

PROSECUTIONS

Purpose: The purpose of this procedure is to ensure that, in respect of a prosecution for an offence under the *Private Managed Forest Land Act* and its regulations, the council, its staff and agents conduct themselves in a manner that is fair, professional, and legally defensible.

Introduction: Prosecution is reserved for the very severe instances where it is in the public interest to punish someone for something they have done either knowing fully that it was a prohibited activity, or in reckless negligence.

Recommending prosecution for a contravention is a serious decision. Not only does the contravention have to be serious enough to be in the public's interest to initiate a prosecution, but the standard of proof required to secure a conviction is much higher than that necessary for an administrative determination. The crown counsel who is dealing with the case puts the investigation report through a stringent test before charges are approved.

With respect to investigations, a potential prosecution requires the investigator to

- exhibit a higher degree of investigative diligence, particularly with respect to photography and continuity of evidence,
- be aware of issues respecting the Charter of Rights and Freedoms, and
- personally attend the court to give testimony and be cross-examined.

For these reasons, an investigation leading to a recommendation to prosecute is conducted to standards well above those necessary for an administrative determination, and puts it beyond the skills of a normal resource professional. Therefore, the following specific procedures are to be followed.

Procedure: **1. Identifying a serious contravention**

If, during an audit, inspection or investigation, an agent of the council discovers a contravention that he or she believes has such an impact that it should be dealt with by way of prosecution, the agent informs the executive director as soon as practicable.

When an incident of non-compliance is severe enough to consider prosecution of an owner, investigative techniques are conducted to a much higher standard that supports a prosecution. The auditor/inspector/investigator discovering the incident should collect any evidence that is likely to disappear, but further investigation should be left to the professional investigator assigned.

2. Investigations to support a prosecution

Once notified of a serious incident, the executive director must

- confirm that the contravention is in fact an offence, and
- apply the prosecution test (Appendix 1) to determine if a prosecution is appropriate.

If the executive director determines that prosecution is appropriate, a special investigator should be retained to lead the investigation. The special investigator, who is familiar with intensive investigations, advises the executive director of the specific resource experts required to assist in the investigation. The executive director will retain the required resource professionals who will take their overall terms of reference from the executive director and day to day direction from the special investigator.

The investigation must be done to the standard necessary to support a prosecution. The special investigator must ensure that there is adequate proof to support each element of the offence and is accountable for addressing any evidentiary and Charter issues.

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3. Evaluation process leading to a report to crown counsel

The evaluation process leading up to a decision of whether the council forwards a report to crown counsel addresses two important operational questions:

- Does the information and evidence gathered to date meet the prosecution test? and
- Can the council support the investigation to the extent necessary to provide crown counsel with all the information and evidence necessary to make an informed charge approval decision?

The council/executive director may seek guidance and input from crown counsel at their discretion prior to, during or after the prosecution test process, with respect to questions of evidence, jurisdiction, process, Criminal Justice Branch policy on prosecutions, or any other matter that may require clarification or guidance.

4. Prosecution test process

The decision as to whether a particular case meets the prosecution test is based solely on the fact pattern of that case. The decision to prosecute is based on the investigation report and the recommendations of the lead investigator and the executive director. However, the decision to forward a report to crown counsel rests with the council.

The prosecution test should be applied as soon as possible in the investigation. Re-evaluation of the test should take place whenever significant information or evidence is uncovered that could alter the original decision whether to initiate a report to crown counsel.

5. Who to charge

Where the prosecution test indicates that a report to crown counsel should be initiated, care is taken to ensure that the appropriate person is charged. In order to determine the person responsible, the lead investigator investigates all parties involved, to determine:

- the degree to which each party's actions contributed to the wrongdoing;
- the degree of control each party had over the wrongful action;
- the economic benefit each party could have realized from the wrongdoing;
- the degree of willfulness on the part of each involved party; and
- the degree of due diligence shown by each party to the wrongdoing.

6. Limitation period

The time limit for laying information respecting an offence under the legislation is two years beginning on the date on which the facts that lead to the report to crown counsel being initiated occurred first came to the knowledge of a member, employee, contractor or agent of the council. Despite this two year limitation period, all investigations and reports to crown counsel are to be completed as soon as possible, and forwarded to the Criminal Justice Branch in a timely manner.

7. Preparing the report to crown counsel

The executive director may prepare a report or direct the special investigator to prepare a report. All completed reports to crown counsel are critically analyzed, reviewed and approved by council. If the council decides that recommending prosecution is appropriate, it forwards the report to crown counsel at the Criminal Justice Branch.

8. Approving the report to crown counsel

Crown counsel will consider the report to crown counsel and decide whether or not a prosecution is appropriate. If the prosecution is to proceed, the crown counsel prepares the

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charges and has the special investigator swear the charges. If the prosecution is not to proceed, crown counsel will advise council of his or her decision and may provide reasons.

If, at any time during the process, either the special investigator or the council becomes aware of information that may affect the crown counsel's decision, they immediately contact crown counsel to discuss the issue. However, once the report to crown counsel has been submitted, conduct of the case is at the sole discretion of crown counsel.

9. Actions on approval of charges

If charges are approved, the special investigator will initiate the prosecution process by swearing the charges before a Justice of the Peace. The charges are delivered on the person who is being charged by a law enforcement officer or a process server.

The special investigator may be called on to assist crown counsel in the preparation of the case. The executive director may be responsible for ensuring that all information with respect to the case is forwarded to crown counsel. The executive director has no discretion to withhold any information.

The special investigator may be called to testify as a witness and to introduce evidence relevant to the case. The special investigator may also be called to address any continuity of evidence issues. Any resource professionals providing expert witness opinions may also be called upon to testify.

10. Action on conviction

If the Court convicts a person, the council may be canvassed as to the penalties and Court orders that may be appropriate. The decision as to which penalties and orders are imposed rests solely with the presiding judge.

Date: Jan 19, 2010

Approved: Original signed
Trevor Swan, Chair

Prosecution Test

Charges are recommended where:

- the investigator has reasonable and probable grounds to believe that an offence has occurred against provincial forestry legislation or the Criminal Code (Canada);

and one or more of the following five conditions are met:

- administrative remedies alone, or other attempts to gain compliance have not been effective in the past; or
- the offence was a consequence of gross negligence; or
- the offence arose from a reckless disregard for the law; or
- the offence has serious impact on, has damaged, or has potential to damage the environment, or has endangered the property or safety of innocent parties; or
- there was intent to commit an offence.

and all of the following five conditions are met:

- there is likelihood of conviction; and
- the evidence shows the offence occurred; and
- the evidence shows the participation of each of the parties involved; and
- the standard of care taken by the person was below what could be reasonably considered duly diligent, and
- it is in the public interest to proceed with a prosecution.