain the consent of the Attorney General (either federal or provincial) before an information can be laid.[31] Others require that the informant obtain such consent within a specified time after laying an information, or the proceedings cannot continue.[32] However, of the *Criminal Code* offences that are most likely to apply to the environment (see above, *Criminal Code* offences), none require consent of the Attorney General before or after laying an information.

Other federal and provincial legislation may also require consent of the Attorney General before proceedings can be initiated, or in order for them to continue.[33] For example, some provincial legislation requires the consent of the Attorney General before an information can be laid in connection with an offence where an offence notice has been issued or other specified

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[26] *Alberta Equivalency Order*, S.O.R./94-752.
[27] S.O.R./92-267.
[28] S.O.R./92-268.
[29] S.O.R./91-155.
[30] S.O.R./92-631.
[31] *Criminal Code*, *supra* note 4. See, for example, s. 136 (witness giving contradictory evidence) and s. 422 (criminal breach of contract).
[32] *Ibid.* See, for example, s. 477.2 (regarding certain offences committed in or on the territorial sea of Canada).
[33] For discussion, see Philip C. Stenning, *Appearing for the Crown* (Cowansville, Que.: Brown Legal Publications Inc., 1986) at 201-204 [Stenning].

enforcement action taken.[34] Although in the environmental context such a requirement will be rare, the statute creating the offence and the applicable procedural legislation should be reviewed before laying an information.

Where consent is required, it must be obtained before laying the information or within the specified period, otherwise the charge may be set aside, or quashed.[35] The decision by the Attorney General to grant or deny consent is completely discretionary.[36] The courts have demonstrated a great reluctance to review the exercise of such discretionary powers, provided the decision complies with any procedural requirements.[37]

Where consent is granted, it is provided in the form of an Attorney General's *fiat*, which is endorsed either on the information or indictment or on a separate form of consent. Consent should be obtained in writing.[38] It is important to comply with any procedural requirements and to ensure that the *fiat* makes specific reference to the alleged offence, the accused, and the time and place of the offence.[39]

Other statutory barriers

Many environmental statutes also prevent the laying of charges where enforcement officials have opted to impose an administrative penalty rather than prosecute, and the penalty has been paid.[40]

Regarding powers of the Attorney General and the courts to intervene once a prosecution has been initiated, see Chapter 10, *Powers to intervene.* Regarding statutory barriers and indictable offences, see also Chapter 13, *Prosecution of indictable offences.*

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[34] See, for example, Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 21(2).
[35] *R. v. Kluge* (1940), 74 C.C.C. 261 (B.C. Co. Ct.).
[36] *Winn v. Canada (A.G.)* (1994), 84 F.T.R. 115 (F.C.T.D.). See also Stenning, *supra* note 33 at 203-204. The policy of the Attorney General of Canada regarding requests for consent to prosecute is set out in *The Federal Prosecution Service Deskbook* (Ottawa: Department of Justice Canada, 2000) at 16.4.6.
[37] *Krieger v. Law Society of Alberta* (2002), 168 C.C.C. (3d) 97 (S.C.C.); *R. v. Warren* (1981), 61 C.C.C. (2d) 65 (Ont. H.C.J.).
[38] *R. v. Kluge*, *supra* note 35. However, *R. v. Harrison* (1976), 28 C.C.C. (2d) 279 (S.C.C.) indicates that adequacy of consent will depend on the circumstances of the case.
[39] *R. v. Breckenridge* (1905), 10 C.C.C. 180 (Ont. C.A.) at 182-83.
[40] See, for example, Alberta *Environmental Protection and Enhancement Act, supra* note 2, s. 237(3).

Chapter 6
Who can be prosecuted?

Most environmental private prosecutions involve corporate offenders. In some cases, individuals may also be prosecuted, either as directors, employees, or agents of a corporate offender or because they were directly involved in the offence. The Crown (federal, provincial and territorial governments) may also be subject to prosecution, as may government officials, employees and agents. This chapter explains the basis for corporate, Crown, and individual liability for environmental offences.

General rule

Subject to any existing statutory bar, a private prosecution may be commenced against any person whom the informant has reasonable grounds to believe has committed an offence.[1] Recent amendments to the *Criminal Code*[2] have expanded the definition of "person" to include the federal and provincial Crown and an organization.[3] An "organization" means

> (a) a public body, body corporate, society, company, firm, partnership, trade union or municipality, or
>
> (b) an association of persons that
> (i) is created for a common purpose,
> (ii) has an operational structure, and
> (iii) holds itself out to the public as an association of persons.[4]

Principals and parties to an offence

The *Criminal Code* provides that, in addition to persons who commit an offence (principals), charges may be brought against the following persons (parties to the offence):

- Persons who do or omit to do anything for the purpose of aiding in the commission of an offence,

- Persons who abet (encourage) the commission of an offence, and

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[1] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 504, 795.
[2] Bill C-45, *An Act to Amend the Criminal Code (criminal liability of organizations)*, S.C. 2003, c. 21. All sections are in force as of June 1, 2004.
[3] *Criminal Code*, *supra* note 1, s. 2 definition of "every one, person, owner". Prosecutions against the Crown are subject to Crown immunity: see below, *Liability of the Crown*.
[4] *Ibid.*, s. 2 definition of "organization".

- Persons who counsel another person to commit, or to aid or abet in the commission of, an offence, if that other person then does so.[5]

This may include corporate directors, officers, supervisors or others who give instructions that lead to the offence.[6] It need not be proven that the accused knew the conduct he was aiding was an offence,[7] and a person may be convicted as a party to an offence even if the principal offender cannot be identified.[8] However, a conviction for aiding or abetting requires proof that the accused actually acted or failed to act for the purpose of aiding or abetting the commission of the offence.[9] Mere negligence is insufficient to establish that a person was a party to an offence.

The *Criminal Code* now also imposes a legal duty upon persons with authority to direct the work of others to take reasonable steps to prevent bodily harm to workers or any other persons.[10] This new duty will assist the prosecution of management level staff for criminal negligence when, for example, management fails to take steps to prevent the release of noxious fumes in a community.[11]

Liability of corporations

Corporations can only act through their directors, officers and other employees or agents. These individuals are liable for offences they commit. In what circumstances will a corporation also be liable for an offence committed by a director, officer or employee?

For information on the types of offences referred to below, see Chapter 5, *What offences can be prosecuted?*

Liability of corporations for offences with a mental element (*mens rea* offences)

Recent amendments to the *Criminal Code*[12] have expanded the basis for a corporation (or other "organization" as defined by the Code) to be convicted for an offence requiring proof of criminal negligence or wrongful intent.[13] The new provisions will make it easier to prosecute corporations for criminal nuisance,

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[5] *Ibid.*, ss. 21-22. This wording is generally incorporated into provincial offences legislation. See, for example, Ontario *Provincial Offences Act,* R.S.O. 1990, c. P.33, ss. 77(1), 78(1).
[6] For a discussion of directors and officers as parties to an offence, see David Estrin, *Business Guide to Environmental Law,* looseleaf (Toronto: Carswell, 1992) at 2.3.1 [Estrin].
[7] *R. v. F.W. Woolworth Co. Ltd.* (1974), 18 C.C.C. (2d) 23 (Ont. C.A.).
[8] *R. v. Thatcher* (1987), 32 C.C.C. (3d) 481 (S.C.C.).
[9] *Dunlop and Sylvester v. The Queen* (1979), 47 C.C.C. (2d) 93 (S.C.C.); *R. v. Curran* (1977), 38 C.C.C. (2d) 151 (Alta. S.C. (A.D.)), leave to appeal to S.C.C. refused (1978), 20 N.R. 180n.
[10] *Criminal Code*, *supra* note 1, s. 217.1.
[11] Stanley David Berger, *The Prosecution and Defence of Environmental Offences*, looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2003) at para. 6.149 [Berger].
[12] *Supra* note 2.
[13] *Criminal Code*, *supra* note 1, ss. 22.1 and 22.2. See also Berger, *supra* note 11 at para. 6.149.

criminal negligence, and non-*Criminal Code* environmental offences where the corporation is alleged to be a party rather than a principal offender.

Formerly, a corporation could only be convicted as a party to an offence with a mental element where the offence was proven to have been committed, either deliberately or recklessly, by a "directing mind" of the corporation.[14] The wrongful intent and conduct of the directing mind was, in law, that of the corporation.[15] Under this former approach to corporate liability, the courts were unwilling to find that an individual was a "directing mind" unless he or she had decision-making authority on matters of corporate policy.[16] This and other requirements made attributing liability to the corporation difficult in many cases.

The *Criminal Code* amendments now make it possible for a corporation to be liable for the conduct of a director, partner, employee, member, agent or contractor who is a party to a criminal offence requiring proof of negligence, but only where a relevant senior officer departs markedly from a reasonable standard of care in failing to prevent the first person from becoming a party.[17] Where the offence requires proof of fault beyond negligence, the involvement or acquiescence of directors and certain senior corporate officers will allow a corporation to be convicted as a party where other conditions are met.[18]

Where a corporation is a party to an offence, the individual offender may also be convicted of being either a principal or party to the offence.[19] Both a corporation and the individual can be prosecuted and convicted of the same offence where the case is made out against both.[20]

Liability of corporations for strict and absolute liability offences

Where a corporation is in a position to exercise control over its relationship with employees, the corporation will generally be liable for strict and absolute liability offences committed by such persons within the scope of their employment.[21] This doctrine applies to independent contractors and agents as well. For strict liability offences, the corporation will escape liability if it can establish that the corporation, through its directing mind(s), took all reasonable steps to prevent the commission of the offence. Typically, "all reasonable steps" will require that the

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[14] *R. v. Canadian Dredge and Dock Co.* (1985), 19 C.C.C. (3d) 1 (S.C.C.) at 17-18. See also, generally, John Swaigen, *Regulatory Offences in Canada: Liability and Defences* (Toronto: Carswell, 1992) c. 6 [Swaigen].
[15] *R. v. Canadian Dredge and Dock Co.*, *ibid*. at 32.
[16] *"The Rhone" v. "The Peter A.B. Widener"*, [1993] 1 S.C.R. 497 at 526; *R. v. Safety-Kleen Canada Inc.* (1997), 114 C.C.C. (3d) 214 (Ont. C.A.).
[17] *Criminal Code*, *supra* note 1, s. 22.1.
[18] *Ibid.*, s. 22.2.
[19] *R. v. Fell* (1981), 64 C.C.C. (2d) 456 (Ont. C.A.).
[20] *R. v. Shamrock Chemicals Ltd.* (1989), 4 C.E.L.R. (N.S.) 315 (Ont. Dist. Ct.). See also Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, Ont.: Canada Law Book Inc., 1990) at 103 [Saxe].
[21] *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 253 (S.C.C.).

corporation had in place and was actively implementing a reasonable system to prevent such violations.[22]

Although a corporation may be charged with aiding and abetting a strict liability offence, conviction requires proof of knowledge,[23] making such a charge impractical in most cases.

Vicarious liability of employers

Up to this point in this chapter we have discussed ways in which an individual or organization can be convicted on the basis of primary liability, that is, as a principal offender or party to an offence.

Vicarious liability occurs when the wrongful acts and fault of another person are attributed to the accused. In general, the courts have rejected vicarious liability as a basis for criminal liability except where legislation expressly provides for it.[24] For example, Alberta's *Environmental Protection and Enhancement Act* provides:

> For the purposes of this Act, an act or thing done or omitted to be done by a director, officer, official, employee or agent of a corporation in the course of that person's employment or in the exercise of that person's powers or the performance of that person's duties is deemed also to be an act or thing done or omitted to be done by the corporation.[25]

Other statutes make it sufficient evidence of an offence to prove that an employee or agent of the accused corporation committed the offence.[26]

In general, such provisions will apply to strict liability offences only, or allow the accused corporation to escape conviction by establishing that it did not know of or consent to the offence.[27] The prosecutor must still prove wrongful intent against the corporation if the offence requires it (see above, *Liability of corporations for offences with a mental element*).[28]

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[22] *Ibid*. See also Swaigen, *supra* note 14 at 144.
[23] See note 9, *supra* and accompanying text.
[24] *R. v. Canadian Dredge and Dock Co.*, supra note 14 at 22.
[25] R.S.A. 2000, c. E-12, s. 253.
[26] See, for example, Alberta *Dangerous Goods Transportation and Handling Act*, R.S.A. 2000, c. D-4, s. 25; *Wildlife Act*, R.S.A. 2000, c. W-10, s. 91; *Canadian Environmental Protection Act*, *1999*, S.C. 1999, c. 33, s. 282; *Fisheries Act*, R.S.C. 1985, c. F-14, s. 78.3.
[27] See, for example, Alberta *Dangerous Goods Transportation and Handling Act*, *ibid*., s. 25; *Wildlife Act, ibid*., s. 91; *Canadian Environmental Protection Act*, *1999*, *ibid*., s. 282; *Fisheries Act*, *ibid*., s. 78.3.
[28] *R. v. Safety-Kleen Canada Inc.*, *supra* note 16.

Comment on corporate liability

There are several bases on which a corporation can be made liable for offences committed by those directing the corporation, or by independent contractors, employees and agents of the corporation. The scope of liability will depend on the type of offence (*mens rea*, strict or absolute liability) and on any express provisions attributing liability to corporations. It is therefore essential to carefully review the statute creating the offence.

Personal liability of corporate directors and officers

We have reviewed the liability of corporations for offences that require proof of a mental element such as intent, and for strict and absolute liability offences. Aside from the provisions of the *Criminal Code* (see above, *Principals and parties to an offence*), on what basis can directors, officers, other managerial employees and agents be personally liable for either participating in an offence, or failing to take steps to prevent the commission of an offence?

Liability of directors, officers and agents under environmental statutes

Many environmental statutes make it an offence to cause or permit the release of a substance in a manner that may cause environmental harm.[29] In the absence of wording indicating that a mental element must be proven, these are generally strict liability offences.[30] Where a director or officer is in a position to exert influence and control to prevent the commission of such an offence, and fails to do so, he or she may be personally liable for the offence.[31] Conviction may be avoided by the accused establishing that he or she took all reasonable steps to prevent the occurrence of the offence.

In addition, many environmental statutes contain provisions imposing a positive duty upon directors and officers to exercise reasonable care to comply with the Act. For example, the *Canadian Environmental Protection Act, 1999* provides:

> Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with
>
> (a) this Act and the regulations; and
> (b) orders and directions of, and prohibitions and requirements imposed by, the Minister and enforcement officers and review officers.[32]

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[29] See, for example, Alberta *Environmental Protection and Enhancement Act*, *supra* note 25, s. 109.
[30] See Chapter 5, *What offences can be prosecuted?* under *Strict liability offences*.
[31] *R. v. City of Sault Ste. Marie*, *supra* note 21. See also Saxe, *supra* note 20 at 107ff.
[32] *Canadian Environmental Protection Act, 1999*, *supra* note 26, s. 280(2). See also Ontario *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 194.

Although the wording of this provision is similar to that used by the courts to describe the due diligence defence, this type of offence may require that the prosecution prove absence of reasonable care, beyond a reasonable doubt.[33]

Many environmental statutes now also directly address the liability of directors and officers for offences committed by the corporation through its employees or agents. For example, the *Canadian Environmental Protection Act, 1999* imposes a duty on directors, officers and agents to avoid any involvement in an offence:

> Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.[34]

Conviction for this offence, and similar offences in other federal and provincial environmental statutes,[35] will require proof that the individual had authority to prevent the commission of the offence, and had knowledge of the facts relevant to the offence (*mens rea*).[36] A few statutes provide that a director or officer can only be convicted if the corporation is first convicted.[37]

Who is an "officer" and a "director"?

When defining terms, always look first to the statute containing the offence. If no definition is provided, federal and provincial statutes governing business corporations provide some guidance. For example, the Ontario *Business Corporations Act* and most other provincial and territorial business corporations statutes define "director" to mean "a person occupying the position of director of a corporation by whatever name called."[38] Federal and provincial business corporations are required to be governed by a board, and the membership of the board is available to the public through provincial and federal corporate registry agents or systems.[39]

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[33] The law on this point is not settled: *R. v. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. Prov. Div.), aff'd on other grounds [1994] O.J. No. 313 (Ont. Ct. Gen. Div.); *R. v. Bata Industries Ltd*. (1992), 70 C.C.C. (3d) 394 (Ont. Ct. Prov. Div.), var'd (1993), 14 O.R. (3d) 354 (Gen. Div.), rev'd in part, on other grounds (1995), 101 C.C.C. (3d) 86 (C.A.).

[34] *Canadian Environmental Protection Act, 1999, supra* note 26, s. 280(1). For further discussion on this and similar sections see Saxe, *supra* note 20 at 131-141.

[35] See, for example, the *Fisheries Act, supra* note 26, s. 78.2, the *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34, s. 39 and various provincial statutes including the Alberta *Environmental Protection and Enhancement Act*, *supra* note 25, s. 232.

[36] *R. v. Swendson* (1987), 78 A.R. 220 (Q.B.); *R. v. Wilansky* (1983), 41 Nfld. & P.E.I.R. 29 (Nfld. Dist. Ct.).

[37] For example, *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 14(4).

[38] R.S.O. 1990, c. B-16, s. 1(1).

[39] In Alberta, corporate registry information is available through private registry agents. For federal corporations, information is available through Corporations Canada (Industry Canada), or see the

Under the Ontario *Business Corporations Act*, an "officer":

> … includes the chair of the board of directors, a vice-chair of the board of directors, the president, a vice-president, the secretary, an assistant secretary, the treasurer, an assistant treasurer and the general manager of a corporation, and any other individual designated an officer of a corporation by by-law or by resolution of the directors or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any such office.[40]

The definition thus depends on the individual's function within the corporation, rather than his or her title.

Individuals who fall within the statutory definitions applicable in that jurisdiction are potentially liable as directors or officers as environmental legislation provides. In addition, elected members of a municipal council and municipal officers such as the chief executive or administrative officer are likely subject to the same liabilities and duties.[41]

In general, "inside" directors (those who are also officers or employees of the corporation) are far more likely to have influence and control over the prevention of offences than "outside" directors. An outside director may be able to establish due diligence by showing that he or she asked appropriate questions regarding the corporation's environmental behaviour, and insisted on reasonable answers. For an officer or inside director, the standard for due diligence will be higher.

Comment on personal liability of corporate directors and officers

Directors, officers and managerial employees may be personally liable as principals or parties to an offence, either under the *Criminal Code* or a federal or provincial environmental statute. More commonly, they may be liable under environmental statutes that impose liability on the basis of acquiescence or other involvement, or that impose a duty to take reasonable care to prevent violations of the law.

In some cases it will be difficult to identify responsible individuals. It will, in general, be easier to identify potentially liable directors and officers, and offending individual behaviour, in a small corporation.[42] It will also typically be easier to establish the involvement, knowledge, acquiescence, or failure to act of an officer or inside director than an outside director.

Corporations Canada website, online: <http://www.corporationscanada.ic.gc.ca> and follow the link to search for a federal corporation.

[40] *Supra* note 38.

[41] Estrin, *supra* note 6 at 2.3.3.2.

[42] Saxe, supra note 20 at 141-142.

Before laying a charge against a director or officer, the evidence should be carefully reviewed to determine whether it provides a sufficient basis to prosecute the individual. A careful review of applicable provisions dealing with directors' and officers' liability in the statute creating the offence is also critical. The advice of an experienced criminal lawyer is recommended.

Personal liability of employees and agents

Employees, independent contractors and agents of a corporation can be personally liable for environmental offences. In general, these parties are under a duty to carry out their instructions in a reasonable manner in light of damage that may result from a failure to do so. Instructions and information provided by the employer or principal and the experience and knowledge of the employee, contractor or agent will affect this determination.[43]

Liability of the Crown

Unless wording in a statute provides or necessarily implies otherwise, the Crown is not bound by statutory law and cannot be prosecuted.[44] This includes the federal and provincial governments, but not municipalities. The Ministers and other officials, employees, and agents of the Crown are also immune, provided they act within the scope of their authority and in furtherance of Crown purposes.[45] A corporation may be an agent of the Crown, either pursuant to the corporation's enabling legislation or as a result of the control the Crown exercises over the corporation.[46]

Some legislation expressly binds only the provincial or the federal Crown, or both. For example, both the federal *Fisheries Act* and the *Canadian Environmental Protection Act, 1999* declare those Acts to be binding on the federal and provincial governments.[47] Other legislation imposes liability on the Crown, without specifying further.

As a general rule and subject to exceptions, the federal Crown cannot be bound by provincial law.[48] However, the federal Crown may be so bound by incorporating the provincial law by reference, by entering into an agreement with a province, or through reliance on and benefit from the provincial law. In addition, the courts have recently indicated a willingness to

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[43] Swaigen, *supra* note 14 at 164-167.
[44] *Interpretation Act,* R.S.C. 1985, c. I-21, s. 17; *Interpretation Act,* R.S.A. 2000, c. I-8, s. 14. See also Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 1997) at 10.8(c) [Hogg].
[45] *R. v. Eldorado Nuclear Ltd.* (1983), 8 C.C.C. (3d) 449 (S.C.C.). See Berger, *supra* note 11 at paras. 1.800-1.835. A Minister of the Crown was successfully prosecuted in *R. v. Snow* (1981), 11 C.E.L.R. 13 (Ont. Prov. Off. Ct.).
[46] Hogg, *supra* note 44 at para. 10.2(b).
[47] *Fisheries Act*, *supra* note 26, s. 3(2); *Canadian Environmental Protection Act, 1999, supra* note 26, s. 5.
[48] Hogg, *supra* note 44 at para. 10.9(d).

broaden the scope of the federal Crown's liability for provincial environmental laws that are squarely within provincial jurisdiction and not contrary to federal law.[49]

By contrast, federal laws that expressly bind the Crown apply to and are binding upon the provincial Crown.[50] In the absence of language expressly binding the provinces, the courts have tended to interpret wording in federal legislation binding "the Crown" as binding the provincial Crown as well.[51]

If there is evidence that either the federal or provincial government, through its officials, employees or agents, has committed an environmental offence or other unlawful act, the statute creating the offence should be examined to determine whether the Crown has been made liable in whole or in part for offences under that Act.

Evidence of a government employee's direct involvement in the commission of an offence may provide a basis for prosecution. To successfully prosecute a senior government official or a Minister of the Crown who was not personally involved in the offence, there must generally be evidence that the official authorized the conduct or ratified it afterward.[52]

However, some environmental legislation imposes broader liability on senior government officials. The Alberta *Environmental Protection and Enhancement Act* binds the Crown to the Act, except where specifically provided to the contrary.[53] In addition, the Act provides:

> Where a person who is acting under the direction of
>
> (a) a Minister of the Government,
> (b) an official of the Government,
> (c) a member of a council of a local authority, or
> (d) the chief administrative officer or a designated officer of a local authority
>
> commits an offence under the Act, the Minister, official, member of council, chief administrative officer or designated officer is also guilty of the offence and liable for the punishment provided for the offence, if [that person] knew or ought reasonably to have known of the circumstances that constituted the commission of the offence and had the influence or control to prevent its commission, whether or not the other person has been prosecuted for or convicted of the offence.[54]

Such provisions may assist with the private prosecution of a government official who was indirectly involved with the commission of an offence.

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[49] *R. v. Smith* (2002), 46 C.E.L.R. (N.S.) 216 (N.B. Prov. Ct.).
[50] Hogg, *supra* note 44 at para. 10.9(f).
[51] Hogg, *ibid.* at para. 10.9(b).
[52] *R. v. Stradiotto* (1973), 11 C.C.C. (2d) 257 (Ont. C.A.).
[53] *Supra* note 25, s. 3.
[54] *Ibid*., s. 233(1). The due diligence defence is available: s. 233(2).

Comment on identifying who should be prosecuted

We have examined the parties who can be prosecuted, but the question of who should be prosecuted will depend on the nature of the offender, the applicable laws, and the facts of the case. Charges should only be brought where there is sufficient credible and reliable evidence to reasonably support a conviction (for guidance on building a case, see Appendix 2, *Investigating and documenting your case*). Remember that charges against each accused must be proven beyond a reasonable doubt.

The time, resources, and assistance available to the private prosecutor are also important to this decision. Keep in mind that a prosecution will become more complex, expensive and time-consuming if more than one offender is charged.

Charges may be withdrawn

The charges against any of the parties named in the information may normally be withdrawn up to the date of trial. After this time it is necessary to seek the permission of the court to withdraw (see Chapter 8, *Initiating a private prosecution*, under *Withdrawing charges*).

Chapter 7
The role of the private prosecutor

A private prosecution is fundamentally a criminal law matter. From a criminal justice perspective, the primary concern of a private prosecution is not righting environmental wrongs, but the commission of an offence under federal or provincial law. The role of the prosecutor in this context deserves careful consideration before proceedings are commenced.

The prosecutor's duties

The prosecutor's primary duty to the public, the court, the accused and the justice system is to pursue a just result. In the context of a private prosecution, this means putting all available, relevant information before the court, whether or not it supports the prosecutor's position. In addition, the private prosecutor should make every effort to be forthcoming and completely honest at every stage of the proceedings, and to avoid unnecessary delays. Failure to do so may infringe on the accused's Charter rights to know the case against him, to a fair hearing, and to be tried within a reasonable time.[1] Such infringements could result in charges being stayed or otherwise undermine the private prosecutor's case.

Subject to legal privilege, the prosecutor has a legal and ongoing duty to provide full disclosure of all relevant evidence to the accused.[2] This includes all information that may reasonably be useful to the defence, whether favourable to the accused or not. Types of evidence that must normally be disclosed include:

- a copy of the information or indictment;
- a summary of the circumstances of the offence;
- a copy of the accused's criminal or enforcement record;
- statements of the accused;
- names of witnesses;

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 7 and 11(b) and (d).

[2] *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.). Only evidence that is clearly irrelevant may be withheld: *R. v. O'Connor*, [1995] 4 S.C.R. 411. See also Stanley David Berger, *The Prosecution and Defence of Environmental Offences*, looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2003) at paras. 4.10-4.99.1 [Berger].

- statements of witnesses (even if they may not testify), including notes from interviews, telephone calls, correspondence including e-mail, and any information showing what evidence the witness is likely to give;

- notes from investigations;

- copies of photographs, films and any other evidence;

- anything proposed to be entered as an exhibit; and

- any information that could reduce the sentence if the accused is convicted.

The disclosure requirement is triggered by a request from the accused, and should occur before the accused is called to plead or elect a mode of trial.[3]

Proving your case "beyond a reasonable doubt"

A few environmental offences require proof of *mens rea*, or wrongful intent, while most require only proof that the accused in fact committed the actions or omissions constituting the offence (see Chapter 5, *What offences can be prosecuted?*). In either case, the prosecutor must establish each element of the alleged offence "beyond a reasonable doubt". This burden is far more onerous than that required in a civil action, where the plaintiff must establish his or her case "on a balance of probabilities".

Proving each element of the offence

For example, if the charge is permitting the deposit of a deleterious substance into water frequented by fish contrary to section 36(3) of the *Fisheries Act*, the prosecutor must establish:

An introduction to the rules of evidence and practical guidance on building your case is provided in Appendix 2, *Investigating and documenting your case.*

- that the substance was "deleterious" under the Act's definition;

- that the substance was deposited, or the deposit permitted, by the accused(s);

- that the deposit was made on the alleged date or dates; and

- that the deposit was made "in water frequented by fish, or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water".[4]

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[3] *R. v. Stinchcombe, ibid*.

[4] *Fletcher v. Kingston (City),* (1998), 28 C.E.L.R. (N.S.) 229 (Ont. Ct. Prov. Div.), var'd [2002] O.J. No. 2324 (Ont. S.C.J.)(QL), var'd [2004] O.J. No. 1940 (C.A.)(QL). For this offence, the prosecution is not required to

Definitions set out in legislation, and requirements for proof, provide guidance to the prosecutor in proving each element of the offence beyond a reasonable doubt. "Deleterious substance", "deposit" and "water frequented by fish" are all defined in section 34 of the Act, and matters relating to the proof of these elements are addressed in section 40(5).

For summary conviction offences, the prosecutor is not required to prove that a violation was not authorized, except to rebut a defence raised by the accused.[5]

The defences available to the accused

Throughout the proceedings, the primary burden to prove the case beyond a reasonable doubt remains with the prosecutor. The accused is not obligated to offer a defence. However, once the prosecution has presented its case, it is normally open to the accused to introduce evidence that may raise a reasonable doubt regarding any of the elements of the offence, such as the identity of the offender, the occurrence of the actions that constitute the offence, or wrongful intent (for *mens rea* offences).[6]

The accused may also seek to avoid conviction on the basis of other, specific defences. To acquit on the basis of these defences, the court must be satisfied of the facts constituting the defence "on a balance of probabilities", meaning more probable than not. The following are summaries of the more common defences; the reader is referred to existing works on this topic for further information.[7]

Due diligence

This is the most common defence where the prosecution has established that the accused committed a strict liability offence. For these offences, once the prosecutor has established the facts constituting the offence, the onus is on the accused to show that he took all reasonable steps to avoid committing the offence (due diligence).[8] If the accused can establish due diligence on a balance of probabilities, an acquittal will result.

Corporations whose activities may harm the environment often implement environmental management systems to achieve compliance with the law, prevent pollution and meet other environmental objectives. Such systems may provide for environmental monitoring, ongoing

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establish that the water into which the substance was deposited became deleterious or harmful to fish habitat. But see paras. 58-84 (C.A.) regarding necessary proof of the deleterious nature of a substance.

[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 794. See also provincial summary proceedings legislation, for example, Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 47(3).

[6] Kent Roach, *Criminal Law,* 2nd ed. (Toronto: Irwin Law, 2000) at 83-92, 124-163 [Roach].

[7] Berger, *supra* note 2, c. 5; Roach, *ibid.*, c. 5 and 8; Elizabeth J. Swanson and Elaine L. Hughes, *The Price of Pollution, Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990) at 129-176 [Swanson & Hughes].

[8] *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 253 (S.C.C.).

employee training in preventing and handling environmental problems, and proper reporting of environmental incidents, among other measures. Environmental management systems assist corporations in establishing due diligence in the event of a prosecution for a strict liability offence.

The due diligence defence is not available for absolute liability offences. For *mens rea* offences, once the actions constituting the offence are proven, the accused need only raise a reasonable doubt as to wrongful intent. The due diligence defence is therefore not generally applicable, but evidence of such efforts may help raise a reasonable doubt.

Due diligence: example

In *R. v. Imperial Oil Ltd.*,[9] the accused, which operated a refinery, was charged under the federal *Fisheries Act* and the BC *Waste Management Act* for releasing a highly toxic substance into water. Two years before the incident in question, the company had implemented a high-level safety and risk-assessment program. The program was designed to establish protocols to deal with any problems resulting from the identified risks, and had already led to important improvements. The accused also had follow-up procedures for spills, was willing to spend money, had good training and monitoring, and was well-supervised. Nevertheless, after considering the evidence, the BC Court of Appeal held that it was not reasonable for the accused to have failed to identify to the toxic substance in question as a priority risk. As a result, the steps the accused took to control the risk, which failed, fell below the due diligence standard of "all reasonable care".

Mistake of fact

Mistake of fact is another defence to a strict liability offence. This defence is available where the accused can establish that he reasonably believed in a mistaken set of facts that, if true, would render the act or omission innocent.[10] For strict liability offences, if a hypothetical reasonable person in the accused's position would have made the same factual mistake, the defence will succeed. As with the due diligence defence, once the facts of the offence are proven beyond a reasonable doubt, the onus is on the accused to establish a reasonable mistake of fact.

The mistake of fact defence is also available for *mens rea* offences. The onus of proving *mens rea* remains with the prosecution, but it is open to the accused to raise a reasonable doubt on this point by introducing evidence of mistake of fact. For *mens rea* offences other than offences of negligence, the accused is not required to establish that his mistaken belief was reasonable, but only that it was honestly held.[11] This defence is not available where the accused deliberately failed to make inquiries when his suspicions were aroused (i.e., was willfully blind).

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[9] (2000), 148 C.C.C. (3d) 367 (B.C.C.A.).
[10] *R. v. City of Sault Ste. Marie*, *supra* note 8.
[11] *R. v. Pappajohn* (1980), 52 C.C.C. (2d) 481 (S.C.C.).

