

ENVIRONMENTAL LITIGATION - STATUTORY LAW:

USES AND LOOPHOLES

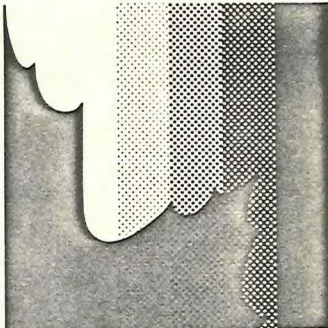
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ENVIRONMENTAL LITIGATION - STATUTORY LAW: USES AND LOOPHOLES

by David Estrin, General Counsel, Canadian Environmental Law Association

Environment & Litigation - Statutory Law: Uses and Loopholes

Why Private Litigation:

In discussing private litigation to deal with environmental matters, it is important that a perspective be struck.

We must ask the question "Why is private litigation necessary when we have witnessed in the past several years, particularly in Ontario, the rise of administrative agencies which have been highly advertised as being the guardians of our environment".

Without dwelling on the answer, which is contained in the "Introduction Chapter" to our new book, Environment on Trial - A Citizen's Guide to Ontario Environmental Law, it is sufficient to say that if we had both proper environmental planning laws and proper enforcement of current laws making pollution and environmental degradation an offence, much private litigation would be unnecessary.

However, in the absence of both proper planning mechanisms and in the presence of legislation which is largely public relations and totally discretionary at the hands of government officials as to its application and use, private remedies are very much important to both protect private persons and property affected by environmental degradation and also to try and ensure that environmental considerations are taken into account when government agencies make decisions with enormous environmentally-negative consequences.

There is no question in our view that environmental planning and control mechanisms and effective administrative agencies will render superior results in the quest for environmental quality than will the haphazard

third tool, judicial protection, which should merely serve to supplement the other two.

However, given the present medieval state, sometimes complete absence, of these first two legal tools in Ontario, assertion of citizen initiative based on legal rights must take on greater importance.

It should be remembered, and it is pointed out in Environment on Trial, that "private actions through the courts, either against the acts of government agencies or in pursuit of private redress, have been the hallmark of our political system. Enlightened legislation is hastened, and has often been preceded, by a history of litigation". Further, as Professor Joseph L. Sax of Michigan (the author of the Michigan "Environmental Bill of Rights") has said, "The court pre-eminently is a forum where the individual citizen or a community group can obtain a hearing on equal terms with the highly organized and experienced interests that have learned so skillfully to manipulate legislative and administrative institutions... Free of the constraints that familiarity and close dealings tend to breed, (the courts) can bring fresh insights to problems of environmental management."

We see the use of the judicial system not as a substitute for the legislative process -- to usurp policies made by elected representatives -- but as a means of providing realistic access to the legislature, so that the theoretical processes of democracy can be made to work more effectively in practice. Citizen initiatives in the court can be used to bring important matters to legislative attention, to force them on

the agendas of reluctant and busy representatives.

Thus, the use of the law can not only resolve disputes between the individual and despoilers of the environment; it can also encourage constructive government activity by illustrating the gap in the enforcement of Ontario's environmental laws and the areas where immediate change is needed because no enforceable law exists.

Finally, private initiatives based on legal rights, whether they are asserted before municipal councils, licencing tribunals or the courts, allow the citizen to come forward and have his say as a person asserting his rights, not as a supplicant coming to a patronizing government official for a favour-- as many have been made to feel in their contacts with federal, provincial, and municipal governments.

The Right of Private Prosecution

Any individual may, if he has "reasonable^{and} probable grounds" to believe that an offence has been committed contrary to:

- a provincial or federal statute
- a regulation made under such a statute
- or a municipal by-law

prosecute the offender in the criminal courts, i.e., the Provincial Courts, Criminal Division. (Reference: Environment on Trial: pg. 327 and footnotes thereto).

