



11 Use the Legal System

There are a variety of ways to use the law and the courts and the legal system in general. The following section is not intended to be legal advice, but merely some considerations and information you might find useful. For legal advice contact a bona fide lawyer.

Pros and Cons of Litigation

The decision to take legal action needs to be very carefully thought out and taken on only as part of a larger strategy. Legal battles are costly and require a high degree of commitment over a significant period of time. Sadly, laws and regulations in Canada regarding intensive livestock operations are relatively weak, so you must assess the consequences of losing, as well as the benefits of winning your case. Do not decide to take legal action based on the feeling or belief that what the ILO is doing is wrong, you are right, and therefore you should win. Have a full and frank discussion with your legal counsel to assess whether your case is winnable. If your group decides that going to court does make sense, be sure you are well-informed and able to commit the necessary time, money and energy required for the duration of the court battle.

Pros

- Can create precedent that will prevent future ILOs from getting away with the offence
- Can stop or delay development while legal issues remain unresolved
- Can show the ILO corporation you are serious
- Can expose the ILO to increased public scrutiny as your case gains access to evidence

Cons

- Can create a damaging precedent if you lose, making it harder for other communities to defend themselves against the offence in question
- Can be very costly and use up resources (financial and personal) that could have been used in other ways
- Can heighten conflict, making it more difficult to repair relationships in the community later on

You may have to pay court costs to the other side if you lose. Costs are a reimbursement for the expense of bringing or defending an action in Court. The Court may award costs as part of the settlement of a legal action. Normally, the losing party must pay costs to the winning party.

Hiring a Lawyer

A major consideration in deciding whether to pursue a legal action is finding the right lawyer and paying for his/her services. You will have to pay the lawyer's fees (charges for work done by the lawyer) as well as disbursements (things the lawyer paid for on your behalf in order to pursue the case). The lawyer may charge an hourly rate (expect to pay from \$200 to \$400/hour), a flat fee, or he/she may work on contingency (a percentage of the settlement, payable only if you win).

To find a lawyer contact your province's Private Bar, and any public interest organizations or environmental law groups that operate in your province (See the *Provincial Resources* section for your province for a list of public interest law groups). Some private firms will do "*pro bono*" work (that is, free of charge to you) as a form of public service.

When working with a lawyer it is important to be very explicit and focused in your communications. The group needs to have a clear decision-making process in order to instruct the lawyer effectively. A mutually respectful relationship that recognizes the expertise and interests of the lawyer and the client will be a major asset in any legal action.

Nuisance suits and "Right to Farm" legislation

Each province in Canada has passed some kind of "Right to Farm" legislation since 1996. These laws are apparently meant to protect farms and farmers from nuisance suits due to incompatibility with newer non-farm activities such as acreages and urban recreational uses. However, they are used to shield ILOs from liability for nuisance as well.

ILOs are protected from nuisance suits if they use "normally accepted agricultural practices". In some provinces, having their activities so defined is all the ILO needs in order to avoid liability for nuisance. In Manitoba and Ontario, an ILO operator that does not meet the requirements of other relevant laws, such as municipal bylaws and environmental statutes, could be found to be operating outside of accepted practices, and thus open to liability for nuisance.

In every province, it is up to the neighbour making the complaint to prove that the ILO is not following normally accepted agricultural practices. The procedure for determining whether an ILO meets the criteria of the right to farm legislation varies from province to province. Some provide for a mediation process, others have a quasi-judicial administrative process.

Strict liability

Rylands v. Fletcher is the oft-cited precedent under Common Law for certain types of liability cases. In order for it to be relevant a physical invasion of land (such as a spill) resulting from the defendant's actions (or failure to act) is required, it must have caused damage, and the plaintiff must own (or have an ownership interest in) the property in question. Rylands v. Fletcher will not apply if the court deems the use of the land in question is overly sensitive.



Conflict of Interest

Public officials are required to disclose any conflict of interest they might have, and to remove themselves from debate and voting on any matters where conflict exists. Conflict of interest is usually defined as the individual or a member of his/her immediate family having a personal pecuniary (money) interest in the outcome of a decision they are involved in making. If you suspect that an elected representative, government appointee or civil servant who is involved in decision-making on an ILO proposal may be in conflict of interest, check the policy, rules or regulations pertaining to that person's position or office. If conflict of interest is found to exist, the decisions in question may be over-turned by the courts.

Fisheries Act

Under the Fisheries Act and the Criminal Code of Canada, a private party can bring criminal charges against another individual or company if they have reasonable and probable grounds to believe that the person or company is harming and destroying fish habitat, or is depositing deleterious substances in waters frequented by fish.