The mistake of fact defence is not available for absolute liability offences, where liability occurs regardless of fault.[12]

Mistake of fact: example

In *R. v. Richmond Plywood Corporation*,[13] the accused operated a lumber company adjacent to the Fraser River in Vancouver. By dragging logs out of the river to dry on the shore, the accused inadvertently created a low-lying tidal marsh that became inhabited by fish. When the accused later dumped waste material in this area, the company was charged under the federal *Fisheries Act* for harmful alteration, disruption, or destruction of fish habitat, a strict liability offence.

The Court determined that the accused was not aware that the property was fish habitat, and had no reason to suspect that it was. Once notified by the authorities, the company was quick to cooperate. The defence of mistake of fact succeeded.

Statutory authority

This defence may be raised where the act or omission that constitutes the offence is permitted under a valid license or other statutory authorization. Normally, this defence is only available if the authorization was issued under the same statute containing the offence charged.[14] The accused must also establish that he was in full compliance with an authorization that was valid at the time the offence was committed.[15] This defence is normally available for *mens rea*, strict liability and absolute liability offences.

Statutory authority: example

In *R. v. Rayonier*,[16] the accused company, which operated a pulp mill, was charged under the federal *Fisheries Act* for depositing a deleterious substance in water frequented by fish. The accused had been in contact with provincial environment officials, and was operating in compliance with a valid provincial permit at the time the charges were laid. Nevertheless, the accused was found guilty on the federal charges.

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[12] Swanson & Hughes, *supra* note 7 at 162.
[13] (1981), 63 C.C.C. (2d) 99 (B.C. Co. Ct.).
[14] *R. v. Rayonier Canada Ltd.* (1974), 1 F.P.R. (II) 25 (B.C. Prov. Ct.). There are exceptions: *R. v. Great Canadian Oil Sands Ltd.* (1977), 9 A.R. 86 (Dist. Ct.).
[15] *R. v. Canadian International Paper Co.* (1974), 20 C.C.C. (2d) 557 (Ont. C.A.).
[16] *Supra* note 14.

Compliance with statutory orders, prior payment of penalty

Some environmental statutes immunize from prosecution parties who fully comply with an order issued by specified officials.[17] Parties may also be protected from prosecution where they enter an agreement with specified officials to address any damage or non-compliance issues.[18]

In addition, many environmental statutes provide that where a party pays an administrative penalty in connection with a violation, the party cannot then be prosecuted for that offence.[19]

Mistake of law is no defence

The *Criminal Code* provides that ignorance of the law, or its meaning, scope, or application, is no defence.[20] It is also no defence that the accused believed that a particular law was not being enforced. This rule applies to regulatory offences as well.[21]

Officially induced error

There is an important exception to the rule that ignorance of the law is no defence. Where the accused can establish that he sought legal advice from an appropriate official, and was given and reasonably relied upon specific legal advice given by that official, he may escape conviction if the advice given was wrong.[22] Officially induced error is difficult to establish and rarely succeeds. This defence is normally available for *mens rea*, strict liability and absolute liability offences.[23]

Officially induced error: example

In *R. v. United Aggregates Ltd.*,[24] the accused was charged in a private prosecution with excavating and removing material without the required provincial permit. The accused testified that the company was informed by the Minister of Environment that they should proceed despite an earlier Court ruling that a permit was required. The Court found that it was not reasonable for the accused to have relied on the Minister's statement. The defence of officially induced error failed.

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[17] See, for example, Ontario *Environmental Protection Act*, R.S.O. 1990, c. E-19, s. 186(4).
[18] See, for example, Northwest Territories *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, s. 11.1(4).
[19] See, for example, Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 237(3).
[20] *Criminal Code*, *supra* note 5, s. 19.
[21] Dianne Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, Ont.: Canada Law Book Inc., 1990) at 152-53.
[22] *R. v. Cancoil Thermal Corporation and Parkinson* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.).
[23] *Ibid.*; *R. v. Jorgensen*, [1995] 4 S.C.R. 55.
[24] (2001), 39 C.E.L.R. (N.S.) 96 (Ont. C.J.).

Act of third party

This defence is most commonly raised by corporations seeking to avoid liability for offences committed by directors, officers, agents, or employees. The act of third party defence is normally available for *mens rea*, strict liability and absolute liability offences. The grounds on which a corporation may be held liable for actions of these persons are addressed in Chapter 6, *Who can be prosecuted*?

Act of third party: example

In *R. v. Canadian Pacific Ltd.*,[25] the company was charged with the harmful alteration of fish habitat under the federal *Fisheries Act*. The evidence showed that an employee had disregarded the instructions of the company's environmental engineer when he used a backhoe to move earth resulting in the commission of the offence. The court noted that the employee was experienced and capable and that the instructions were clear and effectively communicated. In accepting that the company was not liable for the act of the employee, the court stressed that his actions were not reasonably foreseeable.

Other defences

Other possible defences include *necessity* or *impossibility* (the offence was necessary given imminent risk of serious harm and physical impossibility of complying with the law), *act of a stranger* (the offence was caused by a third party, such as a vandal, and not the accused), and *act of God* (the offence was the result of natural forces beyond the accused's control, and the harm would have occurred regardless).[26] All of these defences are normally available for *mens rea*, strict liability and absolute liability offences.

An accused may also raise abuse of process as a defence, arguing that the proceedings are oppressive or brought for an improper purpose (see Chapter 10, *Powers to intervene*, under *Abuse of process*). A stay of proceedings for abuse of process may be sought from the court as part of a Charter application (see below) or, more commonly, on the basis of the court's discretionary, common law power.

The *Charter of Rights and Freedoms*

Finally, the private prosecutor should be aware of the potential for a defence based on the *Canadian Charter of Rights and Freedoms*.[27] An accused may argue that a law creating an environmental offence infringes rights guaranteed by the Charter, or that Charter rights have been infringed as a result of a prosecution. Certain Charter rights, such as the basic safeguards

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[25] (2001), 38 C.E.L.R. (N.S.) 210 (B.C. Prov. Ct.).

[26] For a discussion of these defences, see Swanson & Hughes, *supra* note 7 at 143-156.

[27] *Supra* note 1.

of a fair trial, apply to corporations;[28] others, such as the right to "life, liberty and security of the person" do not.[29] As with the other specific defences summarized here, the onus of raising and establishing the defence is on the accused.

[28] *Ibid*., s. 11 (rights of person charged with an offence). There are exceptions: Peter W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 1997) at 34.1(b).
[29] *Charter of Rights and Freedoms*, *ibid*., s. 7.

Part II

Steps to a private prosecution

Chapter 8
Initiating a private prosecution

A private prosecution is launched by laying an information before a Provincial Court Judge or Justice of the Peace. However, before commencing proceedings, you may wish to advise the offender of the violation and file a formal complaint with the relevant authority. In addition to explaining these steps, this chapter sets out how to draft an information, with examples, and describes where and how to attend before a judicial officer to lay an information.

Informing the alleged offender

As a preliminary step, you may wish to notify the alleged offender of the problem, specifying the offending activity and indicating that you believe the activity to be a violation of the law. It is important not to threaten or even suggest that you intend to contact the authorities or commence criminal proceedings, whether immediately or in the absence of a satisfactory response. See comments regarding the offence of extortion in Chapter 2, *Is private prosecution the right tool for you?*

Making a formal complaint

Before laying an information to commence a private prosecution it is advisable to file a formal complaint with the government authority responsible for enforcement of the offence. There is little utility in pursuing a prosecution privately if government officials are willing to launch an investigation or initiate enforcement action.

Making a formal complaint may be valuable for many reasons. Environmental protection agencies have limited monitoring and surveillance resources, and a complaint may provide information needed to commence an official investigation. In addition, if government officials are already aware of the offence and are considering action, consultation could save duplication of effort. The evidence submitted as part of a complaint may also assist enforcement officials in their investigation and in determining the proper response.

Environmental and other legislation provides government authorities with a variety of tools to enforce laws, including control orders and stop orders. These tools may be necessary to prevent ongoing damage, in place of or in addition to a private prosecution.

In the event that no official enforcement action is taken in response to your complaint, the fact that you made a formal complaint may be important should you decide to launch a private prosecution. A Provincial Court Judge or Justice of the Peace may be more inclined to issue process on your information with evidence of this preliminary step. In addition, the officials

who investigate your complaint may provide valuable evidence for the prosecution. A complaint may also strengthen a private prosecutor's argument against a stay of proceedings by the Attorney General, since that official cannot argue that the authorities were not given the opportunity to investigate and take enforcement action.

You do not limit your right to prosecute by making a formal complaint.

Where do I make a formal complaint?

At both the federal and provincial levels, responsibility for responding to complaints and for enforcement lies with a variety of departments and agencies. Generally speaking, a complaint should be directed to the department or agency responsible for enforcing the Act or regulation containing the alleged offence. In many cases, an environmentally harmful act may constitute an offence under both provincial and federal legislation, and possibly under municipal bylaw. In such cases it is important to file your complaint with all departments and agencies with enforcement authority over the matter.

For example, a complaint about a violation of air pollution standards in Alberta should be made to the provincial Department of the Environment. If the pollution relates to a facility or activity that is regulated by a specific agency, such as oil and gas production, the complaint should also be made to that agency or department (in Alberta, the Energy and Utilities Board).

A complaint regarding a violation of water pollution standards should also be made to the provincial Department of the Environment. However, where the pollution could affect fish or fish habitat, the complaint should also be made to both Environment Canada and the federal Department of Fisheries and Oceans.[1] Where the pollutant is silt or the offence involves the physical disruption of fish habitat, the complaint should be made to the Department of Fisheries and Oceans and to the provincial Department of the Environment.

Complaints regarding a public nuisance with the potential to affect human health should be made to public health officials in addition to the departments listed above.

Where a harmful act constitutes a violation of a municipal bylaw, a complaint should also be made to the local bylaw enforcement office or, if none, to the RCMP. Where the offence is alleged to have been committed by a federal official, you should also ensure that your complaint is filed with the RCMP.

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[1] Pursuant to a 1985 Memorandum of Understanding, Environment Canada is responsible for the administration and enforcement of the pollution prevention provisions (s. 36(3)) of the *Fisheries Act*. The Department of Fisheries and Oceans enforces the prohibition against harmful alteration, disruption or destruction of fish habitat (s. 35(1)), and retains primary responsibility for enforcement of the *Fisheries Act*.

How do I make a formal complaint?

Formal complaints should always be in writing. Ensure that you identify yourself, and that your letter describes the offending activity, identifies the persons responsible, and specifies the date, time and location of the alleged offence. The provision of the law alleged to be violated should also be specified, if possible. Request that the matter be investigated and the appropriate charges be laid. Include copies of any evidence in your possession, such as photographs, pollution journals and other documents (always retain originals). Make sure to indicate that you are expecting a reply. Always keep copies of your letters and any correspondence received in response.

Statutory declaration

A statutory declaration is a statement of events or facts sworn or affirmed before a commissioner of oaths. Unless the statute under which the complaint is made requires such a statement as part of the formal complaint, it is not necessary to include one. It may, however, add weight to your complaint.

Statutory complaint procedure

Some environmental statutes provide a formal complaint procedure (see Chapter 3, *Alternatives to private prosecution and supplementary action* under *Right to have a government investigation conducted*). Where such a procedure is available, compliance with its requirements is advisable, as in some cases doing so will open up other potential remedies. The procedure may require that formal complaints be submitted in a specific form and contain specific information. Where an offence is alleged under the *Canadian Environmental Protection Act, 1999*, for example, a resident Canadian who is at least 18 years old may apply to the Minister of Environment for an investigation of the offence.[2] The application must include a sworn or affirmed statement setting out specific information relating to the alleged offence, including the names of the alleged offenders. Upon receiving a completed application, the Minister is required to investigate, and to report to the complainant on progress made and any action taken.[3] The Minister may or may not refer the matter to the Attorney General's office for prosecution. If the investigation is discontinued, the Minister must provide a report with reasons to the complainant.[4]

Only applications meeting the criteria set out in the Act will compel the Minister to investigate and report to the complainant. Non-conforming complaints may be considered, but any action taken or response given is discretionary. It is therefore important to check whether the statute containing the alleged offence provides such a complaint procedure and, if so, to follow it. Contact the department responsible for enforcement of the Act to obtain clear instructions and proper forms.

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[2] *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 17. Similar provisions are found in provincial legislation. See, for example, Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 197.

[3] *Canadian Environmental Protection Act, 1999, ibid.*, ss. 18-19.

[4] *Ibid.*, s. 21.

Seeking legal assistance

It is wise at the outset to seek legal assistance for the initiation and conduct of a private prosecution. While for many offences a citizen has the right to carry a prosecution on his or her own, the process is complex. An experienced criminal lawyer can help you understand this process, save time, and avoid mistakes that could derail the prosecution.

It is particularly important that you have a lawyer's assistance in drafting or reviewing the information. Legal assistance may also prove helpful in filing a formal complaint, setting up a process hearing, organizing arguments, and preparing for trial. In addition, you may need a lawyer's help to make an application for judicial review, or to file or argue appeals on dismissal of charges or against sentence.

Concerning the need for legal counsel at trial, see Chapter 12, *Prosecution of summary conviction offences*. Regarding how to find a lawyer with the right experience, see Appendix 3, *Finding assistance.*

Laying an information

A prosecution is commenced by the laying of an information. An information is a written statement of an alleged offence sworn before a Provincial Court Judge or Justice of the Peace. Once it is accepted or endorsed by one of those two judicial officers it formally becomes an information.

The proper forms and procedures for laying an information are prescribed by the *Criminal Code* or, in some cases, by provincial and territorial summary proceedings legislation. It is important that all requirements be met to avoid the risk of having a charge fail because of a defect in the information. However, unless it would prejudice or mislead the accused in a way that cannot be corrected by an adjournment, a defect can normally be amended (see below, *Amending an information*).

Where can charges be brought?

Charges for violations of environmental laws must normally be brought in the jurisdiction where the alleged offence occurred.[5] In Canada, a separate legal jurisdiction is created for each province and territory. A Provincial Court Judge or Justice of the Peace has jurisdiction to receive any information regarding the occurrence of an offence anywhere in the province or territory. Offences occurring on Indian lands such as reserves, or on federal lands such as national parks, must be prosecuted in the courts of the province or territory where the offence occurred.

It is common practice to lay an information before a Provincial Court Judge or Justice of the Peace at the Provincial Court nearest to where the offence occurred. If process is issued, the accused will normally be required to appear in Provincial Court in that same location (see Chapter 9, *The process hearing*). However, you may decide to lay your information at the Provincial Court location that is most convenient for you and your counsel and witnesses. In some cases, fairness to the accused may require that the trial be held in the centre nearest to where the accused and his witnesses reside. Once an order has been made as to venue, change of venue requires that a special application be made.

[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 504.

A note on provincial and territorial summary proceedings legislation

All provinces and the territories have summary proceedings legislation that either adopts the *Criminal Code* procedure for the prosecution of provincial and municipal offences, or provides alternative or replacement procedures. For example, the Alberta *Provincial Offences Procedure Act* provides that, except where inconsistent with the Act and its regulations, the *Criminal Code* procedure for laying an information applies to provincial and municipal offences.[6]

In Ontario, New Brunswick, and British Columbia, by contrast, provincial statutes provide a separate procedure for laying an information for provincial and municipal offences.[7] In language similar to the *Criminal Code*, these statutes provide that any person with "reasonable and probable grounds" to believe that a provincial offence has been committed may lay an information before a Provincial Court Judge or a Justice of the Peace.[8] The information should, or in some cases must, be in the prescribed form.[9]

Quebec also provides a separate procedure for commencing a private prosecution for provincial offences and municipal bylaws.[10] In that province, a citizen must first make an application to a Judge for authorization to institute proceedings. If, after hearing the allegations and any sworn testimony, the Judge has reasonable grounds to believe an offence has been committed, he or she must authorize the proceedings.[11]

If the offence you wish to prosecute is created by provincial statute or municipal bylaw, refer to the applicable provincial or territorial summary proceedings legislation to find out whether and how the *Criminal Code* procedure has been adopted, modified, or replaced (see Appendix 4).

Form of the information

An information relating to an alleged provincial or municipal offence in British Columbia, New Brunswick, Ontario or Quebec should, or in some cases must, be laid in the form prescribed by

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[6] *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, s. 3. Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland, and the Yukon and Northwest Territories have also substantially adopted the *Criminal Code* procedure: *Summary Offences Procedure Act, 1990*, S.S. 1990-91, c. S-63.1, s. 4; *Summary Convictions Act*, C.C.S.M., c. S230, s. 3; *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, s. 7; *Summary Proceedings Act*, R.S.P.E.I. 1988, c. S-9, s. 4; *Provincial Offences Act*, S.N.L. 1995, c. P-31.1, s. 6; *Summary Convictions Act*, R.S.Y. 2002, c. 210, s. 7; *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c. S-15, s. 2.

[7] *Offence Act*, R.S.B.C. 1996, c. 338, ss. 25-26; *Provincial Offences Act*, R.S.O. 1990, c. P.33, ss. 23-24; *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1, ss. 3-6.

[8] Under the New Brunswick *Provincial Offences Procedure Act*, *ibid*, s. 2, the information may only be laid before a Provincial Court Judge.

[9] New Brunswick *Provincial Offences Procedure Act, ibid*., s. 2; Ontario *Provincial Offences Act*, supra note 7, s. 23; British Columbia *Offence Act*, *supra* note 7, s. 25(2).

[10] *Code of Penal Procedure*, R.S.Q. c. C-25.1, ss. 9-10.

[11] *Ibid*., s. 10.

provincial summary proceedings legislation. An information relating to any other alleged offence should be laid in the form prescribed in Form 2 under Part XXVIII of the *Criminal Code*.[12]

In Alberta, blank forms are normally available from the Clerk's Office, Criminal Division at the Law Courts.[13] If you are unable to obtain a blank copy of the form you need, the information can be typed on a blank sheet of paper in strict accordance with the prescribed wording and format.

Drafting the information

It is important that your information be complete before you appear before a Provincial Court Judge or Justice of the Peace to swear the information. It is advisable at this stage to seek the assistance of a lawyer, who can ensure your documentation is in order. The requirements for an information are set out in the *Criminal Code* or, where applicable, provincial summary proceedings legislation.[14]

Name of the informant

The information is sworn by an individual who has witnessed the offence or one who has reasonable grounds to believe, and does believe, that an offence has been committed. The full name of the informant must be provided on the information as well as the informant's residence and occupation. Where the information is being laid on the behalf of a corporation, society or other organization, the appropriate affiliation with that organization should be indicated. For example, the following wording would be appropriate:

> This is the Information of Jane Green, of 260 River Road, Edmonton, Alberta, Conservation Director, Clean Air (Alberta) Society…

It is not necessary to lay the information in the Crown's name, or to include the words "for and on behalf of Her Majesty the Queen" in the information.[15] The information may be laid in the informant's name alone.

Reasonable grounds

Where the informant witnessed the commission of the alleged offence, it is sufficient to state the offence after the words "The Informant says that" without referring to belief on reasonable grounds.

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[12] *Criminal Code*, *supra* note 5, ss. 506, 788, 849(1).
[13] Forms may also be downloaded online: Alberta Courts <http://www.albertacourts.ab.ca>. Follow the link for Provincial Court, Criminal Division.
[14] *Criminal Code*, *supra* note 5, s. 581. See also s. 789 regarding summary offences.
[15] *R. v. Devereaux*, [1966] 4 C.C.C. 147 (Ont. C.A.); *MacKenzie v. Denstedt*, [1969] 3 C.C.C. 119 (Man. C.A.).

Where the informant did not witness the commission of the alleged offence, the information must contain the words "he (she) has reasonable grounds to believe and does believe that….".[16] If these words are missing, the information may be quashed.[17] It may be prudent to use this wording even if the informant witnessed the alleged offence.

Regarding what constitutes "reasonable grounds," see Chapter 4, *Who can launch a private prosecution?*

Name of the accused

Be sure to state the correct, full name of the accused, including the surname and all given names. Do not include nicknames.

Where charges are brought against a government official or Crown corporation, check the applicable legislation for the correct title or name of office. Because government departments are not legal entities, a charge against a department must be laid against the government itself. The appropriate wording in this latter case is "Her Majesty the Queen in Right of (name of Province, or Canada), as represented by (name of government department)".[18]

Where the accused is a corporation, it is important to state the full registered name and address. The corporate registry office (or an official agent) in the jurisdiction in which the offence is alleged to have occurred can provide you with the address and the registered name under which the corporation is operating. A corporation may operate under a completely different registered name in different provinces. There may be a holding company and an operating company, a parent company, and subsidiaries. It is therefore unwise to rely on the name posted at a worksite or on other documentation.

Prosecutions against sole proprietorships should be brought against "(name of the individual), operating as (registered business name)."

Where a person is alleged to be a party to an offence rather than a principal, the information need not set this out. It is sufficient to charge the person with the commission of the offence along with the principal or principals.[19]

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[16] Under provincial summary proceedings legislation, the wording is slightly different. See text accompanying note 8, *supra*.

[17] *R. v. Lepage*, [1969] 1 C.C.C. 187 (Ont. H.C.J.). However, it is more likely that the information is not a nullity and may be amended: *R. v. Canadian Industries Ltd.* (1982), 69 C.C.C. (2d) 533 (N.B.C.A.); *R. v. Wildefong* (1970), 1 C.C.C. (2d) 45 (Sask. C.A.).

[18] *R. v. Ontario (Ministry of Transport)* (1996), 19 C.E.L.R. (N.S.) 297 (Ont. Ct. Prov. Div.).

[19] *R. v. Fell* (sub nom. *R. v. Kenitex Canada*) (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.), var'd (1981), 64 C.C.C. (2d) 456 (C.A.).

The information should list all of the parties you believe may be responsible for the alleged offence. Normally, any of the charges may be withdrawn up until the commencement of trial, and after that point with leave of the court. However, it is important to keep in mind that adding parties will normally increase the complexity and cost of the case. Regarding individuals, corporations and others who should be named in an information, see Chapter 6, *Who can be prosecuted?*

Date of the offence

An information must include the date or dates of the alleged offence. It is common practice to use the wording "on or about the 10th day of November, 2004…". An information may also state that an offence occurred on a day between two dates, for example "between the 10th day of November and the 1st day of December, 2004". This may be necessary if you are unsure of the date on which the offence occurred. However, the Judge or Justice of the Peace may require you to amend the information for greater precision if the accused would be prejudiced by the uncertainty.

> Remember that an information must state that the offence was committed on dates that are within the applicable limitation period. Regarding limitation periods, see Chapter 2, *Is private prosecution the right tool for you?*

Where you are alleging a continuing offence (an offence that took place on more than one consecutive day), be sure to state the dates between which you believe that the offending activity took place.[20] A statute providing for continuing offences may use wording such as:

> Every person who is guilty of an offence under this Act is liable on conviction for each day or part of a day on which the offence occurs or continues.[21]

In this case, the continuing offence may be set out in one count of the information, using the wording "on or about the 10th day of October, 2004 and on each succeeding day to and including the 1st day of November, 2004".

However, some statutes provide for continuing offences in another way. Under the federal *Fisheries Act*:

> Where any contravention of this Act or the regulations is committed or continued on more than one day, it constitutes a separate offence for each day on which the contravention is committed or continued.[22]

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[20] Only include dates that fall within the applicable limitation period.

[21] Alberta *Environmental Protection and Enhancement Act*, *supra* note 2, s. 231.

[22] R.S.C. 1985, c. F-14, s. 78.1.

Because it creates a separate offence for each day, this and similarly worded provisions in other Acts may require that a separate count be listed on the information for each day on which the offence occurs.[23]

Location of the offence

An information should state as precisely as possible the location of the alleged offence. For example, if you are alleging the deposit of a deleterious substance into a river, name the river and use the legal land description or municipal address to indicate where on the river the offence took place. The legal land description is, for subdivided land, the plan number, block number and lot number. For unsubdivided land, identify the meridian, range, township, section and quarter-section. To provide additional certainty, it is generally acceptable to describe the location as adjacent to, at, or near the community, property or nearest identifiable structure or feature.

The information must also specify the province or territory in which the offence occurred.

The offence

Before your information is drafted, you must determine which law or laws have been violated. You may need to consult an environmental lawyer on this point.

An information must specify the alleged offence, and describe the acts or omissions constituting the offence in sufficient detail to allow the accused to know and thus be able to defend the charge.[24] Although it is acceptable to use everyday language, it is best to include the exact wording of the statutory provision(s) creating the offence. Where the wording of the offence contains the words "knowingly" or "willfully", or other words indicating state of mind, include this wording in the information. The name of the statute or regulation containing the offence should be cited, with section numbers.

In describing the acts or omissions constituting the offence, do not include information that is not essential to the offence. Including unnecessary detail may require you to prove such details later. For example, concerning a deposit of fuel, a deleterious substance, in water frequented by fish, identify the substance as a "petroleum hydrocarbon" rather than as "diesel fuel".

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[23] This is the case in Ontario: *R. v. TransCanada Pipelines* (1994), 15 C.E.L.R. (N.S.) 62 (Ont. Ct. Prov. Div.). Some environmental statutes require that a separate information be laid for each day that an offence continues, for example, Northwest Territories *Environmental Protection Act*, R.S.N.W.T. 1988, c. E-7, s. 13.
[24] *Criminal Code*, *supra* note 5, s. 581(2)(c).

For summary conviction offences, it is unnecessary to refer to or deny possible defences that may be raised by the accused. In particular, the information need not state that the accused lacked any required authorization or exemption.[25]

Where more than one offence is alleged, or the charges relate to more than one matter, the charges must be set out in separate counts.[26] Separate counts may be included in one information by using separately numbered paragraphs, each setting out the full details of one offence. A series of related incidents may in some cases be included in one count where a single offence is alleged.[27] An information may contain both an indictable and a summary conviction offence.[28]

Dual or hybrid offences

Certain offences may be prosecuted as either an indictable or a summary conviction offence. In most cases, the private prosecutor will have decided before laying the information how the offence should be prosecuted (see factors discussed in Chapter 12, *Prosecution of summary conviction offences* and Chapter 13, *Prosecution of indictable offences)*. Where this decision has been made, it is suggested that the prosecutor specify on the information the manner in which the prosecution will proceed. However, this decision may be delayed until the accused appears in court to answer to the charges. For further guidance on dual offences, see Chapter 13 under *Dual or hybrid offences and the prosecutor's election*.

English or French

Where the *Criminal Code* procedure applies, an information may be drafted and sworn in either of Canada's official languages.[29] In the event that the accused does not speak that language, the court may order that the information be translated.

Examples of drafted informations

Single offence: example

> This is the Information of John Doe, Farmer, of Anytown, Alberta, hereinafter called the Informant.

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[25] *Ibid.*, s. 794. See also provincial summary proceedings legislation, for example, Ontario *Provincial Offences Act*, *supra* note 7, s. 47(3).
[26] *Criminal Code*, *supra* note 5, ss. 581(1), 789(1)(b).
[27] Stanley David Berger, *The Prosecution and Defence of Environmental Offences*, looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2003) at paras. 4.313-4.314.
[28] The charges will normally be tried separately, however: *R. v. Clunas* (1992), 70 C.C.C. (3d) 115 (S.C.C.).
[29] *R. v. Simard* (1996), 105 C.C.C. (3d) 461 (Ont. C.A.), leave to appeal to S.C.C. refused, [1996] 108 C.C.C. (3) vi. See also provincial summary proceedings legislation, for example, New Brunswick *Provincial Offences Procedure Act*, *supra* note 7, s. 19.

The Informant says that he has reasonable grounds to believe and does believe that:

ABC Corporation and Joseph Polluter, born on May 5, 1939,[30] of (corporate registered office address), did on or about the 10th day of October, 2004, at or near (name of nearest city, town or village), in the Province of Alberta, deposit or permit the deposit of a deleterious substance, namely a petroleum hydrocarbon, in water frequented by fish, namely (name of water body), adjacent to ABC Corporation factory located at (municipal address or legal land description), contrary to section 36(3) of the *Fisheries Act*, R.S.C. 1985, c. F-14, and did thereby commit an offence under section 40(2)(a) of the Act.

Continuing offence: examples

Note: see comments above under *Date of the offence*.

Example 1

This is the Information of John Doe, Farmer, of Anytown, Alberta, hereinafter called the Informant.

The Informant says that he has reasonable grounds to believe and does believe that:

Count 1: Her Majesty the Queen in Right of Alberta, Rapid Construction Limited, of (registered corporate office address) and ABC Engineering & Constructors Inc., of (registered corporate office address), did on or about the 23rd day of July, 2004, at or near (name of nearest city, town or village), in the Province of Alberta, carry on a work or undertaking that resulted in the harmful alteration, disruption, or destruction of fish habitat, namely (name of water body), in the (legal land description), contrary to section 35(1) of the *Fisheries Act*, R.S.C. 1985, Chapter F-14, and did thereby commit an offence under section 40(1)(a) of the Act.

Count 2: Her Majesty the Queen in Right of Alberta, Rapid Construction Limited, of (registered corporate office address) and ABC Engineering & Constructors Inc., of (registered corporate office address), did on or about the 24th day of July, 2004, at or near (name of nearest city, town or village), in the Province of Alberta, carry on a work or undertaking that resulted in the harmful alteration, disruption, or destruction of fish habitat, namely (name

[30] Date of birth is not required for an information under the *Criminal Code*.

of water body), in the (legal land description), contrary to section 35(1) of the *Fisheries Act*, R.S.C. 1985, Chapter F-14, and did thereby commit an offence under section 40(1)(a) of the Act.

Example 2

This is the Information of Jane Smith, Mail Carrier and Member, Environmental Watch (Alberta) Society, of Anytown, Alberta, hereinafter called the Informant.

The Informant says that she has reasonable grounds to believe and does believe that:

ABC Corporation, of (registered corporate office address), did on or about December 1, 2004, and on each successive day to and including December 10, 2004, at (municipal address or legal land description), at or near Anytown, in the Province of Alberta, release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect, namely mercury, contrary to section 109(2) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and did thereby commit an offence under section 227(j) of the Act.

Multiple offences: example

This is the Information of Jane Smith, Mail Carrier and Member, Environmental Watch (Alberta) Society, of Anytown, Alberta, hereinafter called the Informant.

The Informant says that she has reasonable grounds to believe and does believe that:

Count 1: ABC Corporation, of (registered corporate office address), being the holder of Approval number _____ issued to it by Alberta Environment to operate the (type of facility) located at (legal land description or municipal address), did on or about the 4th day of June, 2004 at the said (type of facility) location, discharge into the (name of water body), in the liquid effluent from its secondary treatment lagoon, a substance, namely Biochemical Oxygen Demand so that the absolute level of the substance in the said effluent exceeded a mass discharge that day of ___ kilograms, contrary to section ___ of the said Approval, thereby committing an offence under sections 108(2) and 227(e) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

Count 2: ABC Corporation, of (registered corporate office address), being the holder of Approval number _____ issued to it by Alberta Environment to operate the (type of facility) located at (legal land description or municipal address), did on or about the 4th day of June, 2004 at the said (type of facility) location, discharge into the (name of water body), in the liquid effluent from its secondary treatment lagoon, a substance, namely Total Suspended Solids so that the absolute level of the substance in the said effluent exceeded a mass discharge that day of ___ kilograms, contrary to section ___ of the said Approval, thereby committing an offence under sections 108(2) and 227(e) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

Preparation of additional documents

The information itself provides only cursory details about the alleged offence. It is therefore necessary to prepare a brief of additional documents and evidence to support your information.[31] Your brief should include a synopsis of the events leading up to the discovery of the alleged offence, and refer to all your supporting documents, including photographs, correspondence, permits, etc. Although it is not mandatory, your synopsis can be set out in a statutory declaration. Include a list of your supporting documents and any other evidence referred to in your synopsis in an appendix to your brief. Also include a list of potential witnesses and their areas of expertise (if any), and provide a summary of the evidence each witness will give.

Four copies of a tabbed binder containing your brief and appendices should be made; one for you, one for the judicial officer receiving the information, one for the accused, and one for the Crown.[32] The brief is essential to the Crown's review of the case, and to the Attorney General's decision regarding intervention (see Chapter 10, *Powers to intervene).*

Before whom is the information sworn?

Under the *Criminal Code*, an information may be sworn before any Provincial Court Judge or Justice of the Peace. However, it is preferable to attend before either a Provincial Court Judge or, where available, a Justice of the Peace designated to consider privately-laid informations. If you swear your information before a non-designated Justice of the Peace, the matter will be referred to a Provincial Court Judge or a designated Justice.[33]

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[31] This discussion is adapted from Environmental Bureau of Investigation, *The Citizen's Guide to Environmental Investigation and Private Prosecution* (Toronto: Earthscan Canada, 2000) at 73, online: EBI <http://www.e-b-i.net/ebi/index.cfm>.

