



Public Prosecution Service of Canada  
Service des poursuites pénales du Canada

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# Environmental Prosecutions in Canada - An Overview

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## Disclaimer:

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## Canadian Federal Environmental Offences

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Most frequently prosecuted:

- *Fisheries Act*
  - fishing offences; harm to fish habitat
  - deposit of deleterious substances into water frequented by fish
- *Canadian Environmental Protection Act (CEPA)*
  - regulates 100s of toxic substances
- *Migratory Birds Convention Act (MBCA)*
  - hunting offences, protects migratory bird habitat
- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (WAPPRIITA)*
  - import/export of species protected by the Convention on the International Trade in Endangered Species



## Canadian Federal Environmental Offences, cont'd.

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- *Canada National Parks Act (CNPA)*
  - offences in national parks, such as illegal camping, harming flora/fauna
- *Canada Shipping Act*
  - pollution from ships

Least prosecuted:

- *Species at Risk Act (SARA)* - harming threatened/endangered species and their habitat
- *Greenhouse Gas Pollution Pricing Act* - new in 2018
- *Canada Wildlife Act (CWA)* - similar to CNPA, but for national wildlife areas
- *Arctic Waters Pollution Prevention Act* - no prosecutions since mid 1990s



## Proving Environmental Offences in Canada

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- Prosecution must prove:
  - the accused committed the *actus reus* (bad act)
  - “beyond a reasonable doubt” (very high level of certainty)
- Do not need to prove the accused “intended” to commit the act
  - however, the more intentional, the more aggravating for sentencing





## Defences to Environmental Offences in Canada

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- Primary defence is “due diligence”
  - ie. the accused took “all reasonable care” to prevent the offence
  - must prove it on a “balance of probabilities” (more than 50%)
- Reasonable care depends on the circumstances, for eg.:
  - How foreseeable the incident was
  - Severity of potential harm
  - Degree of control held by accused
  - Professional industry standards & practices



## Sentencing for Environmental Offences in Canada

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- Sentences include:
  - Fines
  - Jail (relatively rare)
  - Additional economic penalties for cost savings/benefits related to the offence
  - Creative orders
- Creative orders can be used to:
  - Remediate harm, restore environment
  - Prevent future harm (eg. environmental audits)
  - Promote deterrence (eg. accused must publish article about offence)



## Sentencing Factors

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- Courts consider all aggravating & mitigating factors to determine appropriate sentence
- Primary factors are set out in case law (*R v Terroco*, 2005 Alberta Court of Appeal):
  - 1) Culpability of offender
  - 2) Damage or harm, or risk of such
    - Lack of harm is not mitigating
  - 3) Prior convictions for environmental offences
  - 4) Acceptance of responsibility/remorse
  - 5) Need to deter the accused and others (looks at wealth of offender)
    - Fine cannot be a “slap on the wrist”, or the “cost of doing business”





## Fines for Environmental Offences in Canada

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- Between 2010-2017, the Canadian government significantly increased maximum fines in environmental legislation
  - Old max fines: \$300 000 (lesser offence), \$1m (more serious)
- Also imposed mandatory minimum fines
- All fines are paid to the Environmental Damages Fund
  - \$ goes to environmental projects



## New Minimum and Maximum Fines in Acts

	Summary (lesser) Offence	Indictable Offence
<b>Individual</b>	\$5000 min, \$300 000 max	\$15 000 min, \$1m max
<b>Small Revenue Corp (&lt;\$5m annual rev)</b>	\$25 000 min, \$2m max	\$75 000 min, \$4m max
<b>Large Corp</b>	\$100 000 min, \$4m max	\$500 000 min, \$6m max

- Min/Max is per day, or per plant/animal
- Min/Max amounts double on a subsequent offence.



## Case Examples

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- Highest fine to date:
  - \$7.5m *Bloom Lake*, Fisheries Act for deleterious deposit
  - under old max fine
- So far, ~ 12 cases against large corporations under new fines
  - Canadian National Railway* \$2.5m, FA (90 litre diesel spill) & CEPA
  - Kirby Offshore Marine Operating* \$2.9m, FA (107k litre diesel in bay)
  - Husky Oil* \$2.7m, FA (90k litres), MBCA (old Act)
  - Acuity Holdings Inc.* \$600 000, CEPA (sale of cleaning product exceeded phosphorous regs)



## Sentence Notifications

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- Environment and Climate Change Canada (govt department) is responsible for investigating many of Canada's environmental offences
- They report sentences at:  
<https://www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications.html>



## Challenges in Prosecuting Environmental Offences in Canada

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- Finding appropriate expert witnesses (often scientific)
  - And getting judges to understand complicated science
- Proving that the accused was not duly diligent
  - What is “reasonable” care to avoid the offence
- Similarly, in proving an offence for failing to take all reasonable emergency or remedial measures
  - What were “reasonable” steps to take in the face of the emergency





## Challenges in Prosecuting Environmental Offences in Canada

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- Rare to prosecute directors of corporations, unless there is evidence they were personally involved in the offence
  - Most corporate offences are systemic, and no one person to point at
- Obtaining foreign evidence
- Proving a negative (eg. offence for failing to keep records)



## Challenges in Prosecuting Environmental Offences in Canada

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- Dealing with large volumes of electronic records that are seized
- For sentencing – determining cost savings/benefit related to the offence
- Implementing the precautionary principle
  - Several environmental laws explicitly include the precautionary principle, but it does not fit with the legal burden of proof of “beyond a reasonable doubt”