

TRESPASSES IN NOVA SCOTIA **HUNTER/FISHER/LANDOWNER**

a. TRESPASS

i. Definition

- (1) In common law, "trespass" is defined as a wrongful act done in the disturbance of the possession of property of another or against the person of another against his will. See Halsbury's Laws of England

ii. What constitutes trespass on land?

- (1) There must be an unlawful entry by one person on land in possession of another. No actual damage has to occur to the land to commit a trespass

b. ISSUE

- i. What is the legal position of a hunters/fishers entering privately owned land for the purposes of hunting/fishing in Nova Scotia?
 - (1) First of all it has to be determine whether a hunter/fisher is given special access rights either at common law or by statute to enter upon privately owned land? When purchasing a hunting/fishing license issued under the Wildlife Act/Angling Act and walking onto a parcel of land with a gun/fishing rod in hand, is the person exempt from any action in trespass?

c. ANGLING ACT

i. General

- (1) The Angling Act, R.S.N.S. 1967, c. 9, (<http://www.gov.ns.ca/legi/legc/index.htm>) gives a restricted right of access to anglers to enter upon privately owned land. Section 3 of that Act states:

“Section 3 (1) Any resident of the Province shall have the right to go on foot along the banks of any river, stream or lake upon and across any uncultivated lands and Crown lands for the purpose of lawfully fishing with rod and line in such rivers, streams or lakes.”

ii. Right to Go Upon Water

- (1) “Section 3 (2) Any resident of the Province shall have the right to go on, upon or across any river, stream or lake in boat or canoe or otherwise, for the purpose of lawfully fishing with rod and line in such rivers, streams or lakes.”

iii. Actual Damage