Legislation - "Pollution" by S.H. Berner, Member of Law, University of British Columbia (September 1972, Commissioned by the federal government)

in the Environment (and supposedly available from that agency). This

It should be made clear that the right of private prosecution will not be found in any statute. Rather, it is a common law right of every citizen, and unless a statute specifically removes the right (usually by a provision requiring the prior consent of the Attorney General or some other official or minister for either the laying of an information or its prosecution) then the individual possessing reasonable and probable grounds to believe an offence has occurred ~~contrary~~ to the statutory provisions has the common law right to prosecute.

With only one exception (the offence of public nuisance found in the Criminal Code) every statutory offence whether in provincial, municipal, or federal legislation or regulations thereto dealing with environmental matters is a "summary convictions offence" and therefore the private informant may prima facie prosecute the case himself (or through his own lawyer) without expecting the interference of the provincial Attorney General's office. In fact, most crown attorneys take the position that they would rather have nothing to do with such private information, involving as they usually do controversial matters and also involving matters of law with which they are totally unfamiliar.

As the procedure for prosecutions is contained both in the Summary Convictions Act and the Criminal Code, the prosecutor under a statute, regulation or by-law not only has the substantive offence-creating provisions at his disposal, but also the criminal law devices of "attempt", "conspiracy", and "parties". That is, the private informant

may formulate a charge based on an attempt to commit an offence, a conspiracy to commit an offence contrary to provincial statutes, and may also prosecute not only the person actually committing the illegal act but also any parties giving assistance or counsel to the party most intimately involved.

A private person also, under the Ontario Summary Convictions Act, has the right to obtain a search warrant and to enter private property and to seize and remove evidence likely to show the commission of an offence contrary to an Ontario statute or regulation. Warrants may be obtained prior to the commencement of any proceedings -- and the search and seizure is still valid even if no charges are subsequently laid (or if laid are not successful). The only result of not prosecuting the person following seizure of property is that the goods must be returned to him. (Reference: see Environment on Trial, pages 279-280 and 352-353).

Other aspects of evidence in private prosecutions: Government officials possessing information or who have authored documents relevant to environmental matter may be subpoenaed in the normal criminal court manner. The usual practice is to alter the subpoena form used in the criminal court to include in it a provision to bring documents, etc. relevant to the matter in issue.

Under several environmental statutes (Ref., Section 93 and 97 of the Environmental Protection Act, and the Ontario Water Resources Act, the Public Health Act and the Canada Shipping Act, see Environment on Trial, page 274), certificates or reports of an analyst as to the analysis, description, quality, quantity, or temperature of any material is prima facie evidence of the facts stated therein and of the authority of the person making a certificate or report without any proof of appointment or signature.

Ordinary persons' evidence of pollution is often more relevant than that of experts (and obviously easier to obtain) in many prosecutions for breach of a statute, regulation or by-law.

In other words, in an environmental situation, generally the availability of an expert is not critical to success in litigation.

Ordinary people are allowed to state their opinions in court as to sensations within the range of everyday experience -- for example, whether or not there was an odour at a given time and place, or what kind of odour they thought they smelled. Similarly, a person ordinarily experiences many kinds of sounds, and therefore is entitled to state whether a particular noise disturbed or annoyed him. On a subject of aesthetic pollution, an ordinary person would obviously be able to testify as to whether a given site was obnoxious.

Thus, although it is often said that expert witnesses must be available

to give evidence, in both common law, and in actions and proceedings arising from the breach of any statutes, the law generally provides for a "subjective" standard of what is or is not legally permitted. In such cases, opinions of ordinary persons are highly relevant and are admissible evidence. Almost the only time expert evidence alone will be admitted and ordinary opinions rejected is if the offence charged is the emission of a contaminant beyond a specific level. Of course, technically qualified witnesses must be used here.

Other than that, what is a nuisance, or what is "impairment" of a stream, ~~are~~ questions on which the court will listen to the opinions of ordinary people (as well as experts).

The cases referred to below illustrate judicial approval for such pronouncements.