[32] Regarding requirements for disclosure to the accused, see Chapter 7, *The role of the private prosecutor*, under *The prosecutor's duties.*

[33] *Criminal Code*, *supra* note 5, s. 507.1(1).

Making arrangements to swear an information

When you are prepared to lay your information, you or your lawyer should contact the office of the Court Clerk to make an appointment. Explain in advance that you will be laying a private information in connection with an environmental offence. Ask that sufficient time be set aside so that the Judge or Justice of the Peace has time to review your draft information and provide any suggestions he or she may have as to its form or content.

Before you meet the judicial officer to swear the information, it is advisable to provide a letter to the Clerk of the Court setting out a municipal street address for each defendant. This may facilitate service of the summons, if process is issued.[34]

Swearing the information

If the legal requirements are met, the Provincial Court Judge or Justice of the Peace you appear before is legally obligated to receive the information.[35]

Once the information is sworn, arrangements can be made to fix a date for the process hearing. Make sure to note the name of the Judge or Justice of the Peace who receives your information, in case the signature is illegible. You may also wish to obtain direction from the Judge or Justice of the Peace concerning the requirement that the Attorney General be provided with a copy of the information and reasonable notice of the process hearing.[36]

Amending an information

The courts have broad powers to amend an information, either on application of the accused in objection to the defect, or on application of the private prosecutor to amend.[37] Amendments can be made to correct a deficiency in form or substance at trial or any other stage of the proceedings. The courts will normally agree to amend a charge unless the accused has been irreparably misled or prejudiced by the defect. In such a case the charge may be quashed.[38]

Regardless, it is advisable to be as specific and accurate as you can in drafting the information.

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[34] Ian Cartwright, "A Private Prosecution in Alberta – A Painful Process" (1990) 1 J.E.L.P. 110 at 113.
[35] *Criminal Code*, *supra* note 5, s. 504 and summary proceedings legislation in BC, Ontario and New Brunswick, *supra* note 7, and Quebec, *supra* note 10; *Casey v. Automobiles Renault Canada Ltd.,* [1966] 2 C.C.C. 289 (S.C.C.) at 304; *R. v. Whitmore* (1987), 41 C.C.C. (3d) 555 (Ont. H.C.J.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.).
[36] *Criminal Code*, *ibid*., s. 507.1(3). See Chapter 9, *The process hearing*.
[37] *Criminal Code, ibid.,* s. 601. See also provincial summary proceedings legislation, for example, Ontario *Provincial Offences Act*, *supra* note 7, s. 34.
[38] *R. v. Webster* (1992), 78 C.C.C. (3d) 302 (S.C.C.); *R. v. Precision Plastics Ltd*. (2003), 1 C.E.L.R. (3d) 225 (Alta. Prov. Ct.). See also, for example, Ontario *Provincial Offences Act*, *ibid*., s. 36(2). Regarding amendments under provincial legislation, see *Sanford v. Ontario Realty Corp.,* (2003), 2 C.E.L.R. (3d) 288 (Ont. S.C.J.) at paras. 48-56.

Withdrawing charges

The *Criminal Code* does not provide for the withdrawal of charges by a prosecutor.[39] However, the courts will normally accept the withdrawal of a charge prior to the entering of a plea and the tendering of evidence or the preferring of an indictment.[40] After this time withdrawal of charges is possible only with leave of the court.[41]

Where the prosecutor has decided not to proceed, but leave to withdraw charges is refused, the prosecutor may decline to offer evidence in which case the charges will be dismissed. Once the charges are dismissed, the accused normally cannot be tried again in connection with the same facts.[42] Concerning the possibility of an award of costs against the private prosecutor, see Chapter 14, *Costs.*

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[39] This right is provided by some provincial summary proceedings legislation. See, for example, New Brunswick *Provincial Offences Procedure Act*, *supra* note 7, s. 96. Concerning the nature of the statutory right to withdraw, see *R. v. NBIP Forest Products Inc.* (1994), 14 C.E.L.R. (N.S.) 191 (N.B.Q.B.T.D.).

[40] *R. v. Blasko* (1975), 29 C.C.C. (2d) 321 (Ont. H.C.J.); *R. v. Weightman* (1977), 37 C.C.C. (2d) 303 (Ont. Prov. Ct.). The right of a private prosecutor to withdraw a charge without leave is not settled: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.S.C. (A.D.)) at 411. See also Phillip C. Stenning, *Appearing for the Crown*, (Cowansville, Que.: Brown Legal Publications Inc., 1986) at 246.

[41] *R. v. Blasko, ibid.*

[42] *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 (S.C.C.).

Chapter 9
The process hearing

The prosecution actually commences when the Judge or Justice of the Peace issues "process" compelling the appearance of the accused.[1] 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.[2]

Provincial summary proceedings legislation

Remember that this discussion concerns proceedings to which the *Criminal Code* applies. For provincial offences, summary proceedings legislation may affect the procedure for issuing process.

Participating in a process hearing

If you swore your information before a Justice of the Peace who was not designated to receive private informations, it will be referred to a Provincial Court Judge or a designated Justice of the Peace. Only these officials have authority to consider the allegations and issue process in connection with a privately-laid information.[3]

The *Criminal Code* no longer requires that process hearings on private informations be held in the absence of the accused (*ex parte*).[4] Although there is no requirement to notify the accused of the hearing, doing so is advisable as a matter of courtesy unless there is a reason to exclude the accused. However, if the accused is present, the Judge or Justice of the Peace may give the accused the opportunity to address the court.

It appears that recent amendments to the Code have not altered the rule that the public is to be excluded from process hearings (they will continue to be held *in camera*).[5]

The Judge or Justice of the Peace is required to issue process if he or she considers that a case is made out.[6] The purpose of the hearing is not to weigh the evidence, but to determine whether there is any evidence relating to each of the elements of the offence.[7]

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[1] *R. v. Devereaux*, [1966] 4 C.C.C. 147 (Ont. C.A.).
[2] *Criminal Code*, R.S.C. 1985, c. C-46, s. 507.1(2). Alternatively, if the evidence shows that it is in the public interest, a warrant may be issued for the accused's arrest.
[3] *Ibid.*, s. 507.1(1).
[4] *Ibid.*, s. 507.1.
[5] *Infra*, note 8; *Southam Inc. v. Coulter* (1990), 60 C.C.C. (3d) 267 (Ont. C.A.).
[6] *Criminal Code*, *supra* note 2, s. 507.1(2). However, the judicial officer has the discretion not to issue process where the allegation is abusive, frivolous, vexatious, or the informant is not credible because of mental disorder: *R. v. Edge*, 2004 ABPC 55, [2004] A.J. No. 316 (Alta. Prov. Ct.)(QL).
[7] *Kostuch (Informant) v. W.A. Stephenson Construction (Western) Ltd.* (1993), 9 Alta. L.R. (3d) 34 (Alta. C.A.) rev'g (1992), 9 Alta. L.R. (3d) 30 (Q.B.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. xii; *R. v. Whitmore* (1987), 41 C.C.C. (3d) 555 (Ont. H.C.J.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.).

Recent changes to the *Criminal Code*[8] authorize a Judge or designated Justice of the Peace to issue process only where he or she:

> (a) has heard and considered the allegations of the informant and the evidence of witnesses;
>
> (b) is satisfied that the Attorney General has received a copy of the information;
>
> (c) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a);
>
> (d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.[9]

In the recent Alberta case of *R. v. Edge*, Allen P.C.J. interpreted subsection (a) to mean that process cannot be issued on the basis of the informant's allegations alone.[10] Sworn testimony of the informant or other witnesses may be required. The absence of witnesses to demonstrate that there is some evidence on each of the essential elements of the offence may therefore result in process being refused. However, the court has the discretion to allow the prosecutor an adjournment to obtain further evidence.

R. v. Edge also indicates that hearsay evidence may no longer be admissible in process hearings under the new *Criminal Code* provisions.[11] Where the allegations are based upon information provided to the informant by others, the informant may now be required to call those witnesses to testify.

If, after the process hearing, the Judge or Justice of the Peace refuses to issue process, no other process hearing may be held with respect to the alleged offence unless there is new evidence to support it.[12] The informant may no longer simply take either the existing or a newly sworn

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[8] *An Act to Amend the Criminal Code and to Amend Other Acts*, S.C. 2002, c. 13 (proclaimed in force July 23, 2002).

[9] *Ibid.*, s. 507.1(3). For the purposes of this section, the Attorney General is the provincial or territorial Attorney General: *Criminal Code*, *supra* note 2, s. 2 definition of "Attorney General". However, where a federal offence is alleged, although it is not required it may be advisable to notify the federal Attorney General as well. The Attorney General's office or Department of Justice should be contacted for guidance on providing notice.

[10] *R. v. Edge, supra* note 6 at para. 91 [in *obiter*].

[11] *Ibid.* at para. 99 [Allen P.C.J., in *obiter*].

[12] *Criminal Code*, *supra* note 2, s. 507.1(7). Where new evidence is available, it appears that another process hearing may be held on the basis of the existing information: *R. v. Whitmore, supra* note 7 (Ont. H.C.J.) at 569-570. Where provincial summary proceedings legislation applies and does not adopt the *Criminal Code* provisions, it appears that the private prosecutor may still attempt to obtain process from another Judge or Justice of the Peace in the absence of new evidence, either on the same information or by swearing out another one: *R. v. Allen* (1974), 20 C.C.C. (2d) 447 (Ont. C.A.); *Gilbert Steel Ltd. v. Southwick*, [1968] 1 C.C.C.

information before another Judge or Justice of the Peace with the same evidence. However, there is authority for the view that the Judge or Justice of the Peace must provide brief reasons for refusing process.[13]

Is a refusal to issue process judicially reviewable?

Neither a Judge nor a Justice of the Peace can be compelled to issue process. The determination as to whether a case for doing so is made out is totally within his or her discretion. Only where the Judge or Justice of the Peace fails to act according to law, considers irrelevant factors, or commits another jurisdictional error is the decision reviewable by a Superior Court.[14] In such a case, the Superior Court may order that the Judge or Justice of the Peace who refused to issue process hear the matter again according to law, but will not order that process be issued.[15] Under the *Criminal Code*, an application for an order of *mandamus* must be brought within 6 months of the refusal to issue process.[16]

Should the Judge or Justice of the Peace decide to issue process, the matter will be expedited if you have prepared a typed summons that can be signed and issued by the judicial officer. The summons should be in the form prescribed by the *Criminal Code*[17] or the applicable provincial summary proceedings legislation. Note that regardless of whether the information was sworn on behalf of "Her Majesty the Queen", the summons must be issued "in Her Majesty's name."[18]

Service of a summons

The summons must normally be served by a peace officer pursuant to the *Criminal Code* or applicable provincial summary proceedings legislation.[19] In Alberta, the Judge or Justice of the Peace issuing process will normally direct the police or RCMP to serve the summons. Where the accused's lawyer is present at the process hearing, the informant may be able to arrange with them for the voluntary appearance of the accused at the date and time set out in summons. This will make it unnecessary to have the summons served by a peace officer.[20]

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356 (Ont. C.A.). See also Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 7 [*Private Prosecutions*].

[13] *R. v. Maitland* (1984), 42 C.R. (3d) 206 (Ont. H.C.J.).

[14] *R. v. Blythe* (1973), 13 C.C.C. (2d) 192 (B.C.S.C.); *Syme v. Swan* (1979), 48 C.C.C. (2d) 501 (Ont. H.C.J.).

[15] *R. v. Jones, ex parte Cohen*, [1970] 2 C.C.C. 374 (B.C.S.C.).

[16] *Criminal Code*, *supra* note 2, s. 507.1(5).

[17] *Criminal Code*, *supra* note 2, Form 6. Forms may also be downloaded online: Alberta Courts <http://www.albertacourts.ab.ca>. Follow the link for Provincial Court, Criminal Division.

[18] *R. v. Devereaux*, *supra* note 1.

[19] *Criminal Code*, *supra* note 2, ss. 509, 701.1, 703.2. See also s. 2 definition of "peace officer".

[20] Ian Cartwright, "Suggested Checklist for the Laying of an Information and the Holding of a Process Hearing in a Private Prosecution of an Alleged Environmental Offence in Alberta" (Paper presented to the Midwinter Meeting of the Alberta Branch of the Canadian Bar Association, 1992) at para. 34 [*Suggested Checklist*].

Although the private prosecutor cannot serve the summons, he or she should ensure that the official who carried out service files proof of service (normally an affidavit on the back of a copy of the summons) on the court file. If the summons and affidavit is not filed by the return date on the summons, the private prosecutor should obtain the summons and affidavit from the person who effected service and bring it to court on that date. In the event the accused does not appear, on proof of service the court will either issue a warrant for the accused's arrest or set the matter down for trial.[21]

Subpoenas to witnesses for the process hearing

Where the evidence of witnesses other than the informant is required for the process hearing, the informant will need to obtain a subpoena compelling each witness's attendance from a Provincial Court Judge or Justice of the Peace.[22] The subpoena is available in blank from the Provincial Court Clerk's office.[23] Once you have drafted the subpoena and collected any supporting materials, make an appointment through the Clerk's office to attend upon a Judge or Justice of the Peace. Be prepared to explain the relevant circumstances and bring copies of your supporting materials to leave with the judicial officer.[24]

For additional information on subpoenas, see Appendix 1, *Accessing information*, under *Subpoena.*

Service of a subpoena

Once issued, it is the responsibility of the informant to see that the subpoena is properly served. The *Criminal Code* requires that a subpoena be served by a peace officer or a person qualified to serve civil process in the province.[25] Alternatively, service may be carried out pursuant to the laws of the province.[26]

The sworn affidavit of service should then be filed with the information at the Provincial Court Clerk's office. However, if the witness has agreed to appear as required by the subpoena, practically speaking that person need not be served. In this case, the subpoena may be accepted and marked as an exhibit or filed with the information at the Clerk's office.[27]

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[21] *Criminal Code*, *supra* note 2, ss. 800(3), 803(2). For certain indictable offences the trial will be preceded by a preliminary inquiry: see Chapter 11, *First appearance*, under *Failure to appear.*
[22] *Criminal Code*, *ibid.*, s. 698-700.
[23] *Criminal Code, ibid.*, Form 16. Forms may also be downloaded online: Alberta Courts <http://www.albertacourts.ab.ca>. Follow the link for Provincial Court, Criminal Division.
[24] *Suggested Checklist*, *supra* note 20 at paras. 26-28.
[25] *Criminal Code*, *supra* note 2, s. 701. See also s. 2 definition of "peace officer".
[26] *Ibid.*, s. 701.1.
[27] *Suggested Checklist*, *supra* note 20 at para. 27.

Subpoena: example

To: John A. Smith
Investigator
Alberta Environment
(Complete Address)

Whereas ABC Corporation and Joseph Polluter have been charged that they did on or about the 10th day of October, 2004, at or near (name of nearest city, town or village), in the Province of Alberta, deposit or permit the deposit of a deleterious substance, namely a petroleum hydrocarbon, in water frequented by fish, namely (name of water body), adjacent to ABC Corporation factory located at (municipal address or legal land description), contrary to section 36(3) of the Fisheries Act, R.S.C. 1985, c. F-14, and did thereby commit an offence under section 40(2)(a) of the Act.

And it has been made to appear that you are likely to give material evidence for the Information: This is therefore to command you to attend before The Provincial Court of Alberta, on (day, date and time) at the Provincial Courthouse, (City), to give evidence concerning the above charge and to bring with you anything in your possession or under your control that relates to the charge, and more particularly the following:

All writings made, hardcopy of information electronically stored, and all documents and material obtained or received during the investigation of the events surrounding the alleged offence by Alberta Environment between the (date) and the return date of this subpoena.

Prosecution in Her Majesty's name

For an indictable offence, the prosecution, beginning with the issuance of process, must be carried out in the name of Her Majesty the Queen.[28] Concerning summary conviction offences, the situation is less clear.[29] To avoid potential difficulties, once process has issued all documents relating to the proceedings should be styled to read "Her Majesty the Queen, on the information of (informant's name) v. (alleged offender's name)" or "(informant's name), on behalf of Her Majesty the Queen v. (alleged offender's name)".

[28] *R. v. Beauvais* (1956), 116 C.C.C. 183 (S.C.C.); *R. v. Devereaux*, *supra* note 1; *R. v. Dalton* (1976), 11 Nfld. & P.E.I.R. 287 (Nfld. C.A.).
[29] *Private Prosecutions*, *supra* note 12 at 9.

Chapter 10
Powers to intervene

The right to pursue a private prosecution is limited by the power of the Attorney General to intervene on behalf of the Crown. The court may also dismiss the charges in certain circumstances, and has the discretionary power to stay proceedings.

Who is the Attorney General?

The Attorney General is the Crown's representative before the courts. The federal, provincial and territorial governments each have an Attorney General who is responsible for the prosecution of certain offences and for overseeing private prosecutions. The functions of the Attorneys General are for the most part carried out by Crown counsel, who are agents of the Attorneys General.

For the purposes of a private prosecution in a province, whether of a provincial or federal offence, the Attorney General is the provincial Attorney General.[1] In some circumstances, the federal Attorney General may also have jurisdiction to intervene in a private prosecution in a province (see below, *Jurisdiction of the Attorneys General to intervene*).[2] With respect to private prosecutions in the territories, the Attorney General is the Attorney General of Canada.[3]

Jurisdiction of the Attorneys General to intervene

The provincial Attorneys General are authorized to intervene in private prosecutions of all *Criminal Code* offences and provincial offences.[4] They may also intervene in private prosecutions of federal, non-*Criminal Code* offences unless the statute creating the offence provides otherwise.[5]

The Attorney General of Canada is authorized to intervene in private prosecutions in the territories. The federal Attorney General may also intervene in private prosecutions of non-*Criminal Code* federal offences in a province, except where a provincial Attorney General has already intervened.[6]

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[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 2 definition of "Attorney General".
[2] *Ibid.*, s. 579.1.
[3] *Ibid.*, s. 2 definition of "Attorney General".
[4] *Ibid.*
[5] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(2). Pursuant to an agreement between the federal and Alberta Departments of Justice, the federal department may, on a case by case basis, request that the provincial department take over conduct of a prosecution for certain federal offences (letter from Wes Smart, Director, Federal Prosecution Service, Department of Justice Canada, Prairie Region (June 28, 2004)).
[6] *Criminal Code*, *supra* note 1, s. 579.1.

The Attorney General has the power to intervene in a private prosecution to withdraw charges, conduct the prosecution, or direct a stay of proceedings.[7] This applies to both summary conviction and indictable proceedings.[8] The exercise of these powers by Crown counsel is in some cases affected or restricted by provincial legislation.[9]

Intervention to conduct the prosecution or withdraw charges

Once the Attorney General has intervened, the power of the Crown to pursue the prosecution is paramount to the interests of the private prosecutor. This includes cases where the private prosecutor wishes to withdraw the charges.[10]

Upon intervention and before a plea is taken, the Attorney General has a general right to withdraw charges without leave of the court.[11] However, in most cases, and in all cases where a plea has been taken, the Attorney General will appear in court to seek leave to withdraw charges. Any individual can recommence the proceedings by laying another information, but there are important factors to consider before doing so (see below, *Multiple informations*).

Intervention to stay proceedings

The Attorney General, or counsel instructed by him or her, is authorized to direct the Clerk of the Court to enter a stay of proceedings.[12] The stay may be entered at any point after the information is laid and before judgment.[13] No application is made in court.

A stay provides the Attorney General with the opportunity to review the evidence, and call for an official investigation if one has not yet been conducted. Once a course of action has been

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[7] *R. v. Bradley* (1975), 24 C.C.C. (2d) 482 (Ont. C.A.); *R. v. Leonard* (1962), 133 C.C.C. 262 (Alta. S.C. (A.D.)), aff'g (1962), 133 C.C.C. 230 (T.D.); *Criminal Code*, *ibid.*, s. 579-579.1. See also summary proceedings legislation, for example, Ontario *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 32. For a discussion of the historical and theoretical roots of this authority, see Phillip C. Stenning, *Appearing for the Crown*, (Cowansville, Que.: Brown Legal Publications Inc., 1986) c. 1; Bryce C. Tingle, "The Strange Case of the Crown Prerogative Over Private Prosecutions or Who Killed Public Interest Law Enforcement?" (1994) 28 U.B.C. L. Rev. 309-365 [Tingle].

[8] Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada 1986) at 16 [*Private Prosecutions*].

[9] See, for example, Ontario *Crown Attorneys Act*, R.S.O. 1990, c. C.49, s. 11(d); BC *Crown Counsel Act*, R.S.B.C. 1996, c. 87, s. 4(3)(c). Concerning the effect of such legislation on the power of the Attorney General and his or her agents to enter a stay, see *Perks v. R.* (1998), 26 C.E.L.R. (N.S.) 251 (Ont. Ct. Gen. Div.), aff'd (1998), 116 O.A.C. 399 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 89.

[10] *R. v. Bradley*, *supra* note 7.

[11] *R. v. Blasko* (1975), 29 C.C.C. (2d) 321 (Ont. H.C.J.).

[12] *Criminal Code*, *supra* note 1, s. 579-579.1. See also summary proceedings legislation, for example, Ontario *Provincial Offences Act*, *supra* note 7, s. 32.

[13] *R. v. Pardo*, [1991] R.J.Q. 293, (1990) 62 C.C.C. (3d) 371 (Que. C.A.); *Criminal Code*, *ibid.*, s. 579(1).

determined, the proceedings will either be recommenced under the conduct of the Attorney General, or allowed to lapse.

The Attorney General may recommence proceedings by directing the Clerk to lift the stay within one year after entering the stay or before the applicable limitation period expires, whichever is earlier.[14] Proceedings may be recommenced on the basis of the original information or indictment, or on a new one where the applicable limitation period has not expired. If the Attorney General fails to lift the stay within the prescribed time, the proceedings are deemed never to have been commenced.[15]

Where a stay has been entered by the Attorney General, a new information on identical terms may be laid[16] (see below, *Multiple informations*).

In general, once the Attorney General has intervened, the private prosecutor has no standing in the proceedings.[17] However, the Attorney General is also authorized to intervene and, without taking conduct of the proceedings, call, examine and cross-examine witnesses, present evidence and make submissions.[18] In such a case the private prosecutor retains standing and conduct of the prosecution.

Notification and reasons

The Attorney General is not required to notify the informant, counsel, or the accused of his or her decision to enter a stay, or to provide any reasons for doing so.[19] In some provinces, reasons may be provided as a matter of practice or policy.[20] It is open to any concerned citizen to contact the Attorney General's office to inquire about existing policy or to seek reasons for the entering of a stay. Information regarding the exercise of prosecutorial discretion may also be available under access to information legislation (see Appendix 1, *Accessing information*).

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[14] *Criminal Code*, *ibid.*, s. 579(2).
[15] *Ibid.*, s. 579(2).
[16] *R. v. Judge of the Provincial Court, ex parte McLeod* (sub nom. *R. v. McLeod*), [1970] 5 C.C.C. 128 (B.C.S.C.); *R. v. Davis* (1975), 24 C.C.C. (2d) 218 (B.C.S.C.).
[17] *Private Prosecutions*, *supra* note 8 at 16.
[18] *Criminal Code*, *supra* note 1, s. 579.01.
[19] *Kostuch v. Alberta (A.G.)* (1995), 101 C.C.C. (3d) 321 (C.A.), leave to appeal to S.C.C. refused, [1995] S.C.C.A. No. 512; *Gouriet v. Union of Post Office Workers,* [1977] 3 W.L.R. 300 at 319, cited in *Campbell v. Ontario (A.G.)* (1987), 31 C.C.C. (3d) 289 at 300 (Ont. H.C.J.), aff'd (1987), 35 C.C.C. (3d) 480 (C.A.) leave to appeal to S.C.C. refused (1987), 83 N.R. 24n; *R. v. Neville (D.),* 2003 NLSCTD 134, [2003] N.J. No. 220 (Nfld. S.C.T.D.)(QL).
[20] *Ibid.*, *R. v. Neville (D.)* at paras. 15-16.

Is the Attorney General's intervention reviewable by the courts?

The courts have no jurisdiction to refuse the entry of a stay by the Attorney General.[21] The courts will not interfere in the decision of the Attorney General to intervene and withdraw charges, enter a stay or take over conduct of a private prosecution in the absence of "flagrant impropriety".[22] The applicant bears the onus of establishing such an impropriety.[23] The court will not examine the actions of the Attorney General by holding an evidentiary hearing unless there is some indication of impropriety on the court's record or the applicant provides some other proof.[24]

The courts have indicated that flagrant impropriety can only be established by proof of misconduct bordering on corruption, violation of the law, or bias against or for a particular individual or offence.[25] The courts may also, in exceptional circumstances, be willing to interfere in a decision of the Attorney General to intervene in a private prosecution where there is conspicuous evidence of improper motives or bad faith, but they are extremely reluctant to do so.[26] The standard is an extremely high one and private prosecutors have, to date, been uniformly unsuccessful in challenging interventions by the Attorney General.

Although there is Quebec authority for the view that a patently or obviously unreasonable decision by the Attorney General could justify a court order that a stay by the Attorney General be lifted,[27] other jurisdictions appear to have rejected this view.[28]

There is authority indicating that a blanket policy requiring intervention by the Attorney General in all private prosecutions is unlawful and may constitute a flagrant impropriety.[29]

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[21] *Johnson v. Saskatchewan (Attorney General),* [1998] 2 W.W.R. 573 (Sask. Q.B.).

[22] *Krieger v. Law Society of Alberta* (2002), 168 C.C.C. (3d) 97 (S.C.C.) at para. 49; *Campbell v. Ontario (A.G.), supra* note 19; *Kostuch v. Alberta (A.G.), supra* note 19. For a discussion of the standard of review for stays entered by the Attorney General, see Tingle, *supra* note 7 at paras. 107-111; Keith Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution" (2004) 13 J.E.L.P. 153 [Ferguson].

[23] *R. v. Neville (D.), supra* note 19 at para. 13.

[24] *Perks v. R., supra* note 9.

[25] *Kostuch v. Alberta (Attorney General), supra* note 19 (C.A.) at para. 34; *Werring v. British Columbia (A.G.)* (1997), 122 C.C.C. (3d) 343 (B.C.C.A.).

[26] *R. v. Power*, [1994] 1 S.C.R. 601 at para. 12; *R v. Jewitt* (1985), 21 C.C.C. (3d) 7 (S.C.C.). Ferguson, *supra* note 22 at 161, argues that dishonesty, or lack of objectivity, independence or fairness may in some circumstances constitute a flagrant impropriety.

[27] *Chartrand v. Que. (Minister of Justice),* [1987] R.J.Q. 1732, 40 C.C.C. (3d) 270 (Que. C.A.), leave to appeal to S.C.C. refused (1988), 41 C.C.C. (3d) vi.

[28] *Campbell v. Ontario (A.G.), supra* note 19 (C.A.) at 480; *Kostuch v. Alberta (A.G.), supra* note 19 (C.A.) at para. 37.

[29] *R. v. Catagas* (1977), 38 C.C.C. (2d) 296 (Man. C.A.); *Kostuch v. Kowalski,* (1990), 75 Alta. L.R. (2d) 110 (Prov. Ct.).

***Charter of Rights and Freedoms* (excerpt)**

2 Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Regarding appeals and for further guidance on challenging an intervention of the Attorney General, see Chapter 16, *Appeal and judicial review*. Where the courts decline to interfere in the Attorney General's decision, the private prosecutor's remaining remedy is to bring the matter to the attention of the Legislature or Parliament.

The *Charter of Rights and Freedoms*

The courts will review a discretionary action of the Attorney General where such an action results in a denial or infringement of a constitutionally protected right.[30] The courts have held that the rights of a private prosecutor under sections 2, 7 and 15 of the Charter are not violated by the intervention and stay of the Attorney General,[31] except possibly in the case of a flagrant impropriety.[32]

Policy and practice of the Attorneys General

The Attorney General in each province has the authority to develop policy on interventions in private prosecutions. The Attorney General of Canada also follows a federal policy for interventions. The policies vary from jurisdiction to jurisdiction, with Ontario allowing certain private prosecutions to go forward and Alberta and most other provinces intervening in nearly every case.

The Attorney General of Alberta

In Alberta, the policy of the provincial Attorney General is to consider intervention on a case-by-case basis.[33] A Crown Prosecutor will first examine the case to determine whether there is sufficient evidence to provide a reasonable likelihood of conviction. This includes a consideration of available defences. Secondly, a determination will be made as to whether the

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[30] *R. v. Ertel* (1987), 35 C.C.C. (3d) 398 (Ont. C.A.), leave to appeal to the S.C.C. refused (1987), 86 N.R. 266 n; *Chartrand v. Quebec (Minister of Justice)*, *supra* note 27.

[31] *Kostuch v. Alberta (A.G.), supra* note 19 (C.A.). Regarding section 7, see also *Hamilton v. British Columbia (A.G.)* (1986), 30 C.C.C. (3d) 65 (B.C.S.C.). Regarding section 15, see also *R. v. Baker* (1986), 26 C.C.C. (3d) 123 (B.C.S.C.).

[32] *Hamilton v. British Columbia (A.G.), ibid.*

[33] Alberta Justice, *Criteria for Prosecutions Guideline, Guideline #41, Private Prosecutions Policy* (Edmonton: Alberta Justice, 1993).

prosecution is in the public interest. This determination will depend on a number of factors, including the seriousness and prevalence of the offence, the need for deterrence, the likely length and cost of the prosecution, the availability and appropriateness of alternatives to prosecution, and the need to maintain public confidence in the justice system.[34] This two-step approach is used in most Canadian jurisdictions.

For information on the Attorney General's policy for interventions in other provinces, contact the Attorney General's office or the provincial Department of Justice. Some information is also generally available on departmental websites.

Where the Chief Crown Prosecutor decides that there is insufficient evidence or that the prosecution would not be in the public interest, the charges will be stayed or withdrawn and the informant notified. In some cases reasons may be provided (see Appendix 1, *Accessing information*, under *Access to information legislation*).

If a prosecution is found to be warranted, the Crown will normally intervene to conduct the prosecution. In exceptional circumstances, the matter may be allowed to proceed as a private prosecution. There is no indication of what circumstances might justify a private prosecution.

The Attorney General of Canada

Where a private prosecution involves a federal law other than a *Criminal Code* offence and the provincial Attorney General has not intervened, the Attorney General of Canada may do so. The federal Attorney General may also intervene in private prosecutions in the territories. The *Federal Prosecution Service Deskbook* sets out the Attorney General's policy for intervening and for staying or withdrawing charges, or proceeding with the prosecution.[35] Typically, upon becoming aware of a private prosecution under the jurisdiction of the federal Attorney General, an official from the Federal Prosecution Service will engage the appropriate agency to assign an investigator to the file.[36] The investigator will then seek the private prosecutor's cooperation in providing any evidence he or she has collected. The investigator may undertake further investigations, and will then provide the information to federal prosecutors for review. The Attorney General's decision on intervention is based on specified factors, including

- the need to balance the right of a private citizen to initiate and conduct a private prosecution and the proper administration of justice;

- the seriousness of the offence;

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[34] *Ibid., Criteria for Prosecutions Guideline.*

[35] Department of Justice, *The Federal Prosecution Service Deskbook* (Ottawa: Department of Justice Canada, 2000), c. 26, 15, online: Department of Justice Canada <http://canada.justice.gc.ca/en/dept/pub/fpsdeskbook.pdf>.

[36] Letter from Wes Smart, Director, Federal Prosecution Service, Department of Justice Canada, Prairie Region (10 March 2004).

- whether there is a reasonable prospect of conviction;
- whether a prosecution is in the public interest;
- for regulatory offences, whether a prosecution is the response best suited to achieving the purposes of the legislation, or whether an available alternative mechanism, such as a compliance program, would be more appropriate;
- whether there is any evidence the prosecution was commenced for improper motives; and
- whether, given the nature of the alleged offence or the issues to be determined at trial, it is in the interests of the justice system that the offence be prosecuted by the Crown.[37]

The policies of both the federal and the Alberta Attorneys General specify that the actions of the Attorney General will not be influenced by the political associations, activities or beliefs of any person involved in the case or any possible effects of an action on the government or any political group or party.[38]

Submission to the Attorney General

A private prosecutor may wish to provide the Attorney General with a written submission explaining why the prosecution should go ahead, how the case satisfies policy criteria, and explaining any special circumstances.