SLAPP Suits

A "Strategic Lawsuit Against Public Participation", or SLAPP suit, is a lawsuit filed against an individual who is fighting a corporation or speaking out against a business. They are an attempt by a company to silence people who are critical of that company's operations or who are trying to hold the corporation accountable for some wrongdoing. The Sierra Legal Defense Fund identifies the following characteristics of a SLAPP suit:

- The plaintiff is usually a mid to large-sized company.
- The suit claims enormous damages and generally seeks an injunction.
- The defendant has been speaking out with some success in an attempt to influence government policy or public perception, and the issue is one of public interest or concern.

SLAPP suits can be very effective—many individuals fear the threat of a lawsuit and will not speak up against a company, even if the company is violating the law. One of the most famous SLAPP suits in recent times was the Cattlemen's Association lawsuit against Oprah Winfrey over her statements about beef. (Ms. Winfrey won.) Your best protection against SLAPP suits is to be careful to always get the facts before you issue a statement. In addition, stay away from personal attacks and media sound bites that include statements you can't support. Finally, realize that SLAPP suits are meant to keep you quiet—those who file such a suit don't do it for the purpose of winning in court, they do it with the hope that the strain and expense of defending against it will deter you from speaking. If you have to contend with a SLAPP suit, there is help available. For extensive information on what to do, read the *Survival Guide for SLAPP Victims* at: www.casp.net/survival.html



Legal Tools for Citizens' Groups

The following section outlines various legal tools that are available to you.

(Note: The following information is summarized from the Sierra Legal Defence Fund's "Legal Toolkit" Options, Strategies and Tactics for Environmental Groups).

Civil Proceedings

A civil proceeding is a suit brought by a plaintiff against a defendant in any number of areas including nuisance, negligence and trespass. It is usually based upon an "action" (statement of claim) or an "application" (notice of application). The plaintiff (you) must prove all elements of the claim, including personal loss or injury, interference with property rights or some other special damage. Depending on the claim, it can proceed on oral evidence or affidavit (sworn statement) evidence. Watch out for limitation periods, which are like expiry dates for your lawsuit.

Applications for Judicial Review

An application for judicial review is a court challenge by an applicant against a respondent to actions or decisions taken by government officials. This is most always done by affidavit. There are two broad grounds of judicial review: illegality of decision (outside of jurisdiction, abuse of discretion) and unfairness of procedure (failure to follow steps, notice, etc...)

The only evidence a court will consider must be part of the "record" and includes evidence considered by the decision maker before the decision was made. This means that you have to get the evidence in before the decision is made so that it can legitimately be before the court.

Class Actions

Quebec, BC, Ontario, Saskatchewan, Manitoba, and Newfoundland and Labrador currently have class action legislation. A class action is a civil proceeding brought by a group or class of plaintiffs against one or more defendants. Check your province's legislation for details (see the *Provincial Resources* section). Generally all class members are automatically part of a class action unless they choose to opt out, and no costs are to be awarded in a class action unless there has been misconduct by one of the parties or it would be unjust to deprive the successful party of costs.

Interventions

A group or individual who feels they may provide some meaningful contribution to a case may become an intervenor in a court case brought by someone else, with the court's permission. The applicant must have an interest in the outcome of the proceedings, and must be in a position to make a useful contribution or offer a different perspective from that of the parties.



Injunctions

An injunction is an order of the court prohibiting a party from doing something or forcing them to undo something. An injunction is *not* available against the Crown, but an interim or interlocutory injunction is available against Crown agents, including a minister. An injunction is also available where the Crown or agent is acting unconstitutionally. Beware that an applicant for an interlocutory injunction may be required to provide an undertaking (i.e. agree to pay the costs of the injunction to the defendant if you lose).

Declarations

A declaration is a statement by the court clarifying legal status or rights. Although it is not possible to get an injunction against the Crown, it is possible to get declaratory relief.

Evidence

Rules of evidence govern what evidence is admissible, and how facts are proved. Rules vary depending on the type of legal action. When gathering and presenting evidence you have to be clear on what facts you need to prove and how you will you prove those facts.

Standing

Standing is the legal right to initiate a lawsuit. There is a 3-step test to determine who can get Public Interest standing:

1. Is there a serious issue to be tried?
2. Is the person applying for standing directly affected by the issues or does s/he have a genuine interest in them?
3. Is there any other reasonable way for the issue to get to court?

Mediation

Mediation is a private and consensual decision-making process in which an impartial person (the mediator) assists people in conflict to resolve their problems. Depending on the province, mediation may or may not be mandatory.

Prosecutions: Crown and Private Prosecutions

When you become aware that an offence has been committed you may either tell the Crown and let them decide whether to prosecute, or, prosecute the offender(s) yourself. A private prosecution is a legal action brought in criminal court by an individual (as opposed to a government official).