Examples of Private Environmental Prosecutions

1. Regina ex rel McCarthy v. Adventure Charcoal Enterprises Ltd., (Prov. Ct., [Crim. Div.], County of Renfrew) 1972, 9 C.C.C. (2d) 81; CELN, I. ii., 1. This was the first private prosecution under the Ontario Environmental Protection Act. The decision in the case indicates that the judge considered the issue of the right of private prosecution under the statute and held that it existed.

Further, the case was illustrative of a prosecution brought when government officials refused to act and in which the private prosecutor through his attorney subpoenaed government officials in possession of

the evidence necessary to achieve conviction.

Government engineers who did testify told this writer following the conviction that they were more than pleased to see it happen as without the pressure of the prosecution the company would not have spent nearly as much on pollution abatement equipment as it was forced to do as a result of the conviction. In this case, the Air Management Branch had refused to insist on prior approval of abatement equipment, plans and specifications prior to the construction of the plant (as is required under the Environmental Protection Act) but casually indicated that they would scrutinize the project after it was completed. The government's own engineers disagreed with this policy and were therefore cooperative. The company was fined \$500.

The Adventure Charcoal case also illustrates the important strategic advantage of private prosecutions. Despite the disadvantage usually encountered under them, described below, that a criminal court normally cannot grant an injunction, but only fine or potentially imprison the convicted accused, nevertheless, when one combines the criminal possibilities, described earlier, of attempts, conspiracies and parties, one can use private prosecutions in a strategic manner.

For example, if charges are laid not only against those responsible for the harmful activity, but also against individuals, such as employees working on the site or other agents of the principal offender, the effects will usually be to cause great disruption of the work site

of the principal accused. The principal offender will have many anxious persons on his hands. This technique has proved sufficient in some situations to stop operations altogether until the trial takes place: in effect, a "temporary injunction" has been obtained. The charges against everyone but the principal offender can be withdrawn (with the consent of the court) and in the end, only the principal offender will be put on trial.

For example, charges were laid in the Adventure Charcoal case not only against the limited company but against an electrical contractor seen to be on the site. Charges were brought under Section 102 of the E.P.A. which provides that " ...every person, whether principal or agent, or an employee of either of them, who contravenes any provision of this Act or the regulations ... is guilty of an offense."

When the electrical contractors swore a statutory declaration that he had no contract with the Adventure Charcoal Enterprises Company and had not done any work on the site to that point, the charges against him were withdrawn. The effect of laying the charges and the publicity attendant thereon, however, prevented other persons from doing any work on the site until the substantive charges against the principal company were disposed of in court.

Another occasion on which such a technique was used was in the reported case of Regina ex rel Rayner vs. Lake Ontario Cement Ltd. and Triad Truckways Ltd. [1973] 2 O.R. 247 (Ontario High Court). In that case, charges rose out of noise created by

trucks hauling away sand from sand dunes adjacent to Sandbanks Provincial Park. Not only were charges laid under Section 14 of the E.P.A. for noise disrupting uses of the park and vacationers, but also against the individual operating the front-end loader on behalf of these companies. After the charges were laid, no further activity took place on the site until the charges were disposed of (and after the charges were disposed of, the companies ceased their activities altogether).

Thus it may be seen that innovative techniques may be had through the use of private prosecutions. However, the complainant always must have "reasonable and probable grounds", for any charge he lays, whether it is against a principal or an agent.

2. Regina ex rel Dewar v. Smith

CELN, II. pg. 90 (Provincial Court, Criminal Division) (Judicial District of York, Toronto), June 28, 1973

This was a case where CELA put the bite on barking dogs;

The brief report on this otherwise unreported case contained in the Canadian Environmental Law News is as follows:

"Barking dogs were the subject of attention in a Toronto court recently as CELA prosecuted under the Toronto anti-noise by-law for the second time.

CELA staff lawyer John Dunn obtained a conviction and a fine of \$50 and \$5 costs against the owner of several small dogs who allowed the animals to remain barking in his back

yard all night, much to the annoyance of his neighbours.

The evidence of the complainant, Miss J. Dewar, and of her neighbours, was that at the time in question the defendant was keeping eight dogs at a central Toronto residence and that frequently some or all of them were left out late at night.