Intervention: recent cases

Recent cases in Ontario indicate that the Attorney General's office in that province has adopted a flexible approach to private prosecutions.

In *Fletcher v. Kingston (City)*, a private prosecution assisted by the Sierra Legal Defence Fund was allowed to proceed.[39] The prosecution concerned leachate from a City landfill which had entered fish habitat. After an official investigation, enforcement officials laid further charges, and the prosecutions proceeded together with both a government prosecutor and a prosecutor represented by counsel from the Sierra Legal Defence Fund. Substantial fines were imposed, with half awarded to the private prosecutor under the fine-splitting provisions of the *Fisheries Act*.[40]

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[37] *Supra* note 35 at c. 26.5 and 15.
[38] *The Federal Prosecution Service Deskbook*, *ibid.* at 15.4; *Criteria for Prosecutions Guideline*, *supra* note 33 at 2.
[39] (1998), 28 C.E.L.R. (N.S.) 229 (Ont. Ct. Prov. Div.), var'd [2002] O.J. No. 2324 (Ont. S.C.J.) (QL), var'd [2004] O.J. No. 1940 (C.A.) (QL).
[40] However, a new trial has been ordered on the privately laid charges.

In *R. v. United Aggregates Ltd.*,[41] the Ontario Minister of Environment was a key witness in a private prosecution for excavating and removing materials without the development permit required by provincial law. The Minister requested that the Crown intervene to take conduct of the prosecution. After reviewing the matter and interviewing the lawyers involved in the case, the Crown decided that the public interest would be best served by allowing the private prosecution to continue with Sierra Legal Defence Fund lawyers acting for the prosecution.

In *R. v. The Queen (in Right of Ontario as represented by the Ministry of Environment*),[42] a private prosecution was launched against the Ontario government in connection with its handling of the Deloro mine. The Attorney General intervened to conduct the prosecution, but arrangements were made for counsel from Sierra Legal Defence Fund to assist.

These examples highlight the importance placed by the Attorney General's office, at least in Ontario, on the experience and abilities of counsel for the private prosecutor.

Environmental enforcement policies

Federal and provincial environmental enforcement policies provide additional guidance as to when prosecutions will be initiated by enforcement authorities. While these policies do not address private prosecutions directly, they suggest circumstances in which such prosecutions are more likely to satisfy public interest criteria. For example, the *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999* provides that Environment Canada will always pursue prosecutions under that Act in certain circumstances, including where:

- there is death of, or bodily harm to, a person;
- there is serious harm or risk to the environment, human life or health; or
- the offender did not take all reasonable measures to comply with a direction of an enforcement officer, order of the Minister regarding prohibited specified activities, or environmental protection order.[43]

The *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* also provides helpful guidance for prosecutions under that Act. Prosecution is the preferred course of action for Environment Canada and the Department of Fisheries and Oceans where evidence establishes that:

- the alleged offence resulted in risk of harm to fish or fish habitat;

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[41] (2001), 49 W.C.B. (2d) 16 (Ont. C.J.).
[42] (unreported, June 27, 2001, Ont. C.J., Dorval).
[43] (Ottawa: Environment Canada, 2001) at 29, online: Environment Canada <http://www.ec.gc.ca/publications/index.cfm>.

- the alleged offence resulted in harmful alteration, disruption or destruction of fish habitat (not authorized by the Minister of Fisheries and Oceans);

- the alleged offender had previously received a warning for the activity and did not take all reasonable measures to stop or avoid the offence; or

- the alleged offender had previously been convicted of a similar offence.[44]

Prosecution will always be pursued in specified circumstances, including where:

- there is evidence that the alleged violation was deliberate, or

- evidence establishes that the alleged offender failed to take all reasonable measures to comply with a direction or order issued pursuant to the Act.[45]

For matters within its jurisdiction, the Alberta Department of the Environment has stated that it will consider prosecution in certain circumstances, including where:

- the offence has or may have a significant adverse effect on the environment,

- the offence is committed intentionally or involves fraudulent circumstances,

- the offence is the result of failing to take reasonable steps to comply with an order,

- the offence results in death or bodily harm, or

- the offence is a repeat or multiple offence.[46]

Power of the court to dismiss charges or stay the proceedings

The court may issue an order dismissing an information where the court lacks jurisdiction to hear the matter, or where the information fails to allege a proper offence (see Chapter 8, *Initiating a private prosecution*). The statute creating the offence may also require that the court hearing the matter dismiss the charge where the offender has complied with an alternative

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[44] (Ottawa: Environment Canada, 2001) at 22.
[45] *Ibid.*
[46] Alberta Environment, *Compliance Assurance Principles* (Edmonton: Alberta Environment, 2000) at 13, online: Alberta Environment <http://www3.gov.ab.ca/env/info/infocentre/publist.cfm>.

measures agreement.[47] An information may also be dismissed, or the matter adjourned, if the prosecutor fails to appear.[48]

Counsel for the defence may also apply for an order dismissing the information at the conclusion of the prosecutor's case. Where the prosecution has failed to adduce some evidence relating to any essential element of the offence (i.e., has failed to establish a *prima facie* case), the order will be granted.[49]

Abuse of process

The courts also have the discretion to stay a prosecution on the basis that the judicial process is being abused. The court may issue the stay on its own initiative or on the application of the accused. Although rarely granted, a stay may be ordered where

> …compelling the accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings.[50]

The courts are generally loath to tamper with a statutory right to proceed with a private prosecution.[51] However, a judicial stay may be entered where a private prosecution is launched for an improper purpose, such as using the criminal process to resolve a civil dispute[52] or drawing public attention to an issue. A private prosecution launched to stop an activity reasonably thought to constitute an offence is not an abuse of process. This will normally apply even where the prosecution is publicized, so long as the prosecutor is not involved in the publicity.[53]

Agreement not to prosecute

A stay for abuse of process may also be granted where a government official enters into an agreement with an offender that no prosecution will be initiated so long as the offender complies with a negotiated program to reduce discharges.[54] Where such an agreement is in

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[47] For example, *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 296, which provides that, once an information has been laid, the Attorney General may enter into an agreement with the alleged offender as an alternative to prosecution where certain conditions are met.
[48] *Criminal Code*, *supra* note 1, s. 799.
[49] *R. v. Kennedy* (1973), 11 C.C.C. (2d) 263 (Ont. C.A.); *R. v. Snyder* (1974), 16 C.C.C. (2d) 331 (Sask. Q.B.).
[50] *R v. Jewitt*, *supra* note 26 at para. 25.
[51] *Sanford v. Ontario Realty Corp.* (2003), 2 C.E.L.R. (3d) 288 (Ont. Sup. Ct. J.). See also Stanley David Berger, *The Prosecution and Defence of Environmental Offences*, looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2003) at paras. 4.286.1.1-4.287.4.
[52] *CIBC v. Knight* (1993), 84 Man. R. (2d) 231 (Q.B.).
[53] *Walters (Informant) v. Red River Exhibition Assn.* (1997), 119 Man. R. (2d) 237 (Q.B.).
[54] *R. v. Abitibi Paper Co.* (1979), 47 C.C.C. (2d) 487 (Ont. C.A.). See also Elizabeth J. Swanson and Elaine L. Hughes, *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990) at 172-174.

place, the Attorney General will normally enter a stay for any private prosecution. Where the private prosecution is allowed to proceed, the accused's compliance with the agreement is a mitigating factor that may lead to a nominal sentence should conviction result.[55]

Multiple informations

In some cases, the laying of multiple informations that are identical or similar could constitute an abuse of process. However, unless the proceedings have the effect of forcing the accused to answer for the same offending behaviour twice, the proceedings involve a relitigation of the matter that might lead to inconsistent verdicts, or the proceedings are motivated by malice or spite, the abuse of process claim is very unlikely to succeed.[56] The fact that the Attorney General has entered a stay on a previous information, and his or her reasons for doing so, are relevant but not determinative of the issue.

The *Criminal Code* now provides that a second process hearing concerning the same offence cannot be held in the absence of new evidence.[57] This change means that abuse of process is now less likely to arise where multiple private informations are laid. However, there will normally be no point to laying a second information, unless the prosecutor has additional evidence to present to the court.

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[55] In *R. v. Cyanamid Canada Inc.* (1981), 11 C.E.L.R. 31 (Ont. Prov. Ct. (Crim. Div.)), the defendant was convicted but the fine was set at one dollar.

[56] *R. v. B.* (1986), 29 C.C.C. (3d) 365 (Ont. C.A.) at 375, cited in *Kostuch (Informant) v. W.A. Stephenson Construction (Western) Ltd.* (1991), 66 C.C.C. (3d) 201 at 210 (Q.B.), aff'd in part (1992), 71 C.C.C. (3d) 266 (C.A.).

[57] Where the information is laid privately: *Criminal Code*, *supra* note 1, s. 507.1(7).

Chapter 11
First appearance

At the date of first appearance set out in the summons or warrant, the informant and the accused, or the individuals appearing on their behalf, appear in Provincial Court.

After introductions by the parties, the charges are read out by the Clerk of the Court. Normally, the accused is then requested by the court to enter a plea of guilty or not guilty to each charge (arraignment). If the plea is guilty, the private prosecutor must be prepared to read a statement of facts supporting the charge. The accused will then be asked if he accepts the facts as read. If the accused admits enough of the facts to establish the essential elements of the offence, and he appears to understand the nature of the plea, the trial Judge will register a conviction.[1] Although the matter may be adjourned for sentencing, both parties should be ready to address the court concerning sentencing at this time.

If the plea to one or more of the charges is not guilty, the matter proceeds to trial on the appointed date. For indictable offences, the trial may be preceded by a preliminary inquiry (see Chapter 13, *Prosecution of indictable offences*).

The prosecutor's election

Many offences in the *Criminal Code* and federal environmental statutes provide that the offence may be prosecuted by either indictment or summary conviction proceedings. The prosecutor makes this election before the accused pleads. Concerning dual offences and the right of a private prosecutor to make this election, see Chapter 13, under *Dual or hybrid offences and the prosecutor's election*.

Indictable offences and the accused's election

For most indictable offences, the accused will be asked by the Judge to elect to be tried by a Provincial Court Judge, or by a Superior Court Judge with or without a jury.[2] The accused's election has important ramifications for a private prosecution (see Chapter 13, *Prosecution of indictable offences*).

[1] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 606(1.1), 801(2).
[2] *Ibid.*, s. 536.

Failure to appear

For summary conviction proceedings, the accused may appear either in person or by counsel or agent.[3] On the failure of the accused, his counsel or agent to appear for arraignment, the court may enter a plea of not guilty and proceed in the absence of the accused (*ex parte*).[4] Alternatively, the court may issue a warrant and adjourn the matter.[5] However, the court will not proceed without proof of service of the summons.

If the prosecutor fails to appear after receiving due notice, the court may dismiss the information or adjourn the matter with or without costs.[6] If the charges are dismissed, normally no further charges can be laid in respect of the same matter.[7] Regarding withdrawal of charges, see Chapter 8, *Initiating a private prosecution*.

For indictable offences, where the accused is a corporation or other organization and fails to appear by counsel or agent, a Provincial Court Judge may, on matters over which he or she has absolute jurisdiction, proceed with the trial in the absence of the accused (*ex parte*).[8] Where the accused corporation fails to appear and the Judge does not have absolute jurisdiction, a preliminary inquiry will be held *ex parte*.[9]

Pre-trial motions

On the date of first appearance a number of preliminary or procedural matters may also be raised. These may include an application by the accused to quash (strike out) one or more charges from the information, or an application by the prosecutor to amend the information. The accused can raise objections to the charges prior to entering a plea; after the plea is made, objections to the charges can only be raised with leave of the court.[10] The court has broad powers to amend the charges.[11]

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[3] *Ibid.,* s. 800(2).
[4] *Ibid.,* ss. 800(3), 803(2). See also Roger E. Salhany, *Canadian Criminal Procedure,* 6th ed., looseleaf (Aurora, Ont.: Canada Law Book, 1994) at paras. 7.450-7.470 [Salhany].
[5] *Criminal Code*, *ibid.,* ss. 803(2)(b).
[6] *Ibid.,* s. 799. Costs must be awarded according to the scale of fees and are minimal: ss. 809, 840.
[7] *R. v. Riddle* (1979), 48 C.C.C. (2d) 365 (S.C.C.).
[8] *Criminal Code*, *ibid.,* s. 556(2)(a).
[9] *Ibid.,* s. 556(2)(b).
[10] *Ibid.,* s. 601(1).
[11] *Ibid.,* s. 601.

Adjournments

Either party may request adjournments, but must satisfy the court that both the delay and the time requested are reasonable.[12]

Change of venue

Either party may apply to the court for a change of venue (location of trial) within the same province.[13] The Judge must be satisfied that the change "appears expedient to the ends of justice," and, if the charges were laid where the offence occurred, will generally be reluctant to order the change. An application by the prosecutor must normally be made with reasonable notice to the accused.[14]

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[12] Regarding summary conviction proceedings, see *Criminal Code*, *ibid.*, s. 803(1). Regarding indictable offences, see ss. 571, 601(5), 606(3) and 645.

[13] *Ibid.*, s. 599.

[14] Salhany, *supra* note 4 at paras. 2.450-2.530.

Chapter 12
Prosecution of summary conviction offences

The vast majority of environmental prosecutions are summary conviction proceedings for regulatory, or public welfare, offences. The result is a simplified procedure notwithstanding the availability of significant penalties.

It is important for the private prosecutor to have a general understanding of the rules of evidence (see Appendix 2, *Investigating and documenting your case*). Prosecutors and potential prosecution witnesses should also be familiar with the basics of trial procedure. This chapter reviews the procedure that applies in a summary conviction trial (concerning indictable offences, see Chapter 13, *Prosecution of indictable offences*). For further guidance, the reader is referred to existing resources on this topic.[1]

Regarding failure to appear at trial, see Chapter 11, *First appearance.*

What is a summary conviction offence?

All provincial and municipal offences are summary conviction offences. Federal offences are summary conviction offences as well, unless the law specifies that the offence is indictable.[2] Generally speaking, summary conviction offences are less serious in nature than indictable offences. The *Criminal Code* provides that except where otherwise specified in law, the maximum penalty for a summary conviction offence is a $2,000 fine or six months imprisonment, or both.[3] However, many statutes specify far more onerous penalties. For example, the Alberta *Environmental Protection and Enhancement Act* includes maximum penalties for an individual offender of $100,000, two years imprisonment, or both for certain summary conviction offences.[4]

Summary conviction offences and the private prosecutor

A private prosecutor is entitled to personally conduct the trial of a summary conviction offence, subject to the intervention of the Attorney General (see Chapter 10, *Powers to intervene*).[5] The prosecution may also be conducted by the informant's agent or legal counsel.[6]

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[1] See, for example, Roger E. Salhany, *Canadian Criminal Procedure*, 6th ed., looseleaf (Aurora, Ont.: Canada Law Book, 1994); Christopher A.W. Bentley, *Criminal Practice Manual: A Practical Guide to Handling Criminal Cases*, looseleaf (Scarborough, Ont.: Carswell, 2000).
[2] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(1)(b).
[3] *Criminal Code*, R.S.C. 1985, c. C-46, s. 787.
[4] R.S.A. 2000, c. E-12, s. 228(1).
[5] *Criminal Code*, *supra* note 3, s. 802; *MacIsaac v. Motor Coach Industries Ltd.* (1982), 70 C.C.C. (2d) 226 (Man. C.A.).
[6] *Criminal Code, ibid.,* s. 785 definition of "prosecutor".

Do I need a lawyer for trial?

While an informant has the right to personally conduct the prosecution, he or she should carefully consider retaining experienced legal counsel to conduct the trial. The rules of procedure and evidence can be very complex. Criminal proceedings are considerably more intimidating to the non-lawyer than, for example, a small claims action or intervention in a public hearing. It would be unfortunate to lose a well-founded case because of avoidable mistakes.

The retaining of legal counsel does not, however, necessarily preclude the active involvement of the informant in the preparation of the case. In most cases, counsel will require assistance in locating witnesses and documenting evidence. The level of participation by the informant will have an impact on the expense of mounting a case and its ultimate success.

If you decide to try your case personally, refer to Appendix 2, *Investigating and documenting your case*, and the sources listed there, in addition to the sources cited in this chapter. You may also gain invaluable experience by simply observing a number of trials in the criminal courts.

Summary conviction offences: applicable procedure

Summary conviction offences are tried in the Provincial, County or District courts. The procedure for the prosecution of these offences is set out in Part XXVII of the *Criminal Code*. This procedure applies to summary conviction offences established by the Code and other federal legislation and regulations. The *Criminal Code* procedure also applies to provincial offences and municipal bylaws, except where modified by provincial law. All provinces and the territories have summary proceedings legislation that either adopts the *Criminal Code* procedure for the prosecution of provincial and municipal offences, or provides alternative or replacement procedures.[7]

Summary conviction proceedings: basic trial steps

If, upon arraignment, the accused enters a plea of not guilty, a date will be set for trial (concerning arraignment and the entering of pleas, see Chapter 11, *First appearance*).

The case for the prosecution

Normally, the prosecutor will first make some opening remarks about the case. He or she will then proceed to present the case for the prosecution, calling witnesses and entering exhibits as evidence. The prosecutor will have the first opportunity to question witnesses for the prosecution (the "examination in chief"). These witnesses typically include individuals who observed the events surrounding the commission of the alleged offence. Expert witnesses may

[7] See Chapter 8, *Initiating a private prosecution,* under *A note on provincial and territorial summary proceedings legislation.*

also be called on to provide an opinion on the available evidence, or to testify regarding technical matters such as sample analysis or the harmful nature of substances in question.[8] All testimony must be given under oath.[9]

The prosecutor normally enters any exhibits (physical evidence) through witnesses for the prosecution. Exhibits may include pollution monitoring data, samples of contaminated water collected at the site of the alleged offence, photographs taken at the scene, reports of experts who will testify, and so forth. Individuals who were involved with the collection or production of evidence, such as samples or photographs, will also be called to testify concerning the manner in which the evidence was gathered.

Following the examination in chief of each prosecution witness, the accused, or his counsel or agent, will have the opportunity to cross-examine. Questions may also be put to the witnesses by the Judge. Where new issues are raised by a witness during cross-examination, the prosecutor will be permitted to re-examine the witness.

The case for the accused

At the close of the prosecutor's case, the accused may make an application for an acquittal by directed verdict. The order will be granted if the prosecution has failed to provide any evidence upon which the Judge, or a properly instructed jury, could possibly convict. Usually this means a total lack of evidence on some essential element of the case. For example, on a charge of depositing a deleterious substance in water frequented by fish, the prosecution may have failed to show any evidence that the pollutant entered the water.

Where no such application is made, or the application is made but dismissed, the accused, or his agent or counsel, may proceed to enter evidence for the defence. The accused has the option of not testifying or entering any evidence. Where evidence is presented, the accused and his witnesses and experts may be called to the stand to testify and undergo examination in chief by the defence. The prosecutor is given the opportunity to cross-examine each witness, and the Judge may pose questions, after which the prosecutor and the defence may further examine the witness.

Summation

After all the evidence has been presented, the prosecution and the defence will each have an opportunity to make a closing argument. At this time each party summarizes its interpretation of the law and the evidence presented during the course of the trial. Reference may only be made to evidence that was presented in court.

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[8] Roger E. Salhany, *The Practical Guide to Evidence in Criminal Cases*, 6th ed. (Scarborough, Ont.: Carswell, 2002) at 158.

[9] *Criminal Code*, *supra* note 3, s. 802(3).

It is the usual practice for the defence to present its closing argument first, if the accused has testified or called witnesses in his defence. If the defence did not present any evidence, the prosecutor will address the court first. After closing argument, the Judge will often reserve his or her decision concerning verdict to a later date. In the event that a conviction is entered immediately following the trial, the court may request that the parties address sentencing, or adjourn to an agreed upon date for sentencing.

Speaking to sentence

Where the accused is convicted of an offence, both the prosecution and the defence will have the opportunity to address the court concerning a suitable sentence. The evidence put forward at sentencing may be critical to obtaining an appropriate penalty. It is therefore important to begin gathering evidence and preparing for sentencing as part of trial preparation.

The request to speak to sentence should be made to the court on the date the conviction is entered. Either party may also request an adjournment to prepare to address sentencing.

Concerning sentencing, see Chapter 15, *Sentencing.*

Chapter 13
Prosecution of indictable offences

All criminal and regulatory offences fall into one of three categories that determine what procedure will apply to the prosecution: summary conviction, indictable, and hybrid or dual offences.

The vast majority of environmental prosecutions are summary conviction proceedings (see Chapter 12, *Prosecution of summary conviction offences*). Given the complexity of proceedings by indictment, the uncertain scope of the informant's right to prosecute them, and the advantages of summary proceedings, the private prosecution of indictable offences is rare.

This chapter explains the rights of the private prosecutor in relation to indictable offences, and provides an overview of the procedure involved. For further information on the steps involved in proceedings by indictment, the reader is referred to existing resources on this topic.[1]

What is an indictable offence?

Only the federal government can create indictable offences, which are the most serious criminal offences.[2] These offences are set out in the *Criminal Code* and in a variety of other federal statutes. The penalties attached to indictable offences are severe, and can include maximum prison terms from two years to life imprisonment. Most environmental offences that provide for proceedings by indictment give the prosecutor the option to proceed under summary conviction proceedings instead (see below, *Dual or hybrid offences and the prosecutor's election*). One example of an offence that must be prosecuted by way of indictment is provided by the *Canadian Environmental Protection Act, 1999:*

> Every person is guilty of an offence and liable on conviction on indictment to a fine or to imprisonment for a term of not more than five years, or to both, who, in committing an offence under subsection 272(1) or 273(1),
>
> (a) intentionally or recklessly causes a disaster that results in a loss of the use of the environment; or
>
> (b) shows wanton or reckless disregard for the lives or safety of other persons and thereby causes a risk of death or harm to another person.[3]

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[1] See, for example, Roger E. Salhany, *Canadian Criminal Procedure,* 6th ed., looseleaf (Aurora, Ont.: Canada Law Book, 1994); Christopher A.W. Bentley, *Criminal Practice Manual: A Practical Guide to Handling Criminal Cases,* looseleaf (Scarborough, Ont.: Carswell, 2000).

[2] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. App. II, No. 5, s. 91(27).

[3] S.C. 1999, c. 33, s. 274(1).

Indictable offences: applicable procedure and the right to prosecute

The procedure for the prosecution of indictable offences is set out in Parts XVIII to XXI of the *Criminal Code*, and applies unless the federal statute creating the indictable offence provides otherwise.[4] Part XXVII of the Code (summary conviction proceedings) does not apply.

Language of the accused

Under the *Criminal Code*, an accused can bring an application to be tried before a court that speaks either English or French.[5] However, the private prosecution of an indictable offence may be carried out in English or French, regardless of the language of the accused.[6]

The accused's election

For most indictable offences, the accused has a choice whether to be tried by a Provincial Court Judge, or by a Superior Court Justice with or without a jury.[7] This is the case for almost all indictable offences relating to the environment.[8] The right of the private prosecutor to prosecute an indictable offence and the applicable procedure are partly determined by the accused's election as to mode of trial.

Trial before a Provincial Court Judge

Where the trial is to be heard before a Provincial Court Judge (a "summary" trial of an indictable offence), the trial proceeds on the basis of the information laid.[9] There is no written indictment or preliminary inquiry.[10] Although the procedure is similar in many respects to summary conviction proceedings, Part XXVII of the *Criminal Code* does not apply.

Although the law is not settled, there is authority supporting the right of an informant, or his or her legal counsel, to prosecute through to the conclusion of a summary trial on an indictable offence.[11] It is more likely, however, that the intervention of the Attorney General is required.[12]

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[4] *Interpretation Act*, R.S.C. 1985, c. I-21, s. 34(2).
[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 530.
[6] *Ibid.*, s. 530.1(e).
[7] *Ibid.*, s. 536. In Alberta, the Court of Queen's Bench. Some provinces maintain two levels of court in addition to the Provincial Court.
[8] For certain indictable offences, such as mischief in specified circumstances, the accused has no choice and the trial is normally held before a Provincial Court Judge: *Criminal Code*, *supra* note 5, s. 553.
[9] *Ibid.*, Part XIX.
[10] *Ibid.*, ss. 554, 566. The presiding Provincial Court Judge has the discretion to convert the proceedings into a preliminary inquiry: s. 555.
[11] *Re McMicken* (1912), 20 C.C.C. 334 (Man. C.A.); *R. v. Schwerdt* (1957), 119 C.C.C. 81 (B.C.S.C.).
[12] In *R. v. Dalton* (1976), 11 Nfld. & P.E.I.R. 287 (Nfld. C.A.), it was held that a private prosecutor has no right to prosecute a summary trial of an indictable offence without intervention by the Crown. See also comments (in *obiter*) of Guy, J.A. in *Mackenzie v. Denstedt*, [1969] 3 C.C.C. 119 at 126 (Man. C.A.), aff'g

Any right to prosecute an indictable offence is subject to intervention by the Attorney General or the court (see Chapter 10, *Powers to intervene*). An order of the court is not required.

Trial before a Superior Court Justice with or without a jury

Where the accused elects trial before a Superior Court Justice with or without a jury, a preliminary inquiry will, at the request of the accused or the prosecutor, be held to determine whether there is sufficient evidence to require the accused to stand trial.[13] The preliminary inquiry is normally held before a Provincial Court Judge. After the inquiry, an indictment listing the charges, if any, on which the accused will be tried will be preferred, or laid, by the prosecutor.[14] The charges may include those on which the accused has been ordered by the court to stand trial, and others if there is evidence to support them.[15] From this point proceedings are based on the indictment rather than on the original information.

An informant, or his or her legal counsel, has the right to conduct a preliminary inquiry, subject always to the right of the Attorney General or the court to intervene (see Chapter 10, *Powers to intervene*).[16] However, a private prosecutor cannot prefer an indictment without the written order of the Judge of the court in which the trial will occur.[17] The application for the order is made once the accused has been ordered to stand trial or, if no preliminary inquiry is held, after the accused has elected or been deemed to have elected a mode of trial.[18] It appears likely that the Judge will refuse the order in the absence of the Attorney General's intervention and concurrence in the private prosecution.[19] If the Judge refuses the order, the accused will not stand trial unless the Attorney General intervenes to conduct the proceedings.[20]

If the order is granted, it is arguable that a private prosecutor has the right to conduct the trial, subject to intervention by the Attorney General.[21]

[1969] 3 C.C.C. 119 (Man. Q.B.). But see *R. v. Cathcart* (1988), 82 N.S.R. (2d) 267 (N.S.S.C.T.D.). For discussion on this point, see Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 10-13 [*Private Prosecutions*], and Philip C. Stenning, *Appearing for the Crown* (Cowansville, Que.: Brown Legal Publications Inc., 1986) at 266-267 [Stenning].

[13] *Criminal Code*, *supra* note 5, s. 536, and Part XVIII generally.

[14] *Ibid.*, s. 574. See also Parts XIX and XX of the *Criminal Code* generally. Sections 574 and 576 apply to Part XIX (Judge alone) proceedings by virtue of s. 566(3).

[15] *Ibid.*, s. 574(1).

[16] *R. v. Schwerdt*, *supra* note 11. See also Stenning, *supra* note 12 at 267.

[17] *Criminal Code*, *supra* note 5, s. 574(3).

[18] *Ibid.*, s. 574; *R. v. Cathcart* (1988), 82 N.S.R. (2d) 267 (N.S.S.C.T.D).

[19] See *R. v. Dalton* and *Mackenzie v. Denstedt*, *supra* note 12.

[20] *Criminal Code*, *supra* note 5, s. 574.

[21] *R. v. Schwerdt*, *supra* note 11. There is considerable uncertainty on this point, however: *R. v. Dalton*, *supra* note 12 and *R. v. Parsons* (1983), 41 Nfld. & P.E.I.R. 198 (Nfld. Prov. Ct.). For discussion see Stenning, *supra* note 12 at 267-271 and *Private Prosecutions*, *supra* note 12 at 11-13.

In the event that the accused is discharged by the court following a preliminary inquiry and the Crown has not intervened, no indictment may be preferred without an order of the judge of that court.[22] The order may only be available where necessary to prevent a "miscarriage of justice".[23] Where the Crown has intervened, the consent in writing of the Attorney General or the Deputy Attorney General is required.[24] The court has no power to order that an indictment be preferred in this latter case.

Unlike for summary conviction proceedings, the private prosecution of an indictable offence must in all cases be conducted by the informant or his or her counsel, and not through an agent.[25] Private prosecutors are strongly advised to retain experienced legal counsel to conduct the preliminary inquiry or trial (see Chapter 12, *Prosecution of summary conviction offences*, under *Do I need a lawyer for trial?).*

A note on the preliminary inquiry

The function of the preliminary inquiry, which is held before a Provincial Court Judge, is to determine whether there is some evidence on all essential elements of the offence. If so, the accused is normally committed for trial. For further information on the preliminary inquiry, see existing resources on this topic.[26]

No right of appeal

Unlike summary conviction offences, a private prosecutor has no right of appeal in connection with an indictable offence.[27]

Dual or hybrid offences and the prosecutor's election

Dual offences, also known as hybrid offences, give the prosecution the option to prosecute the offence as either a summary conviction or an indictable offence.[28] Upon election, the offence is prosecuted according to the *Criminal Code* procedure for summary conviction or indictable offences. Most federal environmental offences, including the fisheries habitat protection and pollution prevention provisions of the *Fisheries Act*,[29] are dual offences.

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[22] *Criminal Code*, *supra* note 5, s. 577.
[23] *R. v. Bain*, [2003] O.T.C. 45, O.J. No. 130 (QL)(Ont. S.C.J.); *R. v. Laforme*, [2003] O.J. No. 845 (Ont. S.C.J.) (QL).
[24] *Criminal Code*, *supra* note 5, s. 577.
[25] *Criminal Code*, *supra* note 5, s. 2 definition of "prosecutor".
[26] For example, Roger E. Salhany, *Canadian Criminal Procedure, supra* note 1, c. 5.
[27] *Criminal Code, supra* note 5, ss. 675, 676.
[28] The authority to make this election is a ministerial one that is not provided for in the *Criminal Code* or other statute: *R. v. Parsons*, *supra* note 21 at paras. 35-37.
[29] *Fisheries Act*, R.S.C. c. F-14, ss. 40(1) and (2).

Dual offences are deemed to be indictable offences until the prosecutor's election is made.[30] On this basis, it has been held that a private prosecutor has no authority to make the election absent the intervention and concurrence of the Attorney General.[31] However, it is arguable that the case law supporting a limited right to privately prosecute indictable offences would also support a right to make this election.[32] Practically speaking, the issue is unlikely to arise unless the prosecutor is electing to proceed by indictment.

The election is made before the accused pleads. However, it is generally advisable for the private prosecutor to put his or her election on record at the earliest opportunity. Unless there is a reason to delay the election, it is suggested that the prosecutor specify the mode in which the prosecution will proceed on the information sworn.[33] This may be confirmed at the process hearing.[34]

The private prosecutor may decide to proceed by indictment on a dual offence where the most severe penalties are appropriate or where the limitation period has expired for summary conviction proceedings. The implications of this course should be carefully discussed with a criminal lawyer.

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[30] *Interpretation Act*, *supra* note 4, s. 34(1)(a).

[31] *R. v. Parsons*, *supra* note 21.

[32] Stenning, *supra* note 12 at 216-218, 267. If the right exists, the election cannot be made by an agent, but only by the private prosecutor or his or her counsel: *Criminal Code*, s. 2 definition of "prosecutor"; *R. v. Parsons*, *ibid.* at para. 40.

[33] This may be done by specifying the subsection of the offence provision that allows for prosecution by indictment or the subsection that provides for summary conviction proceedings.

[34] Any challenges based on lack of authority to make the election are, generally speaking, best addressed at an early stage.

Chapter 14
Costs

After a decision of the court on a motion or a final determination on the case, the prosecutor or the defence may make an application for an award of costs. Costs are intended to provide the successful party with some level of compensation for expenses incurred in the conduct of the case.[1] Costs that are typically claimed include disbursements (for witness fees, transcripts, photocopying, and other out of pocket expenses) and fees for filing documents. In some cases legal fees are also claimed.

Provincial summary proceedings legislation

It is important to remember that provincial legislation governing the prosecution of provincial offences may affect how the cost provisions of the *Criminal Code* apply.