To conduct a private prosecution you must observe an offence, speak to other witnesses and gather evidence (who, what, when, where), and swear an information before a Justice of the Peace. You must believe on reasonable grounds that the accused has committed the offence.

Every individual in Canada has the right to swear an information to commence a prosecution. The Attorney General may step in and stay (stop) your prosecution. For more information about private prosecutions, see *Enforcing Environmental Law: A Guide to Private Prosecution* by James S. Mallet, (Edmonton: Environmental Law Centre, 2004).

Advantages of private prosecutions are that there is no need for standing, no waiting for government action and you could possibly be entitled to portion of monetary penalty. However the Attorney General may intervene to withdraw or stay charges and expert evidence may be difficult to obtain.

When the Attorney General prosecutes, his/her office has access to expert investigators, proof of intent is not required in regard to public welfare offences and there is usually public and media interest in these cases. However public prosecutions require proof beyond a reasonable doubt of the offence, evidence of lack of due diligence, and there is no right to discover the other side's case.

“Soft Law”

“Soft Law” can be used with, or as an alternative to, going to court. Here are some examples:

Freedom of Information

Freedom of Information legislation is a tool for gaining access to government documents that applies at all three levels of government. See the *Provincial Resources* section for a website link to your province's access to information process. Federally, see the Access to Information Act and the Department of Justice webpage on accessing information at:

canada.justice.gc.ca/en/ps/atip/index.html

To apply, write a letter or fill out the appropriate form and submit it to the government organization that has the information you seek. Check to see if an application fee is required. Avoid being too broad or vague. Direct the government to the specific type of documents you seek. The FOI Coordinator has 30 days to respond to you. If you don't hear back within 30 days, your request is deemed to be refused. The FOI Coordinator can apply for an extension if she provides written notice and reasons for the extension. If the FOI Coordinator can respond to the request, she will send a Fee Estimate and deposit requirements (50% of the Fee). Fees may be waived in certain circumstances, such as financial hardship or if the information will benefit public health and safety. If you apply for the fee waiver you need evidence to support your claims.

If the Coordinator refuses your request, s/he must provide written reasons. Certain documents such as Cabinet records, documents dealing with law enforcement or national security, and documents covered by solicitor-client privilege are exempt from FOI legislation and will not be released.

You may wish to appeal the decision. Provinces each have their own rules regarding appeals of the FOI office's decision. Generally, there is a time limit for requesting a review of the decision. You will be entitled to make representations to the responsible official. The official will report to the head of the relevant government body, who will decide upon further action, if any. If you are not satisfied with the investigation and review decision, you have a certain number of days to decide whether to appeal to the Court of Queen's Bench.

Canadian Environmental Assessment Act (CEAA)

CEAA applies when a physical work or physical activity is proposed and the federal government is implicated somehow. For example, the proponent may be a federal body or the project may require a federal permit, be federally funded or on federal land. CEAA requires that the federal government conduct the assessment. There are three types of assessments: Screenings (98.5% of EAs), Comprehensive studies (1.4%), and Panel reviews (0.1%). Public participation in comprehensive studies and panel reviews is mandatory while public participation in screenings is discretionary. Keep up to date by checking the Canadian Environmental Assessment Registry at: www.ceaa.gc.ca/050/index_e.cfm

Law Reform

Law reform is the attempt to convince governments to change the law. You can get involved in law reform by providing input into the legislative process (for example, submit a written brief or give oral testimony to a legislative committee); by responding to public participation processes; by proposing a new law under the federal *Auditor General Act*.

Petitions

Prepare a petition under the federal *Auditor General Act* (Commissioner of the Environment and Sustainable Development) and ask for an investigation by a particular ministry. Write:

Office of the Auditor General of Canada
Commissioner of the Environment and Sustainable Development
Attention: Petitions
240 Sparks Street
Ottawa, Ontario
K1A 0G6 Canada

613-995-3708 or 1-888-761-5953 (toll free)

Fax: 613-941-8286

http://www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/menu7_e.html

Investigation

Ask for a formal investigation by the federal Minister of Environment under section 17 of the *Canadian Environmental Protection Act*.

(Note that the investigation must be limited to CEPA offences.)



International Law

The Commission for Environmental Cooperation was established by Canada, Mexico and the US under the *North American Agreement on Environmental Cooperation* (a side agreement to NAFTA). The CEC's mandate is to foster cooperation on environment issues and to oversee enforcement of environmental laws by NAFTA parties.

The Secretariat is an independent body under the CEC. NAAEC Article 14 allows citizens to make written submissions to the CEC regarding the lack of enforcement of a domestic environmental law.