The City of Toronto by-law, first passed in 1938, prohibits "any sound made by any animal or bird which disturbs the peace, quiet, comfort, or repose of any individual in the neighbourhood". The maximum fine is \$300".

The City of Toronto, unlike most municipalities, has no by-law enforcement officer. And although Miss Dewar and her neighbours had complained to the police the attending officers expressed sympathy but would only suggest that the complainants prosecute themselves.

This was done and the only evidence was that of the complainants, no experts were used or needed.

3. Regina ex rel Dungey v. Sheridan; Regina ex rel Dungey v. North Canadian Enterprises Limited (Algoma District Court) No. 1, 1972, CELN, Volume I, iv, 1.; 10 C.C.C. (2d) 545.

This was a successful appeal by a private citizen of the dismissal of informations sworn by him that the two above accused each did "unlawfully

discharge or cause or permit the discharge or deposit of material in Silver Creek and in Lake Superior which may impair the quality of the said lake and said creek, contrary to the Ontario Water Resources Commission Act (now the Ontario Water Resources Act). RSO, Chapter 332.

Facts as found by the Provincial Court judge were inter alia, that "on or about August 30, 1971 a private citizen of Sault Ste. Marie, one Clarence Dungey, took his family on an outing to one of their favorite beaches on Lake Superior and on their arrival Mr. Dungey detected what he thought was someone polluting the water. As a result, Mr. Dungey, whom I am satisfied was genuinely concerned, took samples of the water to the Local Office of the Ontario Water Resources Commission, situated at Sault Ste. Marie (now the Ministry of Environment). Mr. Dungey was advised that the samples he had taken (in coffee cups) would not do and was given the necessary equipment and was given instructions by members of the Ontario Water Resources Commission... and armed with the equipment he went with a witness and took the samples exactly as he had been instructed to do and returned the samples to the OWRC. Subsequently, as a result of these samples being tested, Mr. Dungey, as a private complainant or informant, laid the information... I am satisfied that Mr. Dungey acted throughout as a genuinely interested private citizen concerned about our natural resources and for that I congratulate Mr. Dungey, citizen". The charges were dismissed by the Provincial Court judge on the basis that there was not sufficient evidence to show that the two accused controlled the company from which the pollution emanated. On an appeal by way of trial de

novo before his Honour Judge I.A. Vannini, the acquittal was reversed and a conviction entered and the individual accused was fined \$1000 and his company \$1.00, since his Honour held the accused Sheridan had been the agent of the company and had borne the brunt of the prosecution.

In this case the Crown Attorney's office in Sault Ste. Marie, in consultation with the staff of the Ministry of the Environment, conducted the prosecution in both the provincial and district court trials. That fact illustrates that the very laying of an information may in some cases be sufficient to force government officials to prosecute where a private individual may not have the resources to engage lawyers in private practice to do so. However, unless willing cooperation is offered, it is our advice that a private information be prosecuted by lawyers privately retained and not by lawyers of the Attorney General's or other government departments as they may show more than reluctance for doing the necessary preparation in the matter.

During this case Judge Vannini made a number of interesting rulings: He observed that there was an important deterrant element necessary to take into account in sentencing for environmental offences. "The fight against...pollution is not confined to this province. It is national and international as well. It is probably one of mankind's greatest enemies and man has declared war against it by such a prohibitory and regulatory statute as the Ontario Water Resources Commission Act.

Because of this the deterrant aspect must be taken into consideration in determining an appropriate penalty to impose on one who offends against

a prohibitory provision of that act, not only to deter the particular offender but from committing his offence against man again, but to deter others as well...

Because the protection of society in the deterrant aspect far outweighs any other consideration and because the defence of the defendant was one of negligent omission rather than one of deliberate commission, and having regard also to whatever efforts he through his company may have made to find a solution and to the defendant's concern about pollution and his own determination to combat it, I order the defendant to pay a fine of \$1,000 (in addition to the costs)".

As to the costs the judge said, "It is only fair and just that such costs should be paid by the one who offends the public by committing a breach of prohibitory provision of the Act in question".