Costs in summary conviction proceedings

The *Criminal Code* provides a court hearing a summary conviction matter with the discretionary power to award costs.[2] Costs are payable by the accused to the informant where the court convicts or makes an order against the accused. Where the court dismisses the information, costs are payable by the informant to the accused. Costs awards are limited by a schedule of fees and allowances set out in the *Criminal Code*.[3] No costs outside of this schedule may be awarded to or against the private prosecutor.[4] The costs allowed are nominal (for example, $1.00 for filing an information; $4.00 per day witness fee), and do not provide for reimbursement of lawyers' fees.

In appeals of summary conviction matters, the courts are granted considerably broader discretion to award costs. Rather than imposing fixed fees, the court is empowered to make any costs award that it considers "just and reasonable" or "proper" in the circumstances.[5] Costs are not awarded on the "loser pays" principle, as in civil trials. They are normally awarded only in special circumstances, for example where an appeal by the prosecution is frivolous or brought for an improper purpose.[6] Solicitor-client costs of the appeal may be awarded to the accused where the prosecution engages in oppressive or improper conduct and is unsuccessful on

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[1] Kenneth Jull, "Costs, the Charter and Regulatory Offences: The Price of Fairness" (2002) 81:3 Can. Bar Rev. 657.

[2] *Criminal Code*, R.S.C. 1985, c. C-46, s. 809. For provincial offences, summary proceedings legislation may apply. For example, section 809 of the *Criminal Code* does not apply to proceedings governed by the Alberta *Provincial Offences Procedure Act* (*Procedures Regulation*, Alta. Reg. 233/89, s. 12).

[3] *Criminal Code*, *ibid.*, s. 840.

[4] *Quebec (A.G.) v. Canada (A.G.)*, [1945] S.C.R. 600; *R. v. Port McNeill (Town)* (1998), 123 C.C.C. (3d) 392 (B.C.C.A.).

[5] *Criminal Code*, *supra* note 2, ss. 826, 839(3).

[6] *R. v. King* (1986), 26 C.C.C. (3d) 349 (B.C.C.A.).

appeal.[7] Costs may also be awarded where the appeal is entirely without merit, whether brought by the accused or the prosecution.[8] However, costs are rarely awarded to a private prosecutor on appeal.

Costs in proceedings on indictment

The *Criminal Code* contains no general provision for awarding costs in proceedings on indictment, either at trial or on appeal.[9] However, a trial court may adjourn where the accused has been prejudiced by an error in the indictment or information, and award costs stemming from the amendment to the accused.[10]

The Superior Courts also have the inherent jurisdiction to award costs to censure reprehensible conduct in any proceedings before them. An award may be made against a private prosecutor where the proceedings are brought for an improper purpose (for example, attempting to influence the outcome of civil proceedings) or constitute a blatant abuse of process.[11]

Costs in proceedings by indictment are not limited by the schedule of fees and allowances set out in the *Criminal Code.*

Comment on costs

In nearly all cases, the private prosecutor will be required to bear the costs of his or her case, whether or not the prosecution results in a conviction.[12] In addition, should he or she cause a delay through a procedural mistake or fail at trial, the prosecutor may be ordered to pay certain of the accused's costs. Due to restrictions on costs in summary conviction proceedings, this will normally only be a concern for proceedings before the Superior Courts. To limit the possibility of an adverse award, the prosecutor should consider his or her motives. Any evidence that the court process is being used to draw public attention to an issue may indicate an improper purpose.[13] The private prosecutor should stay away from the media, ensure that any proceedings initiated are well-founded, and obtain legal guidance concerning the court's process as needed.

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[7] *R. v. Gagnon* (2000), 147 C.C.C. (3d) 184 (Que. C.A.).
[8] *R. v. MacKinnon* (1988), 67 Sask. R. 182 (Q.B.).
[9] *R. v. Brown Shoe Co. of Canada (No. 2)* (1984), 11 C.C.C. (3d) 514 (Ont. H.C.J.); *Criminal Code*, *supra* note 2, s. 683(3).
[10] *Criminal Code*, *ibid.*, s. 601(5).
[11] *CIBC v. Knight* (1993), 84 Man. R. (2d) 231 (Q.B.).
[12] National Law Reform Commission, *A Proposal for Costs in Criminal Cases* (Ottawa: National Law Reform Commission, 1973) at 18.
[13] *Walters (Informant) v. Red River Exhibition Assn.* (1997), 119 Man. R. (2d) 237 (Q.B.).

Chapter 15
Sentencing

Speaking to sentence

At the first practical opportunity after an accused has been found or pleaded guilty, the court will invite the parties to speak to sentence.[1] Both the prosecutor and the offender have a right to address the court concerning facts relevant to the sentence and what an appropriate sentence would be.[2] Credible and reliable hearsay evidence (evidence that is not original or first hand) is, generally speaking, admissible at this stage of the proceedings.[3] However, if relevant facts are in dispute, a formal hearing will normally be held, and the court will request that one or both parties call evidence unless sufficient evidence on the fact was adduced at trial.

Provincial summary proceedings legislation

It is important to remember that provincial legislation governing the prosecution of provincial offences may affect how the sentencing provisions of the *Criminal Code* apply.

Some information not admissible to prove guilt may be relevant and admissible in speaking to sentence. For example, while a court will normally refuse to admit evidence of the accused's previous convictions at trial, such evidence is admissible on sentencing to establish aggravating factors relevant to the penalty proposed. As another example, information about the harm to the environment resulting from the offence may not be necessary to convict, but it may be important in seeking an appropriate penalty. Facts that would support a heavier penalty (aggravating factors) must be proven by the prosecutor beyond a reasonable doubt.[4]

The evidence put forward by the prosecutor on sentencing, including evidence of the offender's environmental record and government enforcement efforts, is a critical element of the prosecutor's case.[5] Obtaining an appropriately significant penalty may depend on it.

Factors in sentencing

The *Criminal Code* and some environmental statutes set out criteria that the court must consider in imposing sentence.[6] In addition, the courts have found other factors to be relevant in sentencing for environmental offences, including:

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[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 720.
[2] *Ibid.*, s. 723.
[3] *Ibid.*, s. 723(5).
[4] *Ibid.*, s. 724(3)(a), (e).
[5] *Environmental Enforcement* (Proceedings of the National Conference on the Enforcement of Environmental Law) (Edmonton: Environmental Law Centre, 1985) at 122.

- the nature or sensitivity of the environment affected;
- the actual harm done to the environment or the public, and the cost to the public for repair of the damage;
- the deliberateness of the offence;
- the size, wealth and power of a corporate offender and its ability to absorb a fine as a cost of doing business;
- any financial or other benefit the offender received through the commission of the offence;
- previous convictions or enforcement actions taken against the offender;
- the need to protect the public from risk even in the absence of serious harm to individuals and the environment;
- the risk of harm to which the environment or the public was exposed as a result of the offence;
- evidence that measures that could have prevented the offence were easy or inexpensive to implement; and
- any evidence that the offender deliberately flouted the law or disregarded or refused to cooperate with environmental authorities.[7]

Other, mitigating factors may be raised by the offender, including:

- the extent of the offender's efforts to comply with regulatory and other legal requirements;
- the entering of a guilty plea;
- remorse;
- cooperation with enforcement officials;

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[6] *Criminal Code*, *supra* note 1, ss. 718-718.2 and, for example, *Canadian Environmental Protection Act, 1999*, S.C. 1999, c.33, s. 287.

[7] *R. v. Van Waters & Rogers Ltd.* (1998), 220 A.R. 315 (Prov. Ct.); *R. v. Bata Industries Ltd.* (1992), 7 C.E.L.R. (NS) 245 at 293 (Ont. Ct. Prov. Div.), var'd (1993), 11 C.E.L.R. (N.S.) 208 (Gen. Div.), rev'd in part, on other grounds (1995), 101 C.C.C. (3d) 86 (Ont. C.A.).

- steps taken and expenditures made since the offence to repair harm done or prevent similar occurrences;
- limitations on the offender's ability to pay a fine;
- laxity of government agencies in enforcement; and
- lack of previous convictions or enforcement action and other evidence of good character.[8]

Penalties

The courts have broad discretion in sentencing, subject to limitations imposed by statute regarding sentencing options and maximum and minimum penalties.

Penalty provisions are generally found at the back of statutes under the heading "Offences and Punishment" or "Offences and Penalties".

Many environmental statutes provide that, for each day during which an offence continues, the offender is liable for a separate offence. If convicted for a continuing offence, an offender faces a separate penalty for each day of the offence, and potentially a much greater total penalty.

Maximum and minimum sentences

Most statutes specify penalties for offences created under that Act, including maximum penalties. The Act may contain a general offence and penalty provision or create separate penalty options for each offence. Where the statute is silent as to penalties, the maximum penalty for a summary conviction offence is a fine of $2,000, imprisonment for 6 months, or both.[9] Corporations and other organizations may be fined up to $100,000 for such offences unless a statute provides otherwise (corporations cannot be imprisoned).[10]

For indictable offences, unless a federal statute specifies otherwise, the maximum term of imprisonment is five years.[11] Although there is no general maximum on fines for an indictable offence,[12] most statutes that create such offences provide maximum fines as well as maximum terms of imprisonment. In all cases, the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender,[13] and the offender must be able to pay any fine that is imposed.[14]

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[8] *Ibid*.
[9] *Criminal Code*, *supra* note 1, s. 787(1).
[10] *Ibid.*, s. 735(1)(b).
[11] *Ibid.*, s. 743.
[12] *Ibid.*, s. 735(10).
[13] *Ibid.*, s. 718.1.
[14] *Ibid.*, s. 734.1(2).

Maximum fines for environmental offences range from several hundred dollars to $1,000,000.

Unless otherwise specified by the statute creating the offence, there is no minimum sentence for either a summary conviction or indictable offence. Where available as a sentencing option, imprisonment of individual offenders will generally only be considered for behaviour that is surreptitious, deliberate, or reckless, or where there has been significant harm.

Payment of fines and fine-splitting

Subject to exceptions, any fine imposed in a private prosecution is payable to the provincial, territorial or federal government. There are three exceptions. Under the federal *Fishery (General) Regulations*, the court is required to award payment of one-half of any fine imposed for an offence under the *Fisheries Act* to the private informant.[15] Secondly, under the Yukon Territory *Environment Act,* the courts have the option of awarding part or all of a fine to the informant to assist in compensating for the cost of the prosecution.[16] These fine-splitting provisions apply whether or not the Attorney General intervenes to conduct the prosecution.

The Northwest Territories *Environmental Rights Act* is narrower, providing the courts with the discretion to award part of any fine imposed to an informant who goes on to conduct the prosecution.[17] The fine-splitting provisions in the Northwest Territories and Yukon Acts apply to offences created under those Acts and under statutes listed in the Schedules to the Acts.

Historically, small fines have meant that such fine-splitting provisions provided minimal compensation to private informants.[18] However, in two recent Ontario decisions, substantial awards were made to private informants to cover costs of prosecution and for ongoing environmental advocacy efforts.[19]

Joint liability for fines

Some environmental statutes extend liability for fines to proprietors, owners, agents, tenants, occupiers, partners, or persons in charge.[20] Under these provisions, where an offender is unable to pay a fine, others who were connected to the offence may be required to do so.

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[15] *Fishery (General) Regulations*, S.O.R. 93/53, s. 62; *Fisheries Act*, R.S.C. 1985, c. F-14.
[16] *Environment Act*, R.S.Y. 2002, c. 76, s. 19(2).
[17] *Environmental Rights Act,* R.S.N.W.T. 1988, c. 83 (Supp.), s. 5(2).
[18] L. B. Huestis, *Policing Pollution: The Prosecution of Environmental Offences* (Ottawa: Law Reform Commission of Canada, 1984) [unpublished] at para. 211.
[19] In *R. v. Hamilton (City)* (18 September 2000), 001/134/073 (Ont. C.J. (Prov. Div.)), the informant was awarded half of a $300,000 fine. In *Fletcher v. Kingston (City),* (1998), 28 C.E.L.R. (N.S.) 229 (Ont. Ct. Prov. Div.), var'd [2002] O.J. No. 2324 (Ont. S.C.J.)(QL), var'd [2004] O.J. No. 1940 (C.A.)(QL), the informant was awarded half of the $120,000 fine. However, a new trial has been ordered in *Fletcher*.
[20] For example, *Fisheries Act*, *supra* note 15, s. 80.

Municipalities and other government offenders

The courts have held that no special leniency should be shown when sentencing the Crown, municipalities, or government officials.[21] Indeed, there is authority stating that the courts should be much more severe when an environmental disaster is caused by employees or agents of the Crown.[22] The principles and considerations outlined above apply generally to these offenders.

Sentencing options

Suspended sentence, discharge and probation order

The sentencing court has the discretion to suspend sentencing where there is no minimum penalty for the offence.[23] The offender will then be released on terms set out in a probation order. If the offender fails to comply with the order, he will be brought before the court for sentencing.

The court also has the discretion to grant an absolute discharge to an offender.[24] Although guilty of the offence, no conviction is entered, and the accused is released without penalty. The court may also grant a conditional discharge, requiring the offender to fulfill the terms of a probation order in order to avoid conviction.

Unless provided for under provincial law, discharges are not available for provincial offences.[25] They are also unavailable for the most serious *Criminal Code* offences.[26] A discharge will normally only be considered where a conviction would have a disproportionate affect on the offender in light of his fault and the offence committed.

A probation order requires the offender to comply with its conditions or face additional penalties for breach of the order.[27] They may be issued against individual and corporate offenders to modify behaviour, or to allow a corporate offender to serve as an example of responsible behaviour in a given industry.

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[21] *R. v. Canada (Northwest Territories Commissioner)* (1993), 12 C.E.L.R. (N.S.) 55 (N.W.T. Terr. Ct.), var'd [1995] 1 W.W.R. 17 (N.W.T.S.C.).
[22] *Ibid.* (N.W.T. Terr. Ct.) at para. 22.
[23] *Criminal Code*, *supra* note 1, s. 731(1)(a). See also, for example, *Canadian Environmental Protection Act, 1999, supra* note 6, s. 289.
[24] *Criminal Code*, *ibid.*, s. 730. This section provides that discharges are not available to corporations and other organizations. However, discharges are also available under certain environmental legislation, for example, *Canadian Environmental Protection Act, 1999, ibid.*, s. 288. These non-*Criminal Code* provisions do not exclude corporations.
[25] *R. v. Gower* (1973), 10 C.C.C. (2d) 543 (N.S. Co. Ct.); *R. v. Sztuke* (1993), 87 C.C.C. (3d) 50 (Ont. C.A.).
[26] *Criminal Code*, *supra* note 1, s. 730(1).
[27] *Criminal Code, ibid.*, s. 733.1. Regarding possible terms and conditions, see s. 732.1.

Restitution

Under the *Criminal Code*, the sentencing court has the discretion to require, as a condition of a probation order, that an offender pay compensation to another person for any loss or damage.[28]

However, many environmental and summary proceedings statutes also provide for restitution for loss or damage to property resulting from an offence. Different statutes provide that the application may be made by the person aggrieved,[29] by the prosecutor,[30] or on the court's own initiative.[31] The application must be made to the court that convicted the offender at the time sentence is imposed.[32] If granted, the person to benefit from the order may file it with the Superior Court after which the order may be enforced as a civil judgment or as an order of the court.

These provisions do not appear to limit property loss claims to private property. Damages could then potentially relate to loss of the use of lands or waters for recreational purposes, or perhaps loss of enjoyment or benefit from wildlife habitat or a fishery. The major hurdle for a private prosecutor seeking restitution for an environmental offence will be establishing the dollar value of the damage and, in these latter cases, a compensable property interest.

Forfeiture of benefit and suspension of license

Several environmental statutes provide that in addition to traditional fines and imprisonment, a court may require an offender to forfeit any benefit derived from committing the offence in the form of an additional fine.[33] Normally, calculation of the amount of any benefit is the responsibility of the offender. If not satisfied that this calculation is accurate, the court may rely on a reasonable estimate submitted by the prosecutor.[34]

Environmental statutes may also provide that, in addition to traditional penalties, the court may suspend or cancel a lease or license issued under the statute.[35] The court may also prohibit the offender from applying for a new lease or license for a specified period.

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[28] *Ibid.*, ss. 732.1(3)(h) and (3.1)(a). A separate order for restitution will only be considered on the application of the Attorney General or on the court's own initiative: *ibid.*, s. 738(1).
[29] For example, *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 235; *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, s. 8; *Canadian Environmental Protection Act, 1999*, *supra* note 6, s. 292.
[30] For example, *Environmental Protection Act*, R.S.O. 1990, c. E.19, s. 190.1.
[31] *Ibid*.
[32] *R. v. Goronuk*, [1963] 1 C.C.C. 320 (B.C.C.A.).
[33] For example, *Fisheries Act*, *supra* note 15, s. 79; *Environmental Protection and Enhancement Act*, *supra* note 29, s. 230.
[34] *R. v. United Keno Hill Mines Limited* (1980), 10 C.E.L.R. 43 (Yukon Terr. Ct.).
[35] For example, *Fisheries Act*, *supra* note 15, s. 79.1.

Creative sentencing

The *Criminal Code* and many environmental statutes now provide the courts with a variety of sentencing options beyond the traditional penalties of fines and imprisonment.[36] Creative sentences may include prohibitions against specified activities, remediation of the harm caused, publication of the facts of the offence, contribution of funds toward an environmental or research project or a scholarship, community service, and other conditions designed to secure the good conduct of the offender.[37] Creative sentences are imposed in conjunction with a fine or imprisonment. In most cases they are only available after a guilty plea or where the offender has taken responsibility for the offence.

While the court is authorized to order creative sentencing on its own motion, a creative sentence is normally recommended to the court by the Crown prosecutor at the time of sentencing. This is often done as part of a joint submission after discussions with the offender, his counsel and experts, and technical and enforcement staff from the Department of Environment.

Although creative sentencing has become an important, even dominant aspect of sentencing for environmental offences in some provinces,[38] in many cases a private prosecutor will lack the resources and expertise required to develop a sentencing order that will be acceptable to the court.[39] In particular, conditions that involve ongoing supervision or enforcement, reporting requirements, scientific assessments, audits, or the management of a fund may be beyond the capacity of a private prosecutor.[40] However, in such cases it is open to a private prosecutor to request the involvement of the Attorney General and government officials in developing the order.

Unless complex conditions are necessary to an appropriate sentencing order, in most cases it will be advisable to keep creative sentencing provisions simple. Examples of conditions that require minimal involvement of government officials include publication of the offence, a requirement that specific action be taken, or a prohibition on activities that may result in further, similar offences.

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[36] For example, *Environmental Protection and Enhancement Act*, *supra* note 29, s. 234; *Fisheries Act*, *supra* note 15, s. 79.2; *Canadian Environmental Protection Act, 1999*, *supra* note 6, s. 291.

[37] *Ibid*. For examples of creative sentencing orders, see Stanley David Berger, *The Prosecution and Defence of Environmental Offences*, looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2003) at para. 7.580ff [Berger].

[38] Most extensively in Alberta, British Columbia, Ontario, Nova Scotia and under federal legislation. See Berger, *ibid*.

[39] The Alberta courts have established principles and requirements for creative sentencing: *R. v. Van Waters & Rogers Ltd.* (1998), 220 A.R. 315 (Prov. Ct.). For guidance on the creative sentencing process in Alberta, see also: Alberta Environment/Alberta Justice, *Creative Sentencing Process for the Environmental Protection and Enhancement Act* (Edmonton: Alberta Environment, 2000).

[40] To involve individuals, government departments, or organizations (who are not parties to the prosecution) in a creative sentence, the prosecutor must normally obtain their consent: *R. v. Northwest Territories (Commissioner),* [1995] 1 W.W.R. 17 (N.W.T.S.C.) at paras. 37-39.

Even where a private prosecutor seeks a creative sentence that is relatively straightforward, the active involvement of the Attorney General may be necessary before a submission is accepted in the context of a private prosecution. A defence lawyer experienced in environmental prosecutions may also be able to assist in this regard.

Creative sentencing orders: examples from Crown prosecutions

In *R. v. Mallott,* the operator of an unauthorized tire dump was fined $2,000 and ordered by the sentencing court to remove 10,000 tires within a year and keep a log of tires received at the site.[41] The order also required that the operator not keep tires for longer than one month and that he submit monthly reports to the Department of Environment.

In *R. v. Corner Brook Pulp and Paper Ltd.,* a mill operator was fined $500,000 for depositing or permitting the deposit of acutely lethal effluent into fish habitat.[42] In addition, the offender was ordered to pay:

- A total of $200,000 to environmental scholarship funds at two local colleges, and
- $50,000 to the Corner Brook Development Corporation for environmental improvement projects in the Corner Brook stream area.

In *R. v. Guillevin International Co.*, a chrome-plating operation was charged with failing to comply with its statutory authorization when it unlawfully disposed of varsol, a hazardous material, into the City storm sewer.[43] Although management was aware that this was unlawful, they assumed that new employees hired by the company had become aware of the proper procedure. In fact, the employees were not aware of the procedure. The company was fined $5,000, and in addition the court ordered that $15,000 be paid into a trust account for the purpose of developing, producing, and distributing a training manual for employees working with hazardous materials.

Joint submission

After a plea of guilty in a prosecution of an environmental offence, it is common for the offender and the prosecutor to make a joint submission to the court on the relevant facts and an appropriate sentence. Joint submissions set out the issues on which the parties agree and provide valuable information to the court, which speeds up the proceedings.

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[41] Unreported, September 15, 1999, Ont. Ct. (Prov. Div.).
[42] (1996), 22 C.E.L.R. (N.S.) 199 (Nfld. Prov. Ct.).
[43] *R. v. Guillevin International Co. o/a Gir Del Hydraulics* (unreported, July 17, 2002, Alta. Prov. Ct., Caffaro A.C.J.).

Joint submissions may also be made by a private prosecutor and the offender. The guidance of the Attorney General's office or an experienced criminal defence lawyer may be invaluable to the development of an appropriate and effective submission. The court retains the discretion to accept or reject the submission.

Chapter 16
Appeal and judicial review

Except where expressly conferred by statute, a private prosecutor has no right of appeal.[1] The *Criminal Code* provides the private prosecutor with limited rights of appeal, which may involve a review of the findings made by a trial Judge on the facts of the case, a review of jurisdiction or the applicable law, or a review of the sentence imposed or another order or determination made.

The focus of this chapter is the informant's right to appeal. The offender's right to appeal is dealt with separately, below.

Appeals from summary conviction proceedings

Provincial summary proceedings legislation

For provincial offences, summary proceedings legislation may affect how the appeal provisions of the *Criminal Code* apply. The applicable legislation should be reviewed before taking steps to appeal.

An informant and the Attorney General (or his or her agent) both have the right to appeal a summary conviction court order staying the proceedings or dismissing the information, and to appeal against sentence.[2] This includes cases where the accused was acquitted after a trial,[3] or where the information is dismissed for want of prosecution[4] or for failure to allege an offence known to law.[5] The informant, or his or her agent, may also appeal a discharge.[6]

The appeal may be on a finding or question of fact or law.[7] However, an appeal from an order quashing an information prior to plea due to a defect must normally be taken under an alternate, simplified procedure (see below, *Simplified procedure for a question of law or jurisdiction*).[8]

The informant's right to appeal applies whether or not the Attorney General intervened to carry the prosecution at trial.[9] However, the right is subject to any restrictions specified in statute,

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[1] *R. v. Kennedy* (1972), 6 C.C.C. (2d) 564 (Ont. C.A.); *R. v. Joseph* (1900), 6 C.C.C. 144 (Que. Q.B., Crown Side).
[2] *Criminal Code*, R.S.C. 1985, c. C-46, s. 813(b); *Zaparinuk v. Halstead*, [1966] 3 C.C.C. 123 (Sask. C.A.).
[3] *R. v. Leblanc,* [1964] 3 C.C.C. 40 (N.S. Co. Ct.).
[4] *R. v. Yanke* (1983), 4 C.C.C. (3d) 26 (Sask. C.A.).
[5] Roger E. Salhany, *Canadian Criminal Procedure,* 6th ed., looseleaf (Aurora, Ont.: Canada Law Book, 1994) at para. 9.1550.
[6] *Criminal Code*, *supra* note 2, s. 730(3)(b).
[7] *R. v. Medicine Hat Greenhouses Ltd.* (1981), 59 C.C.C. (2d) 257 (Alta. C.A.).
[8] *Criminal Code*, *supra* note 2, s. 830. See *R. v. Moore* (1987), 38 C.C.C. (3d) 471 (Ont. C.A.).
[9] *Bouree v. Parsons* (1986), 29 C.C.C. (3d) 126 (Ont. Dist. Ct.).

and to the power of the Attorney General to intervene at any stage.[10] The Attorney General also has the authority to appeal an acquittal resulting from a private prosecution.[11]

Appeal in the informant's name

The appeal may be initiated in the name of the informant as appellant, without reference to the Crown.[12] Where the Crown has intervened, it is preferable to use the wording "Her Majesty the Queen, on the information of (informant's name), Appellant v. (alleged offender's name), Respondent".[13]

Summary conviction appeals: applicable procedure

The procedures for providing notice of appeal and filing and service requirements are set out in provincial and territorial rules of court.[14] As soon as practical after filing, the prosecutor must appear before a Provincial Court Judge or Justice of the Peace.[15] At this time the judicial officer will give both parties the opportunity to be heard, and will require the prosecutor to undertake to appear either personally or by counsel at the appeal. The prosecutor may also be required to enter into a recognizance or make a deposit as the judicial officer directs.

Where the prosecutor fails to comply with a condition of recognizance or fails to appear for the appeal, the court may dismiss the appeal and require the prosecutor to pay costs.[16]

The appeal normally proceeds on the basis of the trial record. The appeal court may also order the production of evidence and the testimony of witnesses.[17] Any witnesses may be examined and cross-examined by the parties. The appeal court has the power to dismiss the appeal or to set aside a verdict of acquittal and order a new trial before the original or another summary conviction court. On application of the informant, the accused or the Attorney General, the appeal court may also decide to hear the case again itself (*trial de novo*).[18] In some circumstances the appeal court may substitute a conviction for the acquittal.[19]

In general, appeals from summary conviction matters are made to the Superior Courts (in Alberta, the Court of Queen's Bench).[20]

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[10] *Criminal Code*, *supra* note 2, s. 813; *Bouree v. Parsons*, *ibid*.
[11] *R. v. Hayduk* (1955), 112 C.C.C. 232 (Alta. Dist. Ct.).
[12] *R. v. Allchin* (1971), 6 C.C.C. (2d) 332 (Ont. Co. Ct.).
[13] *Edwards v. Advent* (1977), 34 C.C.C. (2d) 372 (Ont. Dist. Ct.).
[14] *Criminal Code*, *supra* note 2, s. 813.
[15] *Ibid.*, s. 817.
[16] *Ibid.*, s. 825.
[17] *Ibid.*, s. 683, made applicable by s. 822(1).
[18] *Ibid.*, s. 822(4)-(7).
[19] *Ibid.*, s. 686(4)(b)(ii), made applicable by s. 822(1).
[20] *Ibid.*, s. 812.

Simplified procedure for a question of law or jurisdiction

The informant or the Attorney General may also appeal a final order on a question of law or jurisdiction under a simplified procedure.[21] Notice of appeal must be served and filed as required under provincial or territorial rules of court, or where none apply, pursuant to the *Criminal Code* requirements.[22] Under the simplified procedure, the appeal is argued on the trial transcript or an agreed statement of facts submitted by the parties. The appeal court may affirm, reverse or modify the decision of the summary conviction court, or remit the matter back to that court with an opinion.[23]

Further appeals

Questions of law alone arising from a decision or order of a summary conviction appeal court may be appealed to the Court of Appeal.[24] Leave of the court is required. A further appeal to the Supreme Court of Canada on a question of law or jurisdiction is available with leave.[25]

Summary conviction appeals by the convicted party

The convicted party has the right to appeal a conviction or sentence passed by a summary conviction court, and to appeal further to the Court of Appeal.[26] A further appeal to the Supreme Court of Canada on a question of law or jurisdiction is available with leave.[27] In the event of an appeal, the informant or private prosecutor should be prepared to make further submissions, address the court, speak to the evidence and examine or cross-examine witnesses depending on the applicable procedure (see above).

Appeals from proceedings for indictable offences

An informant or private prosecutor has no right of appeal in connection with an indictable offence. The *Criminal Code* provides that appeals of indictable offences may only be instituted by the person convicted of the offence, or by the Attorney General or counsel instructed by him.[28]

Should a private prosecutor have legitimate grounds to appeal an indictable offence, the only available course is to try to convince the Attorney General to do so.

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[21] *Ibid.*, s. 830.
[22] *Ibid.*, s. 830(3).
[23] *Ibid.*, s. 834.
[24] *Ibid.*, s. 839.
[25] *Supreme Court Act*, R.S.C. c. S-26, s. 40.
[26] *Criminal Code*, *supra* note 2, ss. 813, 830, 839.
[27] *Supreme Court Act*, *supra* note 25, s. 40.
[28] *Criminal Code*, *supra* note 2, ss. 675, 676.

Appeals for indictable offences by the convicted party

The convicted party has the right to appeal a conviction or sentence for an indictable offence to the Court of Appeal and further to the Supreme Court of Canada.[29] As for summary conviction appeals, the informant or private prosecutor should be prepared to make further submissions, address the court, speak to the evidence and examine or cross-examine witnesses.

Judicial review and extraordinary remedies

Most decisions and actions of the Attorney General are not subject to appeal, including a decision to intervene in a private prosecution. There is also no right of appeal from certain actions of judicial officers, including a refusal to receive an information or issue process. In these cases, an aggrieved party may ask a Superior Court to review the decision or action and provide one or more extraordinary remedies. The basis for the application is that the official has exceeded or failed to exercise his or her jurisdiction, either by an unlawful act or omission, or as a result of bias, improper motives, abuse of discretion or process, or error of law.

The available remedies include an order quashing or vacating the action (*certiorari*), an order requiring the official to fulfill a statutory duty owed to the applicant (*mandamus*), and an order prohibiting the official from exceeding his or her jurisdiction (prohibition). The procedure is set out in the *Criminal Code*[30] and the provincial and territorial rules of court. For provincial offences, provincial summary proceedings legislation may apply.

With limited exceptions, only persons who are directly affected or have some other specific interest in the prosecution have standing to apply for judicial review.[31] As a general rule, the extraordinary remedies will be available to a private prosecutor in summary conviction proceedings.[32] For indictable offences, availability will likely depend on the right to carry the prosecution, which is uncertain (see Chapter 13, *Prosecution of indictable offences*). In either case, the private prosecutor would appear to lose standing upon the Attorney General's intervention,[33] after which the remedies remain available to challenge the intervention itself.

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[29] *Ibid.*, ss. 675, 691. With the exception of questions of law appealed to the Court of Appeal, leave is required.
[30] *Ibid.*, Part XXVI.
[31] David Phillip Jones and Anne S. deVillars, *Principles of Administrative Law,* 3rd ed. (Toronto: Carswell, 1999) at 573-579 [Jones & deVillars]; concerning standing and judicial review of prosecutorial discretion, see *Campbell v. Ontario (A.G.)* (1987), 31 C.C.C. (3d) 289 Ont. H.C.J.), aff'd (1987), 35 C.C.C. (3d) 480 (Ont. C.A.).
[32] Peter Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269 at 283.
[33] *Ibid*.

Private prosecutors have brought applications to quash a withdrawal of charges[34] or lift a stay entered by the Attorney General,[35] to require the Attorney General to carry forward a prosecution,[36] and to require the Attorney General, who had intervened, to withdraw the charges.[37] Applications have also been brought to require a Justice of the Peace to receive an information[38] and comply with statutory requirements for a process hearing,[39] to require a Provincial Court Judge to arraign the accused on an indictable offence and proceed according to law,[40] and in a number of other contexts.[41]

The extraordinary remedies are discretionary; the court may refuse to grant the order where, for example, the application is delayed, where there is an available appeal procedure, or where the applicant lacks standing.[42] While remedies have been granted where a judicial officer or court exceeds its jurisdiction,[43] the courts are extremely reluctant to review the actions of the Attorney General in the absence of evidence of grossly improper or unlawful conduct. As a result, the intervention of the Attorney General to withdraw charges or enter a stay has traditionally left the private prosecutor without redress in the courts.