Judge Vannini also held that there is no onus on the prosecution to prove or to show that the quality of water above the pollution source in question (or prior to the source being added) was unimpaired.

4. Regina ex rel Caswell v. Cherokee Disposals and Construction Limited. (Ontario Provincial Court - Criminal Division) (District of Algoma, May 30, 1973) CELN Vo. II No. 6, page 158; [1973] 3 O.R. 599.

(Ontario Reports ...)

In this case the accused company was charged that it did unlawfully discharge or cause to be discharged or permitted to be discharged a deposit of material, namely garbage and waste materials, into a creek

and river in the City of Sault Ste. Marie... or on the shore or bank thereof, as ~~may~~ impair the quality of the water of said creek and river contrary to Section 32(1) of the Ontario Water Resources Act.

In this case the complaint was laid by the owner of a block of land adjoining the property which was being used for dumping garbage. The two streams ran through his property to the adjoining property. The complainant had been the owner of his land since 1933. He advised the court that until approximately two and one-half or three years ago the water in both the creek and the river was fresh, clear and suitable for all purposes. He testified particularly that it was perfectly fit for human consumption, for swimming and for fishing.

He indicated in his evidence that when the garbage disposal operation being carried on by the accused reached a point in its development that resulted in garbage, filth, and other refuse being dumped in certain springs and land close to the water's edge, the quality of the water deteriorated noticeably, making^{it} unfit for human consumption and in his opinion unfit for fish and wildlife.

He and other witnesses testified that brownish liquid or slime oozed out of the ground at several spots along the edge of the base of the bank; that this brownish liquid then flowed into the stream, causing serious discolouration thereto and causing a thick brown sludge to form and rest on the bottom. A malodorous smell of garbage was noticeable all along the length of the creek.

Among other defences it was argued that the evidence of the complainant and other witnesses should not be accepted as not only were they not experts, but they also had a financial interest in obtaining a conviction.

The court readily accepted the veracity of the witness' testimony.

"Per Greco, Provincial Court Judge: "I realize that these witnesses do not fall into the category known to the law as expert witnesses. I explain my willingness to allow them to express opinions in the following manner: (a) the opinions expressed were expressed by people who struck me as having at least ordinary intelligence--if not more than ordinary intelligence; (b) any opinion that was expressed by any witness was an opinion arrived at from facts known to the witness from his personal knowledge gained by the attendance at the location where the infraction of the law is said to have occurred; and (c) the subject upon which the opinion was expressed is one the manifestations of which are so familiar to almost every man because of our experiences with the subject within our present day social environment.

"What I really said is that today most people of ordinary intelligence can look at a stream or other body of water and upon seeing garbage in it, and upon seeing a brown, slimy looking substance flowing into it, form an opinion as to whether or not the quality of the water might or may be adversely affected. I personally do not think that it takes an "expert" to tell one that. As to whether or not the quality of the water is actually affected, the same reasoning may not be appropriate, and the same conclusion may not be necessarily reached. Here, however, the statute uses the word "may" not the word "does" or the word "is", and

consequently, whether the substance introduced into the water actually does affect the quality thereof is not the gravamen of the offence, and therefore, failure to prove that the quality is actually affected is not fatal to the Crown's case". In this case the judge proceeded to register a conviction against the accused and the fine imposed was \$300 plus \$200 costs.

Advantages of Private Prosecutions Over Civil Actions:

1. Expense: in the Criminal Courts, if your complaint is dismissed, usually no costs will be awarded against you. Even if the judge awards the accused costs which he must pay, these will not exceed usually \$100 and usually will be only \$5 or \$10. Although as in the Cherokee case the judge sometimes purport to award costs in the Provincial Court of more than \$100, actually such awards are illegal in the sense that there is a strict tariff of costs delineated in the Criminal Code. For example, that tariff is so strict that a \$10 counsel fee is the maximum that may be awarded. The only costs of significance are witness fees at \$4/day and 10¢/mile for mileage.

Of course, should the case proceed to the County or Supreme Court, it is probably the case that these courts can award costs on a civil court scale. However, it is not usually done and usually even in these courts the amount that may be taxed or awarded by the courts is set at a very much lower level than a civil court cost scale, (e.g., Sheridan, where costs of \$300 were imposed).

2. Time: From the laying of the information to the first court appearance is usually a matter of no more than two weeks. The trial date is then set, which may be as soon as two weeks from that time. In other words, from the first charges to the trial may be no more than one month to six weeks. No discoveries are possible in a summary conviction matter and even when there are motions, the trial usually takes place far sooner than could be contemplated in civil courts.

3. Standing: As both lawyers and many members of the public are aware, the civil court system prevents its use by members of the public not specifically affected by a particular problem. That is, everyone may be dying of lead poisoning, but if no one person is being affected more than anyone else (or has no property that is being harmed), then he has no status to sue in the civil court system. However, such is not the case in criminal courts. There is no need to prove injury beyond that of your neighbours, or indeed to prove any personal interest in the outcome of the case. The criminal courts are set up to protect the public interest rather than private interests. Therefore, any person who has "reasonable and probable grounds" to believe that another person is breaching a statute, regulation or by-law has a right to lay charges and have that person prosecuted.

Where there are government officials such as Crown Attorneys, police officers, by-law enforcement officers, or legal services of such ministries as the Ministry of the Environment, they will, almost without exception, not prosecute except cases laid by their own

Citizens who cannot get action from such officials can lay charges themselves, and hire their own lawyer to do so on their behalf. Subject to the intervention of a Crown Attorney on behalf of the Attorney General, a private citizen can carry a prosecution for any offence through all its stages - even a murder charge. Of course, under the Crown Attorneys Act, the Crown Attorney has the unfettered right to take over any prosecution and conduct it. The Crown Attorney can, if instructed by the provincial Attorney General, step into a private prosecution and order it stopped through a nolle prosequi. However, once one gets the information laid and a summons issued and the matter into court, it is not often that the Attorney General's office will intervene in a summary convictions matter.

4. Prohibition orders: It is possible, under some specific statutes, to get a criminal court to make an order in the nature of an injunction prohibiting the offending conduct in the future. Breach of the order of the provincial court judge would constitute contempt of court. Such orders are possible, for example, under the Federal Fisheries Act.

5. Fines: Under the Federal Fisheries Act and the Migratory Birds Convention Act, the private prosecutor is entitled to one-half of the fine recovered. Such is normally not the case under prosecutions for statutory offences. The normal rule is that fines recovered go to the Province of Ontario by virtue of the Fines and Forfeitures Act.

Disadvantages of Private Prosecutions

As stated above, normally a criminal court cannot issue an order in the nature of an injunction, but can merely fine the offender. However, there is the Ontario Probation Act, which allows a judge to make any type of order reasonable in the circumstances which could serve in the nature of an injunction order. However, the breach of that probation order is punishable only by a \$50 fine. Possibilities of a criminal court judge acting pursuant to the Criminal Code making an order of probation under the powers given by the Criminal Code, which are punishable by a higher fine, should be investigated.

Another disadvantage is that usually there is a six-month time limit for the laying of charges. That is, one must have evidence that is relevant to the matter obtained within the six months preceding the date of the information. Evidence obtained prior to the six month period will be of no use whatsoever, except on the legal doctrines of similar fact evidence or as to sentence. Under some statutes, the six-month time limit (imposed by virtue of the Summary Convictions Act which incorporates ^{the} Criminal Code procedure) is longer. For example, under the Federal Fisheries Act and the Ontario Water Resources Act, the time limit for laying informations is two years and one year respectively. With the exception of the statutes mentioned earlier, the Migratory Birds Convention Act and the Federal Fisheries Act, any fine obtained goes to the province and not to the complainant.

Two broad exceptions to the rule that in the criminal courts one cannot obtain an injunction for breach of a statute are those provided by the Ontario Municipal Act and the Planning Act. Under those Acts, ratepayers and municipalities may maintain an action for an injunction for the breach of any by-law enacted pursuant to such acts.