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[34] *Perks v. R.* (1998), 26 C.E.L.R. (N.S.) 251 (Ont. Ct. Gen. Div.), aff'd (1998), 116 O.A.C. 399 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 89.

[35] *Kostuch v. Alberta (A.G.)* (1995), 101 C.C.C. (3d) 321 (C.A.), leave to appeal to S.C.C. refused, [1995] S.C.C.A. No. 512.

[36] *R. v. Reed* (1998), 39 W.C.B. (2d) 537 (B.C.C.A.).

[37] *R. v. Bradley* (1975), 9 O.R. (2d) 161, 24 C.C.C. (2d) 482 (Ont. C.A.).

[38] *R. v. MacLean*, [1972] 1 W.W.R. 159 (B.C.S.C.).

[39] *R. v. Blythe* (1973), 13 C.C.C. (2d) 192 (B.C.S.C.); *Syme v. Swan* (1979), 48 C.C.C. (2d) 501 (Ont. H.C.J.).

[40] *R. v. Cathcart* (1988), 82 N.S.R. (2d) 267 (N.S.S.C.T.D.).

[41] Keith Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution" (2004) 13 J.E.L.P. 153.

[42] Jones & deVillars, *supra* note 31 at 524.

[43] *Supra* notes 38, 39 and 40.

Part III

A proposal for law and policy reform

A proposal for law and policy reform

> The simple conclusion to which we have come … is that the private prosecutor ought, as nearly as possible, to enjoy the same rights as the public prosecutor in carrying his case forward.[1]
>
> - Law Reform Commission of Canada

Introduction

Commentators and the Canadian courts at all levels have consistently emphasized the importance of the right of any citizen to commence a private prosecution by laying charges.[2] Beyond laying charges, however, the right to privately prosecute is subject to significant statutory and common law restrictions. On a practical level, the most important of these is the intervention of the Attorney General, whose discretion is, absent exceptional circumstances, unreviewable. In the great majority of private prosecutions, proceedings end when the charges are stayed or withdrawn by Attorney General. This fundamental tension imposes critical and unpredictable limits on the right of private prosecution.

The changes needed to allow private prosecution to function well as a supplement to public enforcement fall into two broad categories. Firstly, important aspects of the law and procedure that apply to such prosecutions need revision. This category of changes will rationalize private prosecutions, making them more predictable and therefore more accessible.

Secondly, public confidence in government enforcement and the exercise of official discretion must be bolstered. These changes will require increasing enforcement budgets, making discretionary decisions of the Attorneys General more transparent, and continuing to formalize relationships between regulators and regulated parties. Effective and transparent enforcement will limit the perception that private action is needed to expose government laxity or spur enforcement agencies to deal with non-compliance. These changes must accompany an emerging understanding by government that direct citizen involvement in law enforcement is a valuable demonstration of democratic values.[3]

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[1] Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 29 [*Private Prosecutions*].

[2] *R. v. Dowson* (1983), 7 C.C.C. (3d) 527 (S.C.C.); *Hall v. Jakobek,* [2003] O.T.C. Tbed. SE.075 (Ont. Sup. Ct. J.); *Private Prosecutions, ibid.* at 28; Kernaghan Webb, "Taking Matters into their Own Hands: The Role of the Citizen in Canadian Pollution Control Enforcement" (1991) 36 McGill L.J. 770 at 773 [Webb]; Ontario, Attorney General's Advisory Committee, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Toronto: The Committee, 1993) at 121-122 [*Report of the Attorney General's Advisory Committee*].

[3] *Private Prosecutions*, *ibid.* at 4.

In addition to the changes outlined above, alternative avenues for direct citizen involvement in environmental law enforcement should be expanded. Because they avoid many of the pitfalls associated with private prosecution, citizen suits and other statutory tools for direct action will play an increasingly important role in environmental enforcement. Finally, steps must be taken to make legal assistance more available to citizens contemplating private action.

Limits on the right to prosecute

The ability of a citizen to commence a private prosecution has been called "a valuable constitutional safeguard against inertia or partiality on the part of authority".[4] It also provides citizens with an important avenue to participate in ensuring compliance with the law. However, these values are seriously undermined by the approach currently taken to private prosecutions under the *Criminal Code*.

The *Criminal Code*

Recent amendments to the *Criminal Code* have narrowed the right of private prosecution.[5] In *R. v. Dowson*, the Supreme Court stated that the statutory duty of an official receiving an information to "hear and consider" the allegations was central to the right to lay an information.[6] Under the amended Code, there is no longer an express duty to "hear and consider" private informations. The judicial officer is still required to issue process when he or she finds a case to be made out. However, the duty to "hear and consider" has emerged as simply a condition that must be met before process can be issued, along with providing the Attorney General with an opportunity to participate in the hearing.[7]

In addition, the amended Code now prevents an informant who was refused process from taking his or her information before another judicial officer, in the absence of new evidence.[8]

These changes will assist the Attorneys General and judicial officers receiving private informations to deal with them consistently and efficiently. The new requirement that private informations be referred to a Provincial Court Judge or designated Justice of the Peace will also assist informants by ensuring that the receiving officer is familiar with the applicable procedure.[9] Most of the changes, however, serve to further restrict the already narrow right to

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[4] *Gouriet v. Union of Post Office Workers*, [1977] 3 All E.R. 70 (H.L.) at 79 (per Lord Wilberforce), cited in *Hall v. Jakobek*, *supra* note 2 at 22.
[5] *An Act to Amend the Criminal Code and to Amend Other Acts*, S.C. 2002, c. 13 (proclaimed in force July 23, 2002).
[6] *R. v. Dowson*, *supra* note 2.
[7] *Criminal Code*, R.S.C. 1985, c. C-46, s. 507.1.
[8] *Ibid.*, s. 507.1(7).
[9] *Ibid.*, s. 507.1(1).

prosecute privately. The amendments will accelerate the gradual erosion of the right of private prosecution by the courts over the 20th century.[10]

A recent Alberta case confirms that the *Criminal Code* amendments will create significant new obstacles for the private prosecutor seeking process. In *R. v. Edge*, Allen P.C.J. considered the new section 507.1, which provides that a judicial officer may only issue process on a private information after he or she has heard and considered "the allegations of the informant and the evidence of witnesses".[11] Allen P.C.J. interpreted this section to require that sworn evidence of witnesses be heard before process can be issued.[12] He also stated, in *obiter*, that hearsay evidence should no longer be admissible in such hearings.[13]

Under the previous provision,[14] the courts held that a judicial officer could in some cases rely upon the allegations of the informant as a foundation for issuing process, depending on the nature and complexity of the offence.[15] The judicial officer was not required to hear sworn evidence from witnesses unless in the officer's view it was desirable or necessary to do so. The hearing was generally informal and flexible, and hearsay evidence was normally admissible.[16]

R. v. Edge suggests that, under the amended provisions, process hearings will be more formal and trial-like. As a result, private prosecutors will face significant procedural and evidentiary obstacles even before the alleged offender is required to answer to the charge.

To address this process of restriction, which has rendered private prosecutions unnecessarily complex and unpredictable, the *Criminal Code* should be amended to expressly recognize the right to conduct a private prosecution unless the Attorney General intervenes. Amendments are also needed to expressly provide the judicial officer considering process on a private information with the discretion to hear the evidence of witnesses, without requiring him to do so. In addition, the Code should be amended to expressly provide that hearsay evidence is admissible in process hearings, subject to the judicial officer's discretion to require a person to testify where it is in the interests of justice.[17]

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[10] Philip C. Stenning, *Appearing for the Crown* (Cowansville, Que.: Brown Legal Publications Inc., 1986) at 263.
[11] *R. v. Edge,* 2004 ABPC 55, [2004] A.J. No. 316 (Alta. Prov. Ct.)(QL).
[12] *Ibid*. at para. 91 [in *obiter*].
[13] *Ibid.* at para. 99.
[14] *Criminal Code*, *supra* note 7, s. 507(1)(a)(ii). This provision has been retained for public prosecutions.
[15] *Supra* note 11 at para. 56.
[16] *Ibid.*, *R. v. Whitmore* (1987), 41 C.C.C. (3d) 555 (Ont. H.C.J.) at 565, aff'd (1989), 51 C.C.C. (3d) 294 (C.A.).
[17] As is currently provided in connection with sentencing hearings: *Criminal Code*, *supra* note 7, s. 723(5).

Finally, the *Criminal Code* procedure for private prosecutions creates a number of additional anomalies that need to be addressed.[18] In particular, there is no rational basis to treat a private prosecutor differently than a Crown prosecutor in proceedings by indictment. The Attorney General retains the right to intervene at any stage of the proceedings, which is sufficient to ensure that the prosecution continues only in the public interest. The court also retains its inherent jurisdiction to control abuses of its process. With one principal exception,[19] existing restrictions on the right to prosecute an indictable offence (see Chapter 13, *The prosecution of indictable offences*) and appeal (see Chapter 16, *Appeal and judicial review*) are unnecessary and cloud an already difficult area of the law. They should be eliminated.

Costs

For private prosecutions governed by the *Criminal Code*, the near certainty that the prosecutor will have to pay the cost of the prosecution whether or not he or she succeeds has been identified as a major deterrent.[20] Fine-splitting provisions can only benefit a private prosecutor where the prosecution results in a conviction. Because the practice of the Attorney General is to intervene and stay or withdraw the charges in the large majority of cases, such provisions will continue to be of limited use to the private prosecutor. Fine-splitting is therefore a useful but insufficient basis for compensating private prosecutors of meritorious cases.

In recognition of the public interest in worthy private prosecutions, the *Criminal Code* and applicable provincial legislation should be amended to provide all courts with the express power to award costs to and against a private prosecutor. The private prosecutor should be eligible for compensatory costs where there were reasonable and probable grounds for the prosecution, unless the Crown provides reasons for deciding not to conduct the prosecution that are satisfactory to the court.[21] There should be no distinction for summary conviction and indictable offences.

Concerns regarding frivolous or abusive private prosecutions could also be addressed through reform of costs provisions.[22] Summary conviction courts, in particular, should have greater

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[18] Commentators have recommended the elimination of these anomalies since the 1970's: Peter Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269 at 293ff [Burns]; *Private Prosecutions, supra* note 1 at 28-31.

[19] The power to prefer an indictment directly is "one that is sparingly exercised and one which would be inappropriate as a general power exercisable in the context of private prosecution." (*Private Prosecutions*, *ibid.* at 29).

[20] Burns, *supra* note 18 at 286. See also National Law Reform Commission of Canada, *A Proposal for Costs in Criminal Cases* (Ottawa: National Law Reform Commission of Canada, 1973) at 16-18 [*A Proposal for Costs*].

[21] *A Proposal for Costs, ibid.* The Commission recommended that costs be paid out of a provincial compensation fund (at 18).

[22] *Ibid.* at 18; *Private Prosecutions*, *supra* note 1 at 24.

discretion to award significant costs against a private prosecutor who proceeds in the absence of a reasonable likelihood of conviction and abuses the judicial process.

Standard of review

The courts have consistently affirmed that the Attorney General's power to supervise and stay prosecutions is paramount to the right of an informant beyond the laying of charges.[23] Absent "flagrant impropriety", the courts will not interfere with the discretion of the Attorney General to intervene in a private prosecution.[24] This is an extremely high standard of review,[25] generally requiring proof of misconduct bordering on corruption, violation of the law, or bias for or against a particular individual or offence.[26]

Commentators have argued for a lower standard of review for the exercise of prosecutorial discretion in the context of a private prosecution.[27] The rationales for the current standard, including the need to ensure the courts remain independent and impartial, the impracticality of reviewing the Attorney General's discretionary actions, and the need to protect the public interest and the accused from frivolous or malicious prosecutions, have been challenged as lacking force in the context of private prosecutions.[28] The public interest in a fair and transparent process for intervention by the Attorney General weighs heavily in favour of the application of traditional administrative law principles concerning standard of review and a duty to provide reasons. Unfortunately, there is no indication that the courts are ready to consider moving away from the current, very high standard, and thus legislative reform would be required.

The Attorneys General

It is in the office of the Attorneys General that the greatest opportunity lies for the rationalization of private prosecutions. Existing policy provides private prosecutors with basic guidance on how the Attorney General is likely to respond to a given case. In most jurisdictions, the evidence must show a reasonable or substantial likelihood of conviction. The prosecution must also be in the public interest, to be determined with reference to a set of criteria. In the context of a well-founded and documented private prosecution, however,

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[23] *Re Osiowy and The Queen* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.); *Kostuch v. Alberta (A.G.)* (1995), 101 C.C.C. (3d) 321 (C.A.).
[24] *Krieger v. Law Society of Alberta* (2002), 168 C.C.C. (3d) 97 (S.C.C.).
[25] *R. v. Theissen*, 2002 MBQB 149, [2002] M.J. No. 224 (Man. Q.B.)(QL).
[26] See discussion in Chapter 10, *Powers to intervene*, under *Is the Attorney General's intervention reviewable by the courts?*
[27] Keith Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution" (2004) 13 J.E.L.P. 153 [Ferguson]; Bryce C. Tingle, "The Strange Case of the Crown Prerogative Over Private Prosecutions or Who Killed Public Interest Law Enforcement?" (1994) 28 U.B.C. L. Rev. 309 at para. 110.
[28] Ferguson, *ibid.* at 6.1.

reference to existing policy provides, in many cases, little certainty as to the likely response of the Attorney General. The "public interest" remains a vague and unpredictable ground for intervention by the Crown.

It is therefore critical that the Attorneys General be required to provide full reasons for intervening, while protecting the accused from the stigma of unproven suspicions.[29] They are currently under no legal obligation to provide reasons,[30] although prosecutions policy in some jurisdictions may impose such a requirement.[31] Without reasons, even most cases of "flagrant impropriety" will be, practically speaking, unreviewable. The private prosecutor wishing to show that the Crown has acted improperly faces a "catch-22"; the onus is on the prosecutor to establish an impropriety, but the Crown is not required to disclose why it has intervened.[32] Providing detailed reasons will increase the public's trust and promote fairness and consistency in the Attorney General's handling of private prosecutions.[33]

In some cases the Attorneys General consult with other members of Cabinet before determining whether or not a prosecution should proceed.[34] In the interest of transparency, consultations with officials outside the Attorney General's office should be restricted to cases where the official can make a practical and significant contribution to the public interest issue.[35]

Addressing public mistrust in government enforcement

In spite of their limitations, private prosecutions have been effective in drawing judicial and public attention to failures in official enforcement efforts.[36] This is a natural extension of a tool initially designed to permit a person who had suffered a loss to obtain corrective justice through criminal proceedings. For environmental offences, which are often "victimless", the primary concern of the public in many cases is not corrective justice, but the ongoing protection of the

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[29] Roger E. Proctor, "Individual Enforcement of Canada's Environmental Protection Laws: The Weak-spirited Need Not Try: An Alberta Example" (1991) 14:1 Dalhousie L.J. 112 at 127; Webb, *supra* note 2 at 827. Such reasons "should include information about the standard that was applied to reach the decision and enough details of the shortcomings in the case to allow the person to understand why it is reasonable not to prosecute. " (British Columbia, Discretion to Prosecute Inquiry, *Commissioner's Report: Report and Recommendations* (Vol. 1) (Vancouver: Province of British Columbia, 1990) at 107).

[30] *R. v. Neville (D.),* 2003 NLSCTD 134, [2003] N.J. No. 220 (Nfld. S.C.T.D.)(QL).

[31] *Ibid* at paras. 15-16.

[32] *Ibid* at paras. 7-8.

[33] The Federal Prosecution Service has stated that "to ensure public confidence in the administration of criminal justice, prosecutorial discretion must be exercised in a way that is objective, fair, transparent and consistent." (Canada, Department of Justice, *The Federal Prosecution Service Deskbook* (Ottawa: Department of Justice Canada, 2000), preface, online: Department of Justice Canada <http://canada.justice.gc.ca/en/dept/pub/fpsdeskbook.pdf>).

[34] Bruce MacFarlane, "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency" (2001) 45 Crim. L.Q. 272 at 280.

[35] *Ibid*. at 281-282.

[36] Webb, *supra* note 2 at 817.

environment through effective law enforcement.[37] However, the regulatory nature of most environmental offences has made private prosecution more complex, and marginalized private prosecutors within enforcement regimes.

From its role as an important supplement to official enforcement efforts in England in the 18th and 19th centuries, private prosecution is now viewed by environmental regulators as a mostly unwelcome disruption to official efforts to improve compliance with the law. The consistent application of enforcement policy is undermined when an individual lays charges in a situation that would, pursuant to policy, be handled through a pollution abatement program, an enforcement ladder, or in another manner. Private action may also compromise the working relationship between the regulator and a regulated party.

A principle cause of the widespread lack of confidence in environmental enforcement agencies is the flexibility and informality that often characterize their efforts.[38] The relationship between the regulator and regulated parties that develops through ongoing negotiations over compliance and other issues marginalizes concerned citizens, and may add to their sense of mistrust that laws are being enforced.[39]

This perception of collusion is fertile soil for private prosecutions. It can be partly addressed through the development of detailed and transparent enforcement policies that limit the discretion of officials in responding to non-compliance. These policies should be required by statute, subject to public notice and comment, and subject to mandatory review every two years.[40] Negotiations with regulated parties should be transparent and consistent from case to case. Agreements among regulators and between regulators and regulated parties should also be formalized, and in appropriate cases subject to public notice and comment.

None of these efforts, however, will alleviate public concern without a renewed commitment by the federal and provincial governments to adequately fund environmental enforcement agencies. Growth in regulated industries and activities, and the increasing complexity of regulation, have reduced many such agencies to taking enforcement action in priority cases

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[37] L. B. Huestis, *Policing Pollution: The Prosecution of Environmental Offences*, (Ottawa: Law Reform Commission of Canada, 1984) [unpublished] at para. 232.

[38] Matthew D. Zinn, "Policing Environmental Regulatory Enforcement: Cooperation, Capture and Citizen Suits" (2002) 21 Stanford Env. L.J. 1 at 101 [Zinn]. The Quebec Superior Court recently addressed this issue, holding that damages resulting from failure to enforce environmental laws and bylaws could result in civil liability for enforcement agencies: *Girard c. 2944-7828 Quebec Inc.* (23 July 2003), Chicoutimi 150-06-000002-998 (Qc. Sup. Ct.). Although it has been appealed, this decision may influence governments to raise enforcement budgets to adequate levels and formalize enforcement efforts.

[39] Zinn, *ibid.* at 126-131.

[40] Webb, *supra* note 2 at 824.

only.[41] Increased enforcement staffing and funding are essential to address the perception, and often the reality, that regulatory compliance is negotiable.

Ultimately, private enforcement is no substitute for effective public enforcement. At best, enforcement by private citizens can be a valuable supplement to government action. However, private prosecution and other avenues for direct citizen participation in law enforcement will remain critical to public confidence in the administration of justice.[42]

Citizen suits and other statutory tools

Environmental statutes in several Canadian jurisdictions now provide citizens with the right to have an official investigation conducted into an alleged environmental offence (see Chapter 3, *Alternatives to private prosecution*, under *Right to have a government investigation conducted*.) Many of these statutes also allow citizens to apply for an injunction or bring a civil action in court for a violation of an environmental law (see Chapter 3, under *Other statutory remedies*). Given the complexity of the law surrounding private prosecutions, and the apparent unwillingness of legislators and the courts to broaden and clarify the rights of private prosecutors, such provisions are the most effective way to facilitate citizen involvement in environmental law enforcement.

The US experience with citizen suit provisions is instructive. In that country, environmental statutes have allowed citizen suits for over 30 years. The availability of such suits has not resulted in an unworkable number of actions, and there is broad consensus that providing citizens with the right to sue government and other parties to enforce environmental laws is a strategy that has worked.[43]

Citizen suit provisions circumvent many of the problems and uncertainties associated with private prosecutions, including the unavailability of costs, the frequent obscurity of the Attorney General's actions, and a general lack of familiarity with applicable procedure. Citizens bringing civil suits also benefit from a lower standard of proof. Finally, civil suits avoid the difficulties faced by the private prosecutor in ensuring that the accused's Charter rights, such as the right to full and timely disclosure, are not breached.[44]

Problems that are associated with citizen suits, such as the potential for over-enforcement and the undermining of successful, cooperative abatement efforts, can be addressed through

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[41] Elaine L. Hughes and David Iyalomhe, "Substantive Environmental Rights in Canada" (1998-1999) 30 Ottawa L. Rev. 229 at 255.
[42] Webb, *supra* note 2 at 830.
[43] Orlando E. Delogu, "Citizen Suits to Protect the Environment: The U.S. Experience May Suggest a Canadian Model" (1992) 41 U.N.B.L.J. 124 at 126.
[44] The Ontario Attorney General's Advisory Committee found that the need to consistently fulfill the Crown's duty to disclose justifies Crown intervention in most private prosecutions: *Report of the Attorney General's Advisory Committee, supra* note 2 at 187.

carefully tailored procedural and access requirements.[45] It appears likely that efforts to include broader citizens rights provisions in our environmental laws will bear quicker and better fruit than ongoing efforts to reform the law of private prosecutions.

The importance of experienced counsel

Recent cases in Ontario indicate that the presence of experienced counsel is an important consideration in the Attorney General's handling of private prosecutions (see Chapter 10, *Powers to intervene*, under *Intervention: recent cases*). Unfortunately, there are few organizations that can provide this type of assistance, and those that exist, such as Sierra Legal Defence Fund, can only assist in a small number of meritorious cases. Lawyers in private practice may be unwilling to accept reduced fee or *pro bono* arrangements and are generally reluctant to represent private prosecutors. Finding effective counsel is, therefore, in many cases, a major challenge that may have an important impact on the actions of the Attorney General.

The expansion of organizations such as Sierra Legal Defence Fund would be an important step toward making experienced counsel available. Representation for private prosecutors of worthy cases should be available through local environmental law organizations or branch offices throughout Canada. Ultimately, however, the private bar must have better access to legal resources on the subject, and to the guidance of counsel with the relevant experience. The reform of cost rules is also essential to encouraging lawyers to consider worthy cases (see above).

[45] Zinn, *supra* note 38 at 132.

Appendix 1
Accessing information

In many cases, you will not have immediate access to the information necessary to make your case. For example, records indicating that an offence has occurred may be in the exclusive possession of the alleged offender or government. Although such information can sometimes be obtained through an informal request, the party holding the information may refuse to disclose it. This appendix is an introduction to the tools and remedies available for obtaining relevant information.

As you build your case, remember that the prosecutor has a legal duty to the accused to disclose all relevant information in his or her possession. The accused, however, is under no such general duty (see Chapter 7, *The Role of the private prosecuto*r.)

Determine what you are looking for and why

Information controlled by other parties that can assist the private prosecutor may include records relating to:

- environmental assessment,
- the commission of or circumstances surrounding an alleged offence,
- statutory authorizations,
- monitoring and reporting,
- inspection and investigation, or
- enforcement.

You may or may not know ahead of time whether certain records will assist your case. For that matter, you may be unaware whether a certain type of record - for example, inspection reports - exists in connection with the alleged offence. It is up to the prosecutor to determine what types of records are likely to be useful, and which individual, corporation, or government department or institution is likely to hold them.

Information in the possession of government

Information available through corporate, land and personal property registries

Certain information concerning corporations, interests in land, and interests in personal property such as automobiles is available through public registries. A registry search will often be necessary to determine the correct and full name of the accused, or to find out the owners of land where an alleged offence occurred and whether there are tenants on the land. Historical information is also available.

Registry offices and official agents may be located through your telephone directory.

Environmental registries and inventories

Some information is made public through registries established pursuant to environmental laws. For example, the *Canadian Environmental Protection Act, 1999* (CEPA) establishes a registry, which must contain documents relating to the Act that the Minister of Environment publishes or makes available.[1] Information available through the CEPA registry includes:

- the Act, regulations, agreements, and policy;
- information concerning regulated substances;
- authorizations issued, and to whom;
- enforcement actions taken, and against whom; and
- copies of documents submitted to a court by the Minister of Environment relating to any environmental protection action.

Information on pollution sources and dispersion is also available through the National Pollutant Release Inventory, established and maintained by Environmental Canada under the CEPA.

Registries for specific types of information also exist under the federal *Species at Risk Ac*t,[2] the *Canadian Environmental Assessment Act*,[3] and provincial environmental statutes.[4]

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[1] *Canadian Environmental Protection Act, 1999*, R.S.C. 1999, c. 33, s. 13.
[2] *Species at Risk Act*, S.C. 2002, c. 29, s. 120.
[3] *Canadian Environmental Assessment Act*, R.S.C. 1992, c. 37, s. 55.
[4] See, for example, Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, s. 56; Ontario *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, s. 5.

Statutory disclosure requirements

Environmental and other statutes may also provide that specific types of information must be made available to the public, either on request or in another manner. For example, the Alberta *Environmental Protection and Enhancement Act* (EPEA) requires the disclosure of certain records on request, including:

- application information (e.g., for an approval);
- environmental and emission monitoring data provided by an approval holder, and processing information necessary to interpret the data;
- reports or studies required to be provided under an approval or the regulations;
- statements of concern submitted by the public; and
- notices of appeal.[5]

Some records created by the Department of Environment must also be made available to the public. These include:

- approvals and registrations;
- environmental and emission monitoring data recorded by the Department, and the processing information necessary to interpret the data; and
- enforcement and environmental protection orders.[6]

The Minister of Environment also has the discretion to make available any other information the Department possesses, in any manner the Minister considers appropriate.[7]

Much of this information is made available as a matter of routine on the Department of Environment's website or through the Department's Information Centre. Where information is not routinely available, the procedure for obtaining access is set out in the *Disclosure of*

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[5] *Environmental Protection and Enhancement Act*, *ibid*., s. 35. There is an exception for certain types of proprietary business information.
[6] *Ibid*.
[7] *Ibid*., s. 35(3); *Disclosure of Information Regulation,* Alta. Reg. 116/93, s. 2.1. For example, in Alberta, information regarding enforcement action taken by the Department of Environment under EPEA is made available through the Environmental Law Centre. The Centre also provides information on regulatory action taken in connection with oil and gas wellsite reclamation.

Information Regulation.[8] Where information relates to a matter that is the subject of an investigation or proceeding under EPEA, it may not be released.[9]

Access to information legislation

Information not available under environmental legislation may be available under federal, provincial or territorial access to information legislation. These laws provide that records held by government departments and other public bodies shall be made available to the public on request, subject to specific exceptions.

Access to information controlled by provincial or territorial public bodies is governed by the applicable provincial or territorial statutes. The federal *Access to Information Act* governs access to information controlled by federal departments and institutions.[10]

Examples of useful information that may be available under such legislation include water and air quality sampling manuals, records concerning the environmental effects of a specific project, records detailing actions taken by government departments, and environmental data and reports filed by polluters.

However, broad exceptions provided by all access to information laws limit the availability of information relevant to private prosecutions. The exceptions include information relating to law enforcement, information subject to legal privilege, certain commercial information of third parties, and other categories of information. However, the scope and nature of the exceptions vary from jurisdiction to jurisdiction.[11]

The Alberta *Freedom of Information and Protection of Privacy Act (*FOIPP Act), for example, provides for public access to most records in the control or custody of a provincial public body, including municipalities. However, the Act does not apply to records relating to a prosecution that is not complete, information that is available through a public registry or office, information subject to legal privilege, or other specified categories of records.[12]

Furthermore, under the FOIPP Act, access must be refused for records that would reveal certain types of confidential trade information of a third party.[13] Access may be refused where disclosure may harm law enforcement, including disclosure that could reasonably be expected to:

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[8] *Disclosure of Information Regulation, ibid.*
[9] *Environmental Protection and Enhancement Act*, *supra* note 4, s. 35(9).
[10] *Access to Information Act,* R.S.C. 1985, c. A-1.
[11] A useful guide to Canadian access to information legislation is Colin McNairn and Christopher Woodbury, *Government Information: Access and Privacy,* looseleaf (Toronto: Carswell, 1992) [McNairn & Woodbury].
[12] *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 4.
[13] *Ibid.*, s. 16.

- harm the effectiveness of investigative techniques and procedures used in law enforcement,
- reveal the identity of a confidential source of law enforcement information,
- interfere with or harm an ongoing or unsolved law enforcement investigation,
- reveal any information relating to or used in the exercise of prosecutorial discretion (unless the information is more than 10 years old), or
- reveal a record that has been confiscated from a person by a peace officer in accordance with a law.[14]

These exceptions will not normally apply to routine inspection reports and reports on the success of law enforcement programs.[15]

The FOIPP Act also provides that after a police investigation is completed, the head of a public body may disclose the reasons for a decision not to prosecute

- to a person who knew of and was significantly interested in the investigation, and
- to any other member of the public, if the fact of the investigation was made public.[16]

A request for information must be made to the public body you believe controls the information you are seeking, for example the federal or provincial Department of Environment. To assist with this determination, the federal and Alberta governments both publish directories that list the types and classes of information held by public bodies (the federal *Info Source* and the *Alberta Directory*).[17] These directories also provide contact information for a designated information coordinator within each public body. If you are unsure of what you are looking for, or which public body may hold relevant records, these directories are the best place to start. They are available at public libraries and government departments.

Informal request

Once you have determined what records you are looking for and which public body likely controls them, consider making an informal request. This can be done through the designated information coordinator for the public body. In some cases the information will be provided as

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[14] *Ibid*., s. 20(1), (2).
[15] *Ibid*., s. 20(5).
[16] *Ibid*., s. 20(6).
[17] Canada, *Info Source* (Ottawa: Government of Canada, 2004), online: Info Source <http://infosource.gc.ca/index_e.asp>; Alberta, Freedom of Information and Protection of Privacy, *Alberta Directory* (Edmonton: Alberta Public Works, Supply and Service, 1995).

a routine matter, and you will save the time and fees involved in making a formal request. If your request for informal access is denied, the designated information coordinator may be able to provide an alternate information source.

Further guidance on access to information is available on the federal government's *Info Source* website at <http://infosource.gc.ca> and through the Office of the Information and Privacy Commissioner of Alberta at <http://www.oipc.ab.ca>.

Formal request

In the event that you need to make a formal request, you may use the form provided or simply submit a signed letter to the coordinator requesting the information. By providing as much detail as possible in your request, you are more likely to obtain what you are looking for in the quickest time. The public body must normally respond within 30 days, although it may take longer to process your request.

The current fees are $25 for Alberta requests and $5 for federal requests. There may be additional fees.

Overlap of disclosure provisions in access to information and other statutes

As discussed above, many jurisdictions with access to information legislation also have environmental and other statutes that restrict access to certain types of information. Federally, and in most provinces, access to information legislation prevails over restrictions in other legislation except where specifically provided by statute or, in some cases, regulation.[18] However, the interaction of access to information legislation and other statutes varies from jurisdiction to jurisdiction.[19]

Search warrant and subpoena

To obtain the evidence necessary to support a private prosecution, you may require evidence that is not available through the channels described above.

In these cases, the prosecutor may apply for a search warrant, or for a subpoena to require a witness to attend in court. Because judicial officers are reluctant to issue such orders on the request of a private individual, it is advisable to obtain the assistance of an experienced criminal lawyer in preparing the application. If possible, have the lawyer accompany you when you attend before the judicial officer to make your application, to help address any questions.

[18] See, for example, the *Access to Information Act*, *supra* note 10, ss. 4(1), 24 and Schedule II; *Freedom of Information and Protection of Privacy Act*, *supra* note 12, s. 5.

[19] Concerning the interaction of such legislation, see McNairn & Woodbury, *supra* note 11 at para. 3.2.

Search warrant

A search warrant is a written authorization endorsed by a Provincial Court Judge or Justice of the Peace for entry, search and seizure of physical evidence.[20] Any person may apply for a search warrant, and an application for a search warrant may be made regardless of whether any legal proceedings have been commenced.

The procedure that applies is similar to that used for the laying of an information (see Chapter 8, *Initiating a private prosecution*). For *Criminal Code* and other federal offences, the applicable procedures and forms are set out in the *Criminal Code*.[21] For provincial and municipal offences, provincial summary proceedings legislation applies. The provincial legislation may provide procedures and forms, or may adopt the *Criminal Code* provisions. Forms are generally available at the Provincial Court.[22] You may also type up the form, provided you include all information in the printed form.

The person seeking the warrant must first complete an *information to obtain* and a *search warrant* in the proper form. The information to obtain must set out that the informant has reasonable grounds to believe that there is material in a particular place that is relevant to the alleged offence. This can include anything rationally connected to the incident, the offender's identity, the offender's potential guilt, and any defences the offender may raise at trial.[23] The information to obtain must state the alleged offence, and indicate, as precisely as possible, in what place you believe the material will be found. The material sought should also be described in as much detail as possible.