Some of the Major Statutes Providing Environmental Remedies

Air Pollution:

E.P.A., Section 14, and Revised Regulations of Ontario, Regulation No. 15 (maximum fine, \$5000 for first offence and \$10,000 per day for subsequent offences); Public Health Act [see Environment on Trial, pp. 99-101], Municipal anti-nuisance by-laws.

Noise:

E.P.A., Section 14 (recent private prosecution reported April, 1974 issue of CELN, Regina ex rel Johnson vs. Lieberman), Municipal by-laws.

Water:

Ontario Water Resources Act, Sections 31-36; Federal Fisheries Act.

Litter:

E.P.A.; Highway Traffic Act; Municipal by-laws.

Criminal Code:

There are several sections in the Criminal Code which have the potential of being used in environmental situations; for example, those dealing

with causing a disturbance, common nuisance, and mischief.

Section 387 of the Criminal Code provides, for example, that a person commits mischief who wilfully (a) destroys or damages property, (b) renders property dangerous, useless, inoperative or ineffective, or (c) obstructs, interrupts, or interferes with the lawful use, enjoyment or operation of property, or (d) obstructs, interrupts or interferes with any person's lawful use, enjoyment or operation of property.

The Criminal Code sections covering the causing of a disturbance and common nuisance are set out in the noise chapter of Environment On Trial.

Remember that under the Criminal Code, as other statutes, one does not actually have to cause a disturbance, create a nuisance, or cause mischief in order to be punished. The mere attempt to commit an offense is illegal under Section 24 of the Code. Thus, a polluter does not have to contaminate an entire river system before he can be charged. Similarly the threat to commit an offense is in itself illegal.

Finally, there is Section 745 of the Criminal Code, which has a perhaps very interesting potential in environmental situations. It is as follows:

Any person who fears that another person will cause personal injury to him or his wife or child or will damage his property may lay an information before a justice.

If the Justice of the Peace or the court, after hearing both the informant and the accused, decides that the informant has reasonable grounds

for his fears, the accused can be ordered to enter into a recognizance to keep the peace for up to a year. A recognizance is not only a written promise to the court, but can be enlarged by the requirement of a bond or similar requirement to ensure that it will be complied with. This promise could have the effect of restraining the polluter from engaging in the detrimental activities during that year - the same effect as an injunction obtained in a civil case.

Finally, in Environment On Trial there are listed some 70 federal and provincial statutes, on pages 30-38, which provide environmental footholds for statutory proceedings.

The Overlap in Legislation

It is true that in many cases a specific problem will appear to be in the purview of several different levels of legislation and legislative authority.

For example, a Toronto battery smelter emitting lead fumes into an adjacent residential neighbourhood may be breaching laws of all three levels of government. Federally, it could be committing a common nuisance, an offence under the Criminal Code punishable by a jail term (at least for the individuals involved). At the same time it could be in breach of the federal Clean Air Act (except that at present there are no regulations making that Act effective).

Yet the federal Environment Department does not administer the Criminal

Code (the province does), and because the Clean Air Act is toothless, the federal government would disclaim responsibility.

Provincially, lead emissions would be covered by at least two pieces of legislation, the Environmental Protection Act and the Public Health Act. Are lead emissions into the natural environment exclusively a health or an air management matter? In Ontario the ministries responsible for enforcing these Acts (Ministry of Health and Ministry of the Environment) have taken great delight in trying to shift responsibility for the problem to each other, while people living near the plant are suffering harmful effects to their health.

Municipally, the City of Toronto, like most Ontario municipalities, has a nuisance by-law which would cover lead emissions; yet the City probably would not act, alleging that the situation is a health problem or an Environment Ministry responsibility. And the local Board of Health, at least in the year preceding the tenure of Anne Johnston as chairman, through its Medical Officer of Health, disclaimed responsibility for dealing with this problem, saying the provincial Ministry of Health and Ministry of the Environment have the responsibility for dealing with lead fumes.

The point of this discussion is that in any situation there may be three levels of government with theoretical responsibility, and further, within each of these three levels, several different agencies may be legally bound to be concerned with various aspects of the problem.

This proliferation and segmenting of responsibility is, of course, the greatest excuse possible for inaction by all levels of government and their agencies - each will claim it is for the other to do. Or alternatively, ^{if} one level of government starts to do something, another may say "It's not your jurisdiction".

Strategy dictates that the concerned citizen and his lawyer strive for action from all three levels of government and their agencies that may be responsible.

It should be pointed out that the general rule is that municipal laws which overlap provincial responsibilities will generally be valid as long as they provide for higher standards of environmental quality than the provincial Acts do. To the extent that they provide lower standards, they will be invalid.

(Reference: Township of Uxbridge vs. Timbers Brothers Sand & Gravel Ltd. [1973] 2 O.R. 107 (Ontario High Court)).

Similarly, the provinces and federal government have jurisdiction over many of the same areas of environmental concern. Here too, the general rule is that the provincial laws will be valid as long as they do not directly conflict with the federal ones. (Reference: Regina ex rel Rayner vs. Lake Ontario Cement and Triad Truckways Ltd., supra).

So, as counsel for a complainant in an environmental matter, one must be aware that this overlap is there, and be prepared to deal with it strategically. If one keeps meeting this problem, the only alternative

is to prosecute, perhaps using all three levels of legislation.

A Parting Word

Those who contemplate using the law to deal with environmental degradation should bear in mind that strategy and public relations are as important in solving a problem as winning a particular legal action. In fact, it may in some instances be advantageous to take legal action where there is a good possibility that it will be unsuccessful. A lost legal action may demonstrate grave deficiencies in the law supposedly "protecting" the environment, thus highlighting the need for immediate legislative action.

Citizens and their advocates should also realize that, in many cases, it may often be unnecessary to complete all stages of a legal action. Publicity and exposure resulting from litigation are pressure which both governments and industries find hard to cope with. Many times they would rather switch than fight. A number of different legal actions brought at the same time, forcing the opponent to fight on several different forums at once, is a technique that will often help create a more reasonable mood for change in those harming the environment.

As John McLaren, Dean of the University of Windsor Law School and a member of the National Executive Committee of the Canadian Environmental Law Association has written,

Litigation is not going to solve the total pollution problems of, for example, a large city or an extensive river system. It is, however, one instrument which can be used in the absence of effective solutions from more appropriate sources in situations where there is a clearly definable local pollution problem. Moreover, if enough environmental lawsuits are launched against a polluter and succeed, a beneficial psychological effect on polluters in general may accrue. A new spectre may be created, the possibility of being forced into a public forum and asked to explain their conduct and lack of concern for environmental values. Thus the stimulus for redemption may be broader than the cases in which compulsion is actually applied.

(Page 267 of Environment On Trial.)

The Limitations of the Ontario Legal System for Protecting the Environment:

Why We Must Have Some Basic Reforms

One cannot conclude a paper such as this without remarking that if we use the law successfully to obtain environmental improvement, we must recognize that without far-reaching reforms in present laws and the introduction of new laws, there is little to stop the problems beginning anew, or another nuisance or hazard interfering tomorrow with your neighbourhood, your park, or your health.

Once you have won your case you will recognize the vast number of obstacles and difficulties you had to overcome to succeed. These difficulties in applying the law work in favour of the polluter or those who would degrade the environment. Removing these obstacles through legal reform, not winning an individual case, is the only meaningful way the law will be used to prevent degradation of the environment in the long run.

The chapter in Environment On Trial headed "Environmental Bill of Rights" discusses the problems and the reforms needed to ensure that in future, we will have both sound environmental planning mechanisms and laws which properly allow the law to place citizens in a role where they can assert a meaningful right to a healthy and attractive environment.

We hope you will not only join with CELA in pressing for an environmental Bill of Rights but join CELA and give it your financial support and also add your name to our panel of lawyers.

A Membership Form and more information about CELA is contained in Environment on Trial on p. 406.