Personal knowledge of the required information is best. If you must rely on a statement of another person concerning the existence or location of evidence, you should find out as much as you can about your source and the information provided. Indicate in your information why you believe your source to be trustworthy and reliable. The basis for your source's conclusions must also be set out.[24]

The search warrant should state the period and times of day within which the search can occur,[25] and indicate which persons or officials are authorized to conduct the search.

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[20] *Criminal Code*, R.S.C. 1985, c. C-46, s. 487. See also summary proceedings legislation, for example, *Provincial Offences Act*, R.S.O. 1990, c. P.33, s. 158.
[21] *Criminal Code*, *ibid.*, s. 487, Forms 1 and 5.
[22] In Alberta, these forms may also be downloaded online: Alberta Courts <http://www.albertacourts.ab.ca>. Follow the links for Provincial Court, Criminal Division.
[23] *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)* (1998), 133 C.C.C. (3d) 426.
[24] *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), aff'd (1989), 52 C.C.C. (3d) 193 (S.C.C.).
[25] A search warrant must be executed by day unless otherwise specified: *Criminal Code*, *supra* note 20, s. 488.

When your forms are ready, make an appointment to swear your information before a Provincial Court Judge or Justice of the Peace. If all the requirements are met and the judicial officer is convinced that reasonable grounds exist, he or she may issue the warrant. It is important to remember that failure to comply with all requirements may result in a challenge to the warrant and the exclusion of evidence at trial.

Only the persons or officials named in the warrant are authorized to conduct the search. Although the warrant can authorize a private citizen to do so, it is generally preferable to have a police, conservation or other peace officer conduct the search. These officials are familiar with the legal requirements of a proper search, and are trained to respond should entry to the premises be denied. Other persons, such as the private prosecutor, may request to accompany the official if they can assist in finding or identifying the materials sought.[26] Alternatively, you may request to have the warrant authorize you to conduct the search, but arrange for a police or other peace officer to be present.

Only the places named in the warrant may be searched, and only the materials specified may be taken. There is a limited authority for a person conducting a search under warrant to seize unspecified evidence in "plain view".[27]

After the search, any seized material must be taken, as soon as is practicable, before a Provincial Court Judge or Justice of the Peace in the territorial division where the warrant was issued.[28] Due to the unusual circumstances of a private prosecution, it will normally be best to attend before the judicial officer who issued the warrant. The judicial officer will then order the material detained if satisfied by the prosecutor that it is required for investigation or as potential evidence.[29]

Subpoena

A subpoena is an official document that requires a witness to attend in court to give evidence. A subpoena may also require the witness to bring to the proceedings any relevant materials that are in his or her possession or control.[30] Any person may apply for a subpoena, but the application may only be made once the alleged offence is before the courts.

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[26] So long as the person authorized by the warrant is present, participates in and remains in control of the search from beginning to end, the assistance of unnamed persons does not affect the validity of the search: *R. v. B.(J.E.)* (1989), 52 C.C.C. (3d) 224 (N.S.S.C.A.D.).

[27] *Criminal Code*, *supra* note 20, s. 489.

[28] Alternatively, a report concerning seizure of any materials can be made: *ibid.*, s. 489.1(2) and (3).

[29] *Ibid.*, s. 490.

[30] *Ibid.*, s. 700.

For *Criminal Code* and other federal offences, the applicable procedures and forms are set out in the *Criminal Code*.[31] For provincial and municipal offences, provincial summary proceedings legislation applies. The provincial legislation may provide procedures and forms, or may adopt the *Criminal Code* provisions. Forms are generally available at the nearest courthouse. You may also type up the form, provided you include all information in the printed form.

In most cases, an application for a subpoena must be made before the court where the witness is required to attend.[32] For Provincial Court proceedings, the application may be made to a Provincial Court Judge or Justice of the Peace unless the witness is not within the province. In the latter case, the application must be made to a Provincial Court Judge or a Superior Court Justice. In Alberta, a subpoena compelling a government employee to testify or produce physical evidence cannot be issued without an order of the court.[33]

Once you have completed the subpoena in duplicate, take it before the appropriate judicial officer. Where possible, it is advisable to take your subpoena to the Judge or Justice of the Peace that issued process on your information, since that person will be familiar with you and your case. You will be asked to summarize the evidence that the witness can give and its relevance to your case. It may be helpful, but is not required, to present a sworn affidavit in support of your application.[34] If satisfied that the witness can provide relevant evidence, the judicial officer will issue, or endorse, both copies of the subpoena. One copy will be served on the witness, and the other will be placed on the court file with an affidavit of service sworn by the person who served the subpoena.

A subpoena may prove particularly useful for obtaining the testimony and any evidence in the possession of government officials or employees of a corporation. In some cases these individuals may be willing to provide relevant evidence, but be unwilling or unable to testify voluntarily due to confidentiality agreements or fear of retribution by their employer (see below, *Note on whistleblower protection*). It is important, however, to learn beforehand what the intended witness is likely to say. In general, it will not assist your case to compel the attendance of a hostile witness. Arrangements should be made with the witness to go over his or her testimony in detail, more than once if needed.

Service of a subpoena

A subpoena relating to a provincial or municipal offence must be served pursuant to provincial summary proceedings legislation. Such legislation may adopt the *Criminal Code* procedure for service (see below) or provide another procedure.

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[31] *Ibid.*, s. 698-702, Form 16. This form may also be downloaded online: Alberta Courts <http://www.albertacourts.ab.ca>. Follow the link for Provincial Court, Criminal Division.
[32] *Criminal Code*, *ibid.*, s. 699.
[33] *Alberta Evidence Act*, R.S.A. 2000, c. A-18, s. 34(3).
[34] *R. v. Young* (1999), 138 C.C.C. (3d) 184 (Ont. C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 434.

Unless otherwise provided by the statute creating the offence, a subpoena relating to a federal offence may be served by any person qualified to serve civil process in the province, including any peace officer.[35] Police officers, fisheries officers, and specified municipal and other officials are qualified to effect service.[36] The requirements for service are set out in the *Criminal Code*.[37] A federal offence subpoena may also be served pursuant to the service procedure set out in provincial summary proceedings legislation.[38]

The person seeking service must ensure that the correct address of the witness is provided, and that the witness fee, or conduct money, is paid where required.

Warrant for arrest

Where a witness who has been properly served with a subpoena fails to appear to give evidence as required, an application may be made to the court for a warrant.[39] This authorizes the police to arrest the witness and bring him or her before the court.

An application for a warrant is made to the court or judicial officer before whom the witness was required to appear.[40] To obtain a warrant, the applicant must provide proof of service of the subpoena and establish that the witness is likely to give material evidence. Service may be proven by producing the affidavit of service or by calling the person who served the subpoena to testify under oath that he or she did so.[41]

If the warrant is issued, the police must next execute the warrant by finding and arresting the witness.

Note on whistleblower protection

The *Canadian Environmental Protection Act, 1999*[42] and several other environmental and employment standards statutes protect employees who report environmental offences from reprisal by their employers. One purpose of these provisions is to encourage employees to volunteer information concerning unlawful activity. Whistleblower protection may assist a private prosecution in two ways.

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[35] *Criminal Code*, *supra* note 20, s. 701.
[36] *Ibid.*, s. 2.
[37] *Ibid.*, ss. 509(2), 701, 703.2.
[38] *Ibid.*, s. 701.1.
[39] *Ibid.*, s. 705(1), Form 17. In Alberta, the form may be downloaded online: Alberta Courts <http://www.albertacourts.ab.ca>. Follow the link for Provincial Court, Criminal Division.
[40] *Criminal Code*, *supra* note 20, s. 705(1).
[41] *Ibid.*, s. 701(3).
[42] *Supra* note 1, s. 16.

Firstly, whistleblower laws may allow an employee to commence a private prosecution without fear of reprisal. For example, the Yukon *Environment Act* protects an employee who commences a private prosecution by laying an information for offences under specified Acts.[43] The *Environment Act* provides that an employer cannot dismiss, sanction, intimidate or coerce such an employee in any way.

Secondly, certain whistleblower laws may assist a private prosecutor in gathering information from employees of an alleged offender. For example, the New Brunswick *Employment Standards Act* provides broad protection for employees who give information or evidence against the employer regarding a violation of any provincial or federal law.[44] By contrast, under the *Canadian Environmental Protection Act,* employees who volunteer information concerning an offence are only protected where the report is made to an official as provided in the Act.[45] The narrow scope of the CEPA provision and similar provisions in the Ontario *Environmental Protection Act* and *Environmental Bill of Rights* mean that employee protection is likely not available under these statutes where information is released to a private prosecutor.[46]

Where whistleblower laws exist, the nature and scope of the protection will vary depending on the applicable legislation. An employee considering "blowing the whistle" should consult a lawyer to determine whether he or she is protected from reprisal.

Crown privilege, or immunity from disclosure

We have discussed the procedures for obtaining government information through public registries and under environmental and access to information laws. Where relevant government records are not available through these channels, once proceedings are underway you may apply to the court for a subpoena compelling the testimony of a government official, the production of evidence in the possession or control of government, or both. Examples of government evidence that may be subject to subpoena include reports, internal government memos, and correspondence. However, disclosure may be subject to Crown privilege, or public interest immunity.[47]

The common law provides the Crown with the right to object to disclosure of specific records and other evidence on the basis that disclosure would be contrary to the public interest. Private

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[43] *Environment Act*, R.S.Y. 2002, c. 76, s. 20.
[44] *Employment Standards Act*, S.N.B. c. E-7.2, s. 28.
[45] *Supra* note 1, s. 16.
[46] *Environmental Protection Act*, R.S.O. 1990, c. E-19, s. 174; *Environmental Bill of Rights, 1993, supra* note 4, s. 105.
[47] For discussion of objections to disclosure based on Crown privilege, see John Sopinka, Sidney N. Lederman, Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) c. 15 [Sopinka]; Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) c. 10.4; Paul Lordon, Q.C., *Crown Law* (Toronto: Butterworths, 1991) c. 13, section 1.

parties may also object to government disclosure on this basis, and the court may do so on its own motion. The claim is most often raised at trial.

Crown immunity has been incorporated into federal and provincial statute law. The *Canada Evidence Act* provides that government officials may object to disclosure of government information by certifying that disclosure would be contrary to the public interest.[48] Objections may also be raised on grounds of potential harm to international relations, national security or defence.[49]

With the exception of claims concerning federal cabinet documents,[50] claims of Crown privilege are generally reviewable by the courts.[51] When reviewing a claim for privilege, the court will examine the evidence and make a determination as to whether disclosure is in the public interest.[52] The court will then authorize or prohibit disclosure, or authorize disclosure with conditions. Where disclosure is prohibited, copies and other secondary evidence of a document or communication covered by the prohibition are also inadmissible.[53]

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[48] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 37. See also, for example, *Alberta Evidence Act*, *supra* note 33, s. 34.

[49] *Canada Evidence Act*, *ibid.*, s. 38.

[50] *Ibid.*, s. 39. Documents to which the exception applies include certain Cabinet memos, discussion papers, and records of communications and discussions between Cabinet members.

[51] *Carey v. Ontario* (1986), 30 C.C.C. (3d) 498 (S.C.C.).

[52] *Ibid*.

[53] Sopinka, *supra* note 47 at para. 15.3.

Appendix 2
Investigating and documenting your case

The securing of evidence for the prosecution of an environmental offence is often one of the most serious practical problems faced by a private prosecutor.[1] The purpose of this appendix is to provide you with the basic knowledge necessary to put together a strong case.

The challenges faced in connection with evidence will depend on the nature of the charges. For example, a charge of operating an industrial facility without a permit will generally be easier to establish than a charge for the release of a harmful substance into the environment. For the first charge, the testimony of witnesses may be sufficient to establish that the facility was operating on the day in question. The second charge will normally require the collection, analysis, and presentation of samples and the testimony of expert witnesses.

A key factor in the Attorney General's decision to stay or withdraw charges is the likelihood of conviction, which depends in large part on the quality and sufficiency of the evidence. It is therefore essential that the private prosecutor follow proper procedures in the collection, analysis and presentation of evidence.

Rules of evidence

In preparation for a private prosecution, it is important to have at least a general understanding of the basic rules, or legal basis, upon which evidence will be admissible in a court of law. It is equally important to understand how courts determine the weight and relative significance of evidence. An awareness of these issues will help the prosecutor understand how evidence should be gathered, transported and presented.

This appendix sets out the basic rules for the admission of evidence. For further guidance, the reader is referred to existing resources on this topic.[2]

Where rules of evidence are found

The laws of evidence are established by both statute and the common law (legal precedent). The *Canada Evidence Act*, which governs prosecutions under federal statutes, prescribes specific

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[1] L. B. Huestis, *Policing Pollution: The Prosecution of Environmental Offences* (Ottawa: Law Reform Commission of Canada, 1984) [unpublished] at para. 214.

[2] David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed. (Toronto: Emond Montgomery Publications Ltd., 1993) c. 4 [*Environment on Trial*]. The following are useful general texts on the law of evidence: Roger E. Salhany, *The Practical Guide to Evidence in Criminal Cases*, 6th ed. (Scarborough, Ont.: Carswell, 2002); John Sopinka, Sidney N. Lederman, and Alan Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) [Sopinka].

rules regarding such matters as the compellability of witnesses and the admissibility of, and proper procedures for the introduction of, evidence.[3] The provincial Evidence Acts set out rules for prosecutions under provincial legislation and municipal bylaws. Lastly, environmental legislation may provide specific rules relating to evidence.[4]

In many cases, you will need the help of a criminal lawyer to determine whether there are any statutory barriers or restrictions on the use of information relating to the alleged offence. However, the following summary of important common law rules and principles will help you determine what information is likely to be useful in proving your case.[5]

Materiality and relevance

To be admissible in court, evidence must be both material and relevant. Evidence will be deemed material where it relates to the alleged act or omission, assists in establishing the identity of the accused, or provides proof of intent. Material evidence is relevant if there is a logical connection between the evidence and the offence being tried.

Reliability

Evidence must also be reliable to be admissible. Reliability is measured by the court based on such factors as the manner in which the information was collected, the credibility of a witness's testimony, and whether the evidence is in the best available form. It is on the basis of unreliability that a court will generally exclude statements made to a witness by a third party, photocopies, and evidence given in writing rather than in person. Even where evidence is admitted, low reliability may lead the court to give the evidence relatively little weight.

Oral versus written evidence

A court will normally refuse to admit a witness's written statement unless the witness is physically unable to testify in person. Documentary or physical evidence such as notes, photographs and samples are generally only admissible where a witness can testify that he or she produced or gathered the evidence, or personally witnessed the person who produced or gathered the evidence doing so. Some statutes provide that, in specific circumstances, written statements or certificates of designated officials or analysts are admissible without the oral testimony of the official or analyst.[6]

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[3] *Canada Evidence Act*, R.S.C. 1985, c. C-5.
[4] See, for example, Alberta *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 254, 255.
[5] This summary is adapted from *Environment on Trial*, *supra* note 2 at 80-87.
[6] See, for example, *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s. 285 and Alberta *Environmental Protection and Enhancement Act*, *supra* note 4, s. 254.

Hearsay rule

As a general rule, oral statements made to a witness by a third party are not admissible. In other words, a witness cannot be called on to testify as to information provided by another party. Likewise, a witness cannot be called on to testify regarding statements made by a third party in a document. There are several important exceptions to the hearsay rule. These include the admissibility of statements made by persons who are not available to testify, and admissions of the accused. In determining admissibility, the court will examine the relevance and reliability of the hearsay evidence, and whether direct evidence is available.[7]

Opinion evidence versus factual evidence

As a general rule, opinion evidence can only be given by an expert witness - a person who is specially qualified to testify on a particular subject as a result of experience or education in that field. Non-expert witnesses are normally restricted to testifying about facts of which they have first-hand knowledge. However, where the facts cannot be told in such a way that the court can draw the inference, such as for distance, odour or noise, an ordinary person will generally be permitted to give an opinion.[8]

Continuity of evidence

A final rule of considerable significance to the success of a prosecution is the rule regarding continuity of evidence. This rule requires proof that continuous control was maintained over the condition of and access to evidence from the date of its collection through to its introduction as an exhibit in court. The rule applies primarily to collected samples and other physical evidence. While normally oral testimony will be required to establish continuity of evidence, some statutes provide that continuity can be proven through official documents or certificates in specific circumstances.[9]

Investigation and gathering evidence

In order to ensure convictions are only obtained on the basis of reliable evidence, the legal process requires that proper procedures be followed in the treatment and control of evidence. In the context of a prosecution, the manner in which evidence is collected and handled may be as important as the evidence itself.

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[7] Sopinka, *supra* note 2, c. 6.

[8] *R. v. Graat* (1980), 55 C.C.C. (2d) 429 (Ont. C.A.), aff'd (1982), 2 C.C.C. (3d) 365 (S.C.C.). See also Stanley David Berger, *The Prosecution and Defence of Environmental Offences*, looseleaf (Aurora, Ont.: Canada Law Book, Inc., 2003) at para. 4.150ff.

[9] See, for example, Ontario *Environmental Protection Act*, R.S.O. c. E-19, s. 175.

Assistance of government officials

The private prosecutor should consider seeking the cooperation and assistance of officials trained in the collection and control of environmental evidence. Government officials such as environmental investigators, fisheries officers, and public health officers may be willing to attend the scene of a reported offence to investigate and gather evidence. These officials follow procedures developed to ensure such evidence is reliable. They may also be willing to provide you with access to procedure manuals, sampling kits, or with advice on the collection and control of evidence.

In some instances officials are legally obligated to respond to a public complaint and to conduct an investigation (see Chapter 3, *Alternatives to private prosecution and supplementary action*). Some government departments make investigation results public; others do not. Where such information is not made available, it may be obtainable under access to information laws, or be compellable in legal proceedings (see Appendix 1, *Accessing information*).

Gathering physical evidence

Several types of evidence will be necessary for trial. Concerning documentary evidence, it is important to keep all correspondence received, including e-mail, along with copies of any correspondence you send, any complaints you file, and any other record you come across relating to the incident at issue. Many find it useful to organize such records chronologically.

> Maintain all of your records until after the trial and the limitation period for appeals has passed.

Preparation of your case may also involve the collection of samples or other physical evidence. In these situations, the use of standard procedures in note-taking and in the collection, analysis, and preservation of samples is very important in building a strong case. This section provides an overview of these procedures. For further information on the topics discussed in this section, refer to *The Citizen's Guide to Environmental Investigation and Private Prosecution*, and *Environment on Trial: A Guide to Ontario Environmental Law and Policy*.[10]

Taking notes

Note-taking is a simple and effective way to record the commission of an offence or an environmental effect. For each site visit or observation, your notes should include the following information:

- name(s) of person(s) present;

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[10] Environmental Bureau of Investigation, *The Citizen's Guide to Environmental Investigation and Private Prosecution* (Toronto: Earthscan Canada, 2000), online: EBI <http://www.e-b-i.net/ebi/index.cfm> [*The Citizen's Guide*]; *Environment on Trial*, *supra* note 2.

- 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.[11]

Keep in mind that the admissibility of photographs and videotapes depends on:

- their accuracy in truly representing the facts,
- their fairness and absence of any intention to mislead, and
- their verification on oath by a person capable to do so.[12]

It is advisable to prepare a chart before your visit, to ensure you record all necessary information. The use of waterproof pen and waterproof paper in a bound notebook is also recommended. If you recopy your notes, be sure to keep your originals, and make photocopies of your final notes for storage in separate locations. Where the activity occurs over several weeks or months, try to maintain a daily record, noting all relevant events.

Collecting samples

Samples may be taken of air, water or soil, as well as affected plant and animal matter. When taking samples, it is important to use containers and procedures appropriate to the material being sampled. Analysis for biological and certain other contaminants may also require that a preservative be included in the sample, or that analysis be carried out within a certain time after collection. Containers should be carefully labeled with the date and time, the sampler's name, and an identification code cross-referenced with notes indicating exactly where the sample was taken, and under what conditions. Immediately after sampling, the containers should be sealed to demonstrate that there has been no tampering.

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[11] Adapted from *The Citizen's Guide*, *ibid.* at 46.
[12] *R. v. Maloney (No. 2)* (1976), 29 C.C.C. (2d) 431 (Ont. Ct. G.S.P.).

It is advisable to contact the laboratory that will do the analysis ahead of time to ask for guidance on specific requirements for the sampling you are doing.

Samples should be gathered from all relevant locations, including areas that are likely to be affected and areas that are not. For example, proof of a harmful release into a river may require sampling at the point of discharge of the pollutant as well as upstream and downstream from the discharge.

A note on trespass

Unless specially authorized, a private prosecutor has no rights of access to property beyond those of an ordinary individual. It is therefore important to remember that your uninvited presence on private or restricted public property may constitute trespass. Information collected in this way may be inadmissible in court.

Where access to private property is necessary for collecting evidence and you are unable to obtain permission to enter, you can request the assistance of an individual who has permission. Government investigators, who have the authority to enter private property to obtain samples where there is some indication that an offence has occurred, may also be willing to assist.

Note that, in Alberta, the *Public Lands Act* (s. 3) provides that the beds and shores of all naturally occurring and permanent water bodies belong to the Province.

It may also be advisable to continue sampling over a number of days or weeks, even once the discharge has stopped, to document impacts arising from the offence. This evidence may be important in sentencing to demonstrate the gravity of the offence, particularly where the prosecutor is seeking a creative sentence order that provides for clean-up or restitution.

Continuity of evidence: practical steps

All samples, photographs, and other documents should be treated as if they will be necessary to prove your case at trial. Whenever possible, evidence should be kept in your possession or under your control, preferably under lock and key.

When evidence must leave your possession, such as samples that must be sent for analysis, you will need to be able to establish continuity of possession. As soon as they are taken, samples should be placed in a sealed container and delivered to the laboratory. All deliveries of evidence are best made in person, but may also be done by a reputable courier, or by registered mail. The laboratory should be informed ahead of time that the samples are to be handled as legal evidence. Most laboratories have special procedures that will identify persons that handled the sample, and demonstrate that it remained in the laboratory and was not tampered with.

When the laboratory completes the analysis, the samples should be placed back into the storage container and sealed, not to be re-opened again until the trial. The laboratory will be able to advise you regarding preservation of the samples.

Keep the number of people who handle your evidence to a minimum, and keep a careful record of names and times.

When transferring possession of samples to another person, obtain a receipt or a written and signed statement indicating the circumstances. On the basis of these measures, you will be able to testify at trial that no one has tampered with the evidence.

Exhibit book

In preparation for trial, the prosecutor will normally organize the evidence for the prosecution into tabbed binders for easy reference. This greatly assists the examination of witnesses and the presentation of argument. Three sets of evidence should be prepared, one each for the prosecution, the court, and the accused (concerning mandatory disclosure to the accused, see Chapter 7, *The role of the private prosecutor*).

Witnesses

Whenever possible, two persons should be present for site visits and the collection of samples. It may be important for a witness to be able to corroborate the testimony of the person who took samples, notes or photographs.

If there were witnesses to the offence who are willing to discuss the matter with you, it is important to record their statements as accurately as possible. It is best to have each witness write and sign a typewritten, or at least a handwritten, statement of his or her evidence. This should be done as soon after the offence as possible.

At trial, a witness's written statement must be corroborated by that person's testimony. You should therefore obtain the full names, addresses and telephone numbers of any witnesses, as well as their profession or other factors that may connect them to the offence. This information will be important in an application for a subpoena to compel their attendance.

In addition to these witnesses, presentation of your case will normally require the testimony of all persons who handled physical evidence. These may include any government officials who investigated the offence.

Lastly, you may require the testimony of expert witnesses to provide opinion evidence. Experts may be called upon to testify concerning sample analysis and other technical issues, as well as immediate or long-term impacts of the offence. Preference should be given, where there is a choice, to experts with the best technical or professional qualifications and with experience testifying in court. Experts typically charge a fee for this type of testimony.

Laws restricting use of personal information

Where personal information is collected from witnesses by a member of an organization, privacy legislation restricting the use of such information may apply. Personal information may include names, addresses, phone numbers, and other information about an individual. In

Alberta, the *Personal Information Protection Act* (PIPA) requires that organizations that are not registered or incorporated as non-profit organizations take reasonable steps to keep personal information secure.[13] For these associations, the PIPA also imposes restrictions on the collection, use and disclosure of personal information, among other requirements. However, there are exemptions where the collection, use or disclosure is reasonable for the purposes of an investigation or legal proceeding.[14]

In general, the PIPA requirements concerning collection, use and disclosure of personal information should not apply where the information is collected and used in connection with a private prosecution. However, for any use of the information not reasonably connected to legal proceedings, such as releases to the media, the public, or other interested groups, consent from the person must be obtained and restrictions on use and disclosure will apply.[15] The prosecutor's duty to disclose all relevant evidence to the accused is not affected by the PIPA.[16]

Restrictions on the use of personal information vary from jurisdiction to jurisdiction. Before collecting such information, it is advisable to review the applicable legislation.

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[13] S.A. 2003, c. P-6.5, ss. 34, 56. PIPA does not apply to organizations incorporated under the Alberta *Societies Act* or the *Agricultural Societies Act*, or registered under Part 9 of the *Companies Act,* except where personal information is collected, used or disclosed in connection with a commercial activity.
[14] *Ibid.*, ss. 14(d), 17(d), 20(m), 24(2)(c).
[15] These restrictions apply only to certain organizations: see note 13, *supra*.
[16] *Ibid.*, s. 4(5)(b).

Appendix 3
Finding assistance

Two major practical concerns faced by private prosecutors are 1) where to find the legal and technical assistance required, and 2) how to pay for these services. This appendix provides some basic guidance on these points.

Finding legal assistance

Lawyers are expensive. Unless you have the support of a well-financed environmental or community group, a lawyer's fees may be a real obstacle to launching a private prosecution. In some cases, individual lawyers may be willing to take on your case *pro bono*, meaning that the lawyer's time is donated. *Pro bono* arrangements normally require that the client pay any disbursements, such as payments for sample analysis, expert testimony, and other out of pocket expenses. Some lawyers may also be willing to work for a reduced fee.

Individuals who are not lawyers but who have initiated or conducted private prosecutions may also be of great assistance. Such persons can offer practical guidance on dealing with lawyers and experts, negotiating the court process, and organizing community support.

Legal aid

Legal aid services are not normally available to represent litigants or informants in environmental cases. Where the applicant is of modest financial means and has a substantial financial or property interest at stake, assistance may be available in some provinces, depending on applicable legal and policy restrictions.[1]

Some provinces provide community legal aid clinics that offer legal representation and other services to persons without the resources to pay for such assistance. One such clinic, the Canadian Environmental Law Association (Toronto), provides legal advice and assistance to victims of environmental harm and those seeking environmental protection through the courts (see contact information below).

Finding scientific assistance

Many environmental prosecutions require the services and testimony of analysts and other experts. Lawyers with experience in criminal or environmental matters may be able to refer you to appropriate experts. University professors may also be willing to assist in this regard.

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[1] For a discussion of legal aid in Ontario and environmental cases, see David Estrin and John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed. (Toronto: Emond Montgomery Publications Ltd., 1993) at 68-71.

Where an expert has some personal commitment to the issues at stake, he or she may be willing to provide services *pro bono* or at a reduced fee.

Organizations that can help

The organizations listed below can provide valuable information on building an effective case, finding the right legal and scientific assistance, and available financial support. They may also be able to refer you to non-lawyers who have experience with private prosecutions.

Environmental Defence is a national organization that assists in connecting community groups with lawyers, scientists and other experts with experience in environmental cases. ED does not provide legal representation or direct funding, but may assist local groups with fundraising and communications. Assistance is limited to public interest cases that are of national or regional significance. Groups must apply to partner with Environmental Defence.

Environmental Defence
615 Yonge Street
Suite 500
Toronto, Ontario
M4Y 1Z5
Phone: (416) 323-9521
Fax: (416) 323-9301
email: info@environmentaldefence.ca
www.environmentaldefence.ca

The Canadian Environmental Law Association is a non-profit, public interest organization that provides environmental law information to citizens, community groups and environmental groups. It is also a free legal advisory clinic for the Ontario public, and will act at hearings and in courts on behalf of citizens or citizens' groups who are otherwise unable to afford legal assistance. CELA does not provide direct funding.

Canadian Environmental Law Association
130 Spadina Avenue
Suite 301
Toronto, Ontario
M5V 2L4
Phone: (416) 960-2284
Fax: (416) 960-9392
www.cela.ca

The Environmental Law Centre (University of Victoria) is both a non-profit society and a University of Victoria law course. The primary mission of the ELC is to provide research and advocacy on public interest environmental issues. The ELC draws on the expertise and involvement of students, professors, legal practitioners, and environmental activists.

Environmental Law Centre (University of Victoria)
University of Victoria
P.O. Box 2400 STN CSC
Victoria, British Columbia
V8W 3H7
Phone: (250) 721-8188
E-mail: elc@uvic.ca
www.elc.uvic.ca

The Environmental Law Centre (Alberta) Society is a charitable organization that provides Albertans with a source of objective information about environmental and natural resources law. Although the ELC does not represent individuals or organizations before the courts, the ELC can assist with lawyer referrals.

Environmental Law Centre
204, 10709 Jasper Avenue
Edmonton, Alberta
T5J 3N3
Phone: (780) 424-5099
Toll Free: 1-800-661-4238
Fax: (780) 424-5133
E-mail: elc@elc.ab.ca
www.elc.ab.ca

Sierra Legal Defence Fund is a non-profit environmental law organization that provides environmental law information and free legal services to citizens and environmental groups across Canada. SLDF does not provide direct funding, and legal services are generally restricted to precedent-setting cases.

Sierra Legal Defence Fund
Vancouver Head Office
214 - 131 Water Street
Vancouver, British Columbia
V6B 4M3
Phone: (604) 685-5618
Toll Free: 1-800-926-7744
Fax: (604) 685-7813
E-mail: sldf@sierralegal.org

Ontario Office
30 St. Patrick Street, Suite 900
Toronto, Ontario
M5T 3A3
Phone: (416) 368-7533
Fax: (416) 363-2746
E-mail: sldfon@sierralegal.org
www.sierralegal.org

West Coast Environmental Law provides citizens and organizations in British Columbia with environmental law information, summary legal advice and, in select cases, representation. Legal services are available to individuals and groups who could not otherwise afford a lawyer. Funding for cases with public interest value is available through WCEL's Environmental Dispute Resolution Fund.

West Coast Environmental Law
1001 - 207 West Hastings Street
Vancouver, British Columbia
V6B 1H7
Phone: (604) 684-7378
Toll-free in BC: 1-800-330-9235
Fax: (604) 684-1312
E-mail: admin@wcel.org
www.wcel.org

The Environmental Bureau of Investigation is dedicated to the protection of public resources through the application and enforcement of environmental laws. The goals of EBI are to investigate and prosecute environmental crime, assist individuals and groups in their fight against polluters, develop public education tools to empower citizens to stop pollution, and publish and publicize information on pollution sources and sites.

Environmental Bureau of Investigation
225 Brunswick Avenue
Toronto, Ontario
M5S 2M6
Phone: (416) 964-9223
Fax: (416) 964-8239
E-mail: EBI@nextcity.com
www.e-b-i.net/ebi

The Waterkeeper Alliance is an umbrella organization that supports legal and other environmental action to protect aquatic habitats and the people who depend on them. Available support may vary among the local organizations, but is normally limited to the local watershed. New waterkeeper organizations will be listed on the Alliance's Canadian website at <http://www.waterkeepers.ca/>.

Sentinelles Petitcodiac Riverkeeper
P.O. Box 300
Moncton, New Brunswick
E1C 8K9
Phone: (506) 388-5337
www.petitcodiac.org

Lake Ontario Waterkeeper
245 Queen's Quay West
Toronto, Ontario
M5J 2K9
Phone: (416) 861-1237
www.waterkeeper.ca

Sentinelles Ottawa Riverkeeper
P.O. Box 67008
421 Richmond Rd
Ottawa, Ontario
K2A 4E4
Phone: (613) 864-7442
Toll-free: 1-888-952-2737
E-mail: keeper@ottawariverkeeper.ca
www.ottawariverkeeper.ca

Georgian Baykeeper
38 Church Street
Parry Sound, Ontario
P2A 1Y5
Phone: (416) 489-8101

Fundy Baykeeper
23 Privateer Lane
Chance Harbour, New Brunswick
E5J 2A2
Phone: (506) 650-5849
www.fundybaykeeper.org

Bow Riverkeeper
P.O. Box 3120
Banff, Alberta
T1L 1C7
Phone: (403) 762-0591
www.bowriverkeeper.org

Canadian Detroit Riverkeeper
2710 Robert Road
Windsor, Ontario
N8W 5L9
Phone: (519) 257-2413

Fraser Riverkeeper
1251 Cardero Street
Suite 1204
Vancouver, British Columbia
V6G 2H9
Phone: (604) 838-1584
www.fraserriverkeeper.ca

Appendix 4
Provincial and territorial summary proceedings legislation

Jurisdictions adopting the *Criminal Code* procedure

Alberta, Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island, Newfoundland, and the Yukon and Northwest Territories have substantially adopted the *Criminal Code* procedure for laying an information:

- *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, s. 3;
- *Summary Offences Procedure Act, 1990*, S.S. 1990-91, c. S-63.1, s. 4;
- *Summary Convictions Act*, C.C.S.M., c. S230, s. 3;
- *Summary Proceedings Act*, R.S.N.S. 1989, c. 450, s. 7;
- *Summary Proceedings Act*, R.S.P.E.I. 1988, c. S-9, s. 4;
- *Provincial Offences Act*, S.N.L. 1995, c. P-31.1, s. 6;
- *Summary Convictions Act*, R.S.Y. 2002, c. 210, s. 7;
- *Summary Conviction Procedures Act*, R.S.N.W.T. 1988, c. S-15, s. 2.

Jurisdictions with separate procedures

British Columbia, Ontario, Quebec and New Brunswick have separate procedures for laying an information:

- *Offence Act*, R.S.B.C. 1996, c. 338, ss. 25-26;
- *Provincial Offences Act*, R.S.O. 1990, c. P.33, ss. 23-24;
- *Code of Penal Procedure*, R.S.Q. c. C-25.1, ss. 9-10;
- *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1, ss. 3-6.

Bibliography

Books

Benedickson, Jamie. *Environmental Law,* 2nd ed. (Toronto: Irwin Law Inc., 2002).

Bentley, Christopher A.W. *Criminal Practice Manual: A Practical Guide to Handling Criminal Cases*, looseleaf (Scarborough, Ont.: Carswell, 2000).

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

Bodger, Keith. *Fundamentals of Environmental Sampling* (Rockville, Maryland: ABS Consulting, 2003).

Boyd, David R. *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).

Environmental Bureau of Investigation. *The Citizen's Guide to Environmental Investigation and Private Prosecution* (Toronto: Earthscan Canada, 2000), online: EBI <http://www.e-b-i.net/ebi/index.cfm>.

Environmental Law Centre. *Environmental Enforcement* (Proceedings of the National Conference on the Enforcement of Environmental Law) (Edmonton: Environmental Law Centre, 1985).

Estrin, David. *Business Guide to Environmental Law*, looseleaf (Toronto: Carswell, 1992).

Estrin, David and John Swaigen. *Environment on Trial: A Guide to Ontario Environmental Law and Policy*, 3rd ed. (Toronto: Emond Montgomery Publications Ltd., 1993).

Hogg, Peter W. *Constitutional Law of Canad*a, 4th ed., looseleaf (Toronto: Carswell, 1997).

Jones, David Phillip and Anne S. deVillars. *Principles of Administrative Law*, 3rd ed. (Toronto: Carswell, 1999).

Lordon, Paul, Q.C. *Crown Law* (Toronto: Butterworths, 1991).

McNairn, Colin and Christopher Woodbury. *Government Information: Access and Privacy*, looseleaf (Toronto: Carswell, 1992).

Roach, Kent. *Criminal Law*, 2nd ed. (Toronto: Irwin Law, 2000).

Rogers, Ian M. *The Law of Canadian Municipal Corporations*, 2nd ed., looseleaf (Toronto: Carswell, 1971).

Salhany, Roger E. *Canadian Criminal Procedure*, 6th ed., looseleaf (Aurora, Ont.: Canada Law Book, 1994).

Salhany, Roger E. *The Practical Guide to Evidence in Criminal Cases*, 6th ed. (Scarborough, Ont.: Carswell, 2002).

Saxe, Dianne. *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, Ont.: Canada Law Book Inc., 1990).

Sopinka, John, Sidney N. Lederman, and Alan Bryant. *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999).

Stenning, Phillip C. *Appearing for the Crown* (Cowansville, Que.: Brown Legal Publications Inc., 1986).

Swaigen, John. *Regulatory Offences in Canada: Liability and Defences* (Toronto: Carswell, 1992).

Swanson Elizabeth J. and Elaine L. Hughes. *The Price of Pollution* (Edmonton: Environmental Law Centre, 1990).

Articles

Burns, Peter. "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21 McGill L.J. 269.

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

Delogu, Orlando E. "Citizen Suits to Protect the Environment: The U.S. Experience May Suggest a Canadian Model" (1992) 41 U.N.B.L.J. 124.

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

Hughes, Elaine L. and David Iyalomhe. "Substantive Environmental Rights in Canada" (1998-1999) 30 Ottawa L. Rev. 229.

Jull, Kenneth. "Costs, the Charter and Regulatory Offences: The Price of Fairness" (2002) 81:3 Can. Bar Rev. 657.

MacFarlane, Bruce. "Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency" (2001) 45 Crim. L.Q. 272.

Proctor, Roger E. "Individual Enforcement of Canada's Environmental Protection Laws: The Weak-spirited Need Not Try: An Alberta Example" (1991) 14:1 Dalhousie L.J. 112.

Tingle, Bryce C. "The Strange Case of the Crown Prerogative Over Private Prosecutions or Who Killed Public Interest Law Enforcement?" (1994) 28 U.B.C. L. Rev. 309.

Webb, Kernaghan. "Taking Matters Into Their Own Hands: The Role of the Citizen in Canadian Pollution Control Enforcement" (1991) 36 McGill L.J. 770.

Zinn, Matthew D. "Policing Environmental Regulatory Enforcement: Cooperation, Capture and Citizen Suits" (2002) 21 Stanford Env. L.J. 1.

Government documents

Alberta Environment. *Compliance Assurance Principles* (Edmonton: Alberta Environment, 2000), online: Alberta Environment <http://www3.gov.ab.ca/env/info/infocentre/publist.cfm>.

Alberta Environment/Alberta Justice. *Creative Sentencing Process for the Environmental Protection and Enhancement Act* (Edmonton: Alberta Environment, 2000).

British Columbia. Discretion to Prosecute Inquiry. *Commissioner's Report: Report and Recommendations (*Vol. 1) (Vancouver: Province of British Columbia, 1990).

Department of Justice Canada. *The Federal Prosecution Service Deskbook* (Ottawa: Department of Justice Canada, 2000), online : Department of Justice Canada <http://canada.justice.gc.ca/en/dept/pub/fpsdeskbook.pdf>.

Alberta Justice. *Criteria for Prosecutions Guideline* (Edmonton: Alberta Justice, 1993).

Environment Canada. *Compliance and Enforcement Policy for the Canadian Environmental Protection Act, 1999* (Ottawa: Environment Canada, 2001), online: Environment Canada <http://www.ec.gc.ca/publications/index.cfm>.

Environment Canada. *Compliance and Enforcement Policy for the Habitat Protection and Pollution Prevention Provisions of the Fisheries Act* (Ottawa: Environment Canada, 2001).

Ontario, Attorney General's Advisory Committee. *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Martin Report) (Toronto: The Committee, 1993).

Reports and papers

Cartwright, Ian. "Suggested Checklist for the Laying of an Information and the Holding of a Process Hearing in a Private Prosecution of an Alleged Environmental Offence in Alberta" (Paper presented to the Midwinter Meeting of the Alberta Branch of the Canadian Bar Association, 1992).

Huestis, L.B. *Policing Pollution: The Prosecution of Environmental Offences* (Ottawa: Law Reform Commission of Canada, 1984) [unpublished].

Law Reform Commission of Canada. *Crimes Against the Environment* (Working Paper 44) (Ottawa: Law Reform Commission of Canada, 1985).

Law Reform Commission of Canada. *Pollution Control in Canada: The Regulatory Approach in the 1980's* (Ottawa: Law Reform Commission of Canada, 1988).

Law Reform Commission of Canada. *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986).

National Law Reform Commission. *Criminal Procedure: A Proposal for Costs in Criminal Cases* (Ottawa: National Law Reform Commission, 1973).

International materials

Commission for Environmental Cooperation. *Bringing the Facts to Light: A Guide to Articles 14 and 15 of the North American Agreement on Environmental Cooperation 2000* (Montreal, Que: The Commission, 2000), online: CEC <http://www.cec.org/files/PDF/SEM/BringingFacts.pdf>.

Cases

Abitibi Paper Co., R. v. (1979), 47 C.C.C. (2d) 487 (Ont. C.A.).

Alex Couture Inc. v. Piette (1990), 5 C.E.L.R. (N.S.) 314 (Que. C.A.).

Allchin, R. v. (1971), 6 C.C.C. (2d) 332 (Ont. Co. Ct.).

Allen, R. v. (1974), 20 C.C.C. (2d) 447 (Ont. C.A.).

Attorney General of Quebec v. Lechasseur et al. (1981), 63 C.C.C. (2d) 301 (S.C.C.).

B., R. v. (1986), 29 C.C.C. (3d) 365 (Ont. C.A.).

B. (J.E.), R. v. (1989), 52 C.C.C. (3d) 224 (N.S.S.C.A.D.).

Bain, R. v. [2003] O.T.C. 45, O.J. No. 130 (QL) (Ont. S.C.J.).

Bata Industries Ltd., R. v. (1992), 70 C.C.C. (3d) 394 (Ont. Ct. Prov. Div.), var'd (1993), 14 O.R. (3d) 354 (Gen. Div.), rev'd (1995), 101 C.C.C. (3d) 86 (C.A.).

Beauvais, R. v. (1956), 116 C.C.C. 183 (S.C.C.).

Belgal Holdings Ltd., R. v. [1967] 3 C.C.C. 34 (Ont. H.C.J.).

Berman v. Jenson (1989), 77 Sask. R. 161 (Q.B.).

Blasko, R. v. (1975), 29 C.C.C. (2d) 321 (Ont. H.C.J.).

Blythe, R. v. (1973), 13 C.C.C. (2d) 192 (B.C.S.C.).

Bouree v. Parsons (1986), 29 C.C.C. (3d) 126 (Ont. Dist. Ct.).

Bradley, R. v. (1975), 24 C.C.C. (2d) 482 (Ont. C.A.).

Breckenridge, R. v. (1905), 10 C.C.C. 180 (Ont. C.A.).

British Acceptance Corporation Ltd. v. Belzberg (1962), 36 D.L.R. (2d) 587 (Alta. S.C. (T.D.)).

Brown, R. v. (1982), 69 C.C.C. (2d) 301 (Alta. C.A.), leave to appeal to S.C.C. refused (1982), 40 A.R. 450.

Brown Shoe Co. of Canada (No. 2), R. v. (1984), 11 C.C.C. (3d) 514 (Ont. H.C.J.).

Campbell v. Ontario (A.G.) (1987), 31 C.C.C. (3d) 289 (Ont. H.C.J.), aff'd (1987), 35 C.C.C. (3d) 480 (C.A.), leave to appeal to S.C.C. refused (1987), 35 C.C.C. (3d) 480 n.

Canada (Northwest Territories Commissioner), R. v. (1993), 12 C.E.L.R. (N.S.) 55 (N.W.T. Terr. Ct.), var'd [1995] 1 W.W.R. 17 (N.W.T.S.C.).

Canadian Dredge and Dock Co., R. v. (1985), 19 C.C.C. (3d) 1 (S.C.C.).

Canadian Industries Ltd., R. v. (1982), 69 C.C.C. (2d) 533 (N.B.C.A.).

Canadian International Paper Co., R. v. (1974), 20 C.C.C. (2d) 557 (Ont. C.A.).

CanadianOxy Chemicals Ltd. v. Canada (Attorney General) (1998), 133 C.C.C. (3d) 426 (S.C.C.).

Cancoil Thermal Corporation and Parkinson, R. v. (1986), 27 C.C.C. (3d) 295 (Ont. C.A.).

Carey v. Ontario (1986), 30 C.C.C. (3d) 498 (S.C.C.).

Casey v. Automobiles Renault Canada Ltd., [1966] 2 C.C.C. 289 (S.C.C.).

Catagas, R. v. (1977), 38 C.C.C. (2d) 296 (Man. C.A.).

Cathcart, R. v. (1988), 82 N.S.R. (2d) 267 (N.S.S.C.T.D).

Chartrand v. Que. (Minister of Justice), [1987] R.J.Q. 1732, 40 C.C.C. (3d) 270 (Que. C.A.), leave to appeal to S.C.C. refused (1988), 41 C.C.C. (3d) vi.

CIBC v. Knight (1993), 84 Man. R. (2d) 231 (Q.B.).

City of Sault Ste. Marie, R. v. (1978), 40 C.C.C. (2d) 253 (S.C.C.).

*Clunas, R. v. (*1992), 70 C.C.C. (3d) 115 (S.C.C.).

Commander Business Furniture Inc., R. v. (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. Prov. Div.), aff'd [1994] O.J. No. 313 (Ont. Ct. Gen. Div.).

Curran, R. v. (1977), 38 C.C.C. (2d) 151 (Alta. S.C. (A.D.)), leave to appeal to S.C.C. refused (1978), 20 N.R. 180n.

Dalton, R. v. (1976), 11 Nfld. & P.E.I.R. 287 (Nfld. C.A.).

Davis, R. v. (1975), 24 C.C.C. (2d) 218 (B.C.S.C.).

Debot, R. v. (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), aff'd [1989] 2 S.C.R. 1140, 52 C.C.C. (3d) 193.

Devereaux, R. v. [1966] 4 C.C.C. 147 (Ont. C.A.).

Dowson, R. v. (1983), 7 C.C.C. (3d) 527 (S.C.C.).

Dunlop and Sylvester v. The Queen (1979), 47 C.C.C. (2d) 93 (S.C.C.).

Edge, R. v. 2004 ABPC 55, [2004] A.J. No. 316 (Alta. Prov. Ct.)(QL).

Edwards v. Advent (1977), 34 C.C.C. (2d) 372 (Ont. Dist. Ct.).

Eldorado Nuclear Ltd., R. v. (1983), 8 C.C.C. (3d) 449 (S.C.C.).

Ertel, R. v. (1987), 35 C.C.C. (3d) 398 (Ont. C.A.), leave to appeal to S.C.C. refused (1987), 86 N.R. 266 n.

F.W. Woolworth Co. Ltd., R. v. (1974), 18 C.C.C. (2d) 23 (Ont. C.A.).

Fell, R. v. (sub nom. *R. v. Kenitex Canada*) (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.), var'd (1981), 64 C.C.C. (2d) 456 (C.A.).

Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607.

Fletcher v. Kingston (City) (1998), 28 C.E.L.R. (N.S.) 229 (Ont. Ct. Prov. Div.), var'd [2002] O.J. No. 2324 (Ont. S.C.J.)(QL), var'd [2004] O.J. No. 1940 (C.A.)(QL).

Gagnon, R. v. (2000), 147 C.C.C. (3d) 184 (Que. C.A.).

Gilbert Steel Ltd. v. Southwick, [1968] 1 C.C.C. 356 (Ont. C.A.).

Girard c. 2944-7828 Quebec Inc. (23 July 2003), Chicoutimi 150-06-000002-998 (Qc. Sup. Ct.).

Goronuk, R. v. [1963] 1 C.C.C. 320 (B.C.C.A.).

Gouriet v. Union of Post Office Workers, [1977] 3 All E.R. 70 (H.L.).

Graat, R. v. (1980), 55 C.C.C. (2d) 429 (Ont. C.A.), aff'd (1982), 2 C.C.C. (3d) 365 (S.C.C.).

Great Canadian Oil Sands Ltd., R. v. (1977), 9 A.R. 86 (Dist. Ct.).

Hall v. Jakobek, [2003] O.T.C. Tbed. SE.075 (Ont. Sup. Ct. J.).

Hamilton v. British Columbia (A.G.) (1986), 30 C.C.C. (3d) 65 (B.C.S.C.).

Hamilton (City), R. v. (18 September 2000), 001/134/073 (Ont. C.J. (Prov. Div.)).

Harrison, R. v. (1976), 28 C.C.C. (2d) 279 (S.C.C.).

Hayduk, R. v. (1955), 112 C.C.C. 232 (Alta. Dist. Ct.).

Jewitt, R. v. (1985), 21 C.C.C. (3d) 7 (S.C.C.).

Johnson v. Saskatchewan (A.G.), [1998] 2 W.W.R. 573 (Sask. Q.B.).

Jones, ex parte Cohen, R. v. [1970] 2 C.C.C. 374 (B.C.S.C.).

Jorgensen, R. v. [1995] 4 S.C.R. 55.

Joseph, R. v. (1900), 6 C.C.C. 144 (Que. Q.B., Crown Side).

Judge of the Provincial Court, ex parte McLeod, R. v. (sub nom. *R. v. McLeod*), [1970] 5 C.C.C. 128 (B.C.S.C.).

Kennedy, R. v. (1972), 6 C.C.C. (2d) 564 (Ont. C.A.).

Kennedy, R. v. (1973), 11 C.C.C. (2d) 263 (Ont. C.A.).

King, R. v. (1986), 26 C.C.C. (3d) 349 (B.C.C.A.).

Kluge, R. v. (1940), 74 C.C.C. 261 (B.C. Co. Ct.).

Kostuch v. Alberta (A.G.) (1995), 101 C.C.C. (3d) 321 (Alta. C.A.), leave to appeal to S.C.C. refused, [1995] S.C.C.A. No. 512.

Kostuch v. Kowalski (1990), 75 Alta. L.R. (2d) 110 (Prov. Ct.).

Kostuch (Informant) v. W.A. Stephenson Construction (Western) Ltd. (1993), 9 Alta. L.R. (3d) 34 (Alta. C.A.), rev'g (1992), 9 Alta. L.R. (3d) 30 (Q.B.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. xii.

Krieger v. Law Society of Alberta (2002), 168 C.C.C. (3d) 97 (S.C.C.).

Laforme, R. v. [2003] O.J. No. 845 (Ont. S.C.J.)(QL).

Leblanc, R. v. [1964] 3 C.C.C. 40 (N.S. Co. Ct.).

Leonard, R. v. (1962), 133 C.C.C. 262 (Alta. S.C. (A.D.)), aff'g (1962), 133 C.C.C. 230 (T.D.).

Lepage, R. v. [1969] 1 C.C.C. 187 (Ont. H.C.J.).

Lynk v. Ratchford (1995), 142 N.S.R. (2d) 399 (C.A.).

MacIsaac v. Motor Coach Industries Ltd. (1982), 70 C.C.C. (2d) 226 (Man. C.A.).

MacKenzie v. Denstedt, [1969] 3 C.C.C. 119 (Man. C.A.).

MacKinnon, R. v. (1988), 67 Sask. R. 182 (Q.B.).

MacLean, R. v. [1972] 1 W.W.R. 159 (B.C.S.C.).

Maitland, R. v. (1984), 42 C.R. (3d) 206 (Ont. H.C.J.).

Maloney (No. 2), R. v. (1976), 29 C.C.C. (2d) 431 (Ont. Ct. G.S.P.).

McMicken, Re (1912), 20 C.C.C. 334 (Man. C.A.).

Medicine Hat Greenhouses Ltd., R. v. (1981), 59 C.C.C. (2d) 257 (Alta. C.A.).

Moore, R. v. (1987), 38 C.C.C. (3d) 471 (Ont. C.A.).

Moore, R. v. (1988), 41 C.C.C. (3d) 289 (S.C.C.).

NBIP Forest Products Inc., R. v. (1994), 14 C.E.L.R. (N.S.) 191 (N.B.Q.B.T.D.).

Neville (D.), R. v. 2003 NLSCTD 134, [2003] N.J. No. 220 (Nfld. S.C.T.D.)(QL).

Nickel City Transport (Sudbury) Ltd., R. v. (1993), 82 C.C.C. (3d) 541 (Ont. C.A.).

Ontario, R. v. (1991), 13 W.C.B. (2d) 79 (Ont. Ct. Gen. Div).

Ontario (Ministry of Labour) v. NMC Canada Inc. (1995), 25 O.R. (3d) 461 (Ont. C.A.).

Ontario (Ministry of Transport), R. v. (1996), 19 C.E.L.R. (N.S.) 297 (Ont. Ct. Prov. Div.).

Osborne, R. v. (1975), 25 C.C.C. (2d) 405 (N.B.S.C. (A.D.)).

Osiowy and The Queen, Re (1989), 50 C.C.C. (3d) 189 (Sask. C.A.).

Pappajohn, R. v. (1980), 52 C.C.C. (2d) 481 (S.C.C.).

Pardo, R. v. [1991] R.J.Q. 293, (1990) 62 C.C.C. (3d) 371 (Que. C.A.).

*Parsons, R. v. (*1983), 41 Nfld. & P.E.I.R. 198 (Nfld. Prov. Ct.).

Perks v. R. (1998), 26 C.E.L.R. (N.S.) 251 (Ont. Ct. Gen. Div.), aff'd (1998), 116 O.A.C. 399 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 89.

Port McNeill (Town), R. v. (1998), 123 C.C.C. (3d) 392 (B.C.C.A.).

Power, R. v. [1994] 1 S.C.R. 601.

Precision Plastics Ltd., R. v. (2003), 1 C.E.L.R. (3d) 225 (Alta. Prov. Ct.).

Quebec (A.G.) v. Canada (A.G.), [1945] S.C.R. 600.

The Queen (in Right of Ontario as represented by the Ministry of Environment), R. v. (unreported, June 27, 2001, Ont. C.J., Dorval).

Rayonier Canada Ltd., R. v. (1974), 1 F.P.R. (II) 25 (B.C. Prov. Ct.).

Reed, R. v. (1998), 39 W.C.B.J. (2) 537 (B.C.C.A.).

Reese v. Alberta (Ministry of Forestry, Lands & Wildlife) (1992), 7 C.E.L.R. (N.S.) 89 (Alta. Q.B.).

"The Rhone" v. "The Peter A.B. Widener", [1993] 1 S.C.R. 497.

Riddle, R. v. (1979), 48 C.C.C. (2d) 365 (S.C.C.).

Sacobie and Paul, R. v. (1979), 51 C.C.C (2d) 430 (N.B.C.A.), aff'd (1983), 1 C.C.C. (3d) 446 (S.C.C.).

Safety-Kleen Canada Inc., R. v. (1997), 114 C.C.C. (3d) 214 (Ont. C.A.).

Sanford v. Ontario Realty Corp. (2003), 2 C.E.L.R. (3d) 288 (Ont. S.C.J.).

Schwerdt, R. v. (1957), 119 C.C.C. 81 (B.C.S.C.).

Shamrock Chemicals Ltd., R. v. (1989), 4 C.E.L.R. (N.S.) 315 (Ont. Dist. Ct.).

Simard, R. v. (1996), 105 C.C.C. (3d) 461 (Ont. C.A.), leave to appeal to S.C.C. refused, [1996] 108 C.C.C. (3) vi.

Smith, R. v. (2002), 46 C.E.L.R. (N.S.) 216 (N.B. Prov. Ct.).

Snider, R. v. (1954), 109 C.C.C. 193 (S.C.C.).

Snow, R. v. (1981), 11 C.E.L.R. 13 (Ont. Prov. Off. Ct.).

Snyder, R. v. (1974), 16 C.C.C. (2d) 331 (Sask. Q.B.).

Southam Inc. v. Coulter (1990), 60 C.C.C. (3d) 267 (Ont. C.A.).

Stinchcombe, R. v. (1991), 68 C.C.C. (3d) 1 (S.C.C.).

Storrey, R. v. (1990), 53 C.C.C. (3d) 316 (S.C.C.).

Stradiotto, R. v. (1973), 11 C.C.C. (2d) 257 (Ont. C.A.).

Swendson, R. v. (1987), 78 A.R. 220 (Q.B.).

Syme v. Swan (1979), 48 C.C.C. (2d) 501 (Ont. H.C.J.).

Sztuke, R. v. (1993), 87 C.C.C. (3d) 50 (Ont. C.A.).

Thatcher, R. v. (1987), 32 C.C.C. (3d) 481 (S.C.C.).

Theissen, R. v. 2002 MBQB 149, [2002] M.J. No. 224 (Man. Q.B.)(QL).

TransCanada Pipelines, R. v. (1994), 15 C.E.L.R. (N.S.) 62 (Ont. Ct. Prov. Div.).

United Aggregates Ltd., R. v. (2001), 49 W.C.B. (2d) 16 (Ont. C.J).

United Keno Hill Mines Ltd., R. v. (1980), 10 C.E.L.R. 43 (Yukon Terr. Ct.).

Van Waters & Rogers Ltd., R. v. (1998), 220 A.R. 315 (Prov. Ct.).

Walters (Informant) v. Red River Exhibition Assn. (1997), 119 Man. R. (2d) 237 (Q.B.).

Warren, R. v. (1981), 61 C.C.C. (2d) 65 (Ont. H.C.J.).

Webster, R. v. (1992), 78 C.C.C. (3d) 302 (S.C.C.).

Weightman, R. v. (1977), 37 C.C.C. (2d) 303 (Ont. Prov .Ct.).

Werring v. British Columbia (A.G.) (1997), 122 C.C.C. (3d) 343 (B.C.C.A.).

Whitmore, R. v. (1987), 41 C.C.C. (3d) 55 (Ont. H.C.J.), aff'd (1989), 51 C.C.C. (3d) 294 (Ont. C.A.).

Wildefong, R. v. (1970), 1 C.C.C. (2d) 45 (Sask. C.A.).

Winn v. Canada (A.G.) (1994), 84 F.T.R. 115.

Yanke, R. v. (1983), 4 C.C.C. (3d) 26 (Sask. C.A.).

Young, R. v. (1999), 138 C.C.C. (3d) 184 (Ont. C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 434.

Zaparinuk v. Halstead, [1966] 3 C.C.C. 123 (Sask. C.A.).

Legislation: federal

Access to Information Act, R.S.C. 1985, c. A-1.

An Act for the regulation of Fishing and Protection of Fisheries, S.C. 1867-68, c. 60.

An Act to Amend the Criminal Code and to Amend Other Acts, S.C. 2002, c. 13.

An Act to Amend the Criminal Code (criminal liability of organizations), S.C. 2003, c. 21.

Auditor General Act, R.S.C. 1985, c. A-17.

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Canadian Environmental Assessment Act, R.S.C. 1992, c.37, s. 55.

Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33.
Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations, S.O.R./92-267.
Pulp and Paper Mill Defoamer and Wood Chips Regulations, S.O.R./92-268.
Secondary Lead Smelter Release Regulations, S.O.R./91-155.
Vinyl Chloride Release Regulations, S.O.R./92-631.

Canada Evidence Act, R.S.C. 1985, c. C-5.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. App. II, No. 5.

Criminal Code, R.S.C. 1985, c. C-46.

Fisheries Act, R.S.C. 1985, c. F-14.
Fishery (General) Regulation, S.O.R. 93/53.

Interpretation Act, R.S.C. 1985, c. I-21.

Species at Risk Act, S.C. 2002, c. 29.

Supreme Court Act, R.S.C. 1985, c. S-26.

Transportation of Dangerous Goods Act, 1992, S.C. 1992, c. 34.

Federal Orders

Alberta Equivalency Order, S.O.R./94-752.

Legislation: provincial

British Columbia

Crown Counsel Act, R.S.B.C. 1996, c. 87.

Environment Management Act, R.S.B.C. 1996, c. 118.

Offence Act, R.S.B.C. 1996, c. 338.

Waste Management Act, R.S.B.C. 1996, c. 482.

Alberta

Alberta Evidence Act, R.S.A. 2000, c. A-18.

Dangerous Goods Transportation and Handling Act, R.S.A. 2000, c. D-4.

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12.
Substance Release Regulation, Alta. Reg. 124/93.
Disclosure of Information Regulation, Alta. Reg. 116/93.

Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25.

Interpretation Act, R.S.A. 2000, c. I-8.

Municipal Government Act, R.S.A. 2000, c. M-26.

Ombudsman Act, R.S.A. 2000, c. O-8.

Personal Information Protection Act, S.A. 2003, c. P-6.5.

Provincial Offences Procedure Act, R.S.A. 2000, c. P-34.
Procedures Regulation, Alta. Reg. 233/89.

Provincial Parks Act, R.S.A. 2000, c. P-35.

Public Lands Act, R.S.A. 2000, c. P-40.

Wildlife Act, R.S.A. 2000, c. W-10.

Saskatchewan

Environmental Management and Protection Act, 2002, S.S. 2002, c. E-10.21.

Summary Offences Procedure Act, 1990, S.S. 1990-91, c. S-63.1.

Manitoba

Environment Act, C.C.S.M c. E125.

Summary Convictions Act, C.C.S.M. c. S230.

Ontario

Business Corporations Act, R.S.O. 1990, c. B.16.

Crown Attorneys Act, R.S.O. 1990, c. C.49.

Environmental Bill of Rights, 1993, S.O. 1993, c. 28.

Environmental Protection Act, R.S.O. 1990, c. E.19.

Provincial Offences Act, R.S.O. 1990, c. P.33.

Quebec

Environment Quality Act, R.S.Q. c. Q-2.

Code of Penal Procedure, R.S.Q. c. C-25.1.

New Brunswick

Clean Environment Act, R.S.N.B. 1973, c. C-6.

Employment Standards Act, S.N.B. 1982, c. E-7.2.

Provincial Offences Procedure Act, S.N.B. 1987, c. P-22.1.

Nova Scotia

Public Prosecutions Act, S.N.S. 1990, c. 21.

Environment Act, S.N.S. 1994-1995, c. 1.

Summary Proceedings Act, R.S.N.S. 1989, c. 450.

Prince Edward Island

Environmental Protection Act, R.S.P.E.I. 1988, c. E-9.

Summary Proceedings Act, R.S.P.E.I. 1988, c. S-9.

Newfoundland

Environmental Protection Act, S.N.L. 2002, c. E-14.2.

Provincial Offences Act, S.N.L. 1995, c. P-31.1.

Yukon

Environment Act, R.S.Y. 2002, c. 76.

Summary Convictions Act, R.S.Y. 2002, c. 210.

Northwest Territories

Environmental Protection Act, R.S.N.W.T. 1988, c. E-7.

Environmental Rights Act, R.S.N.W.T. 1988, c. 83 (Supp.).

Summary Conviction Procedures Act, R.S.N.W.T. 1988, c. S-15.

Further readings

References are to sources listed in the Bibliography.

Accessing information

McNairn [book].

Appeal and judicial review

Jones, Salhany (1994) [books].

Attorney General's policy and intervention

MacFarlane [article]; British Columbia, Department of Justice, Alberta Justice, Ontario [government documents].

Costs

Jull [article]; National Law Reform Commission [report]; Alberta Environment/Alberta Justice [government document].

Criminal law generally

Roach [book].

Criminal procedure generally

Bentley, Salhany (1994) [books].

Environmental law generally

Benedickson, Boyd [books].

Evidence in criminal cases

Estrin, Hogg, Lordon, Salhany (2002), Sopinka [books].

Government enforcement of environmental laws

Benedickson, Boyd, Environmental Law Centre [books]; Zinn [article]; Law Reform Commission of Canada (1988)[report]; Alberta Environment (2000), Environment Canada (Compliance and Enforcement Policies, 2001) [government documents].

Investigating and documenting an offence

Bodger, Environmental Bureau of Investigation, Estrin, Salhany (2002) [books].

Legal avenues to environmental change and protection

Environmental Bureau of Investigation, Estrin, Swanson [books]; Delogu, Hughes [articles]; Commission for Environmental Cooperation [international material].

Liability (Crown)

Hogg [book].

Liability for environmental offences

Benedickson, Berger, Estrin, Saxe, Swaigen [books].

Municipal offences and enforcement

Rogers [book].

Private prosecution and law reform

Stenning [book]; Burns, Cartwright (1990), Cartwright (1992), Ferguson, Proctor, Tingle, Webb [articles]; Huestis, Law Reform Commission of Canada (1986)[reports].

Prosecution of environmental offences

Berger, Benedickson, Swanson, Roach [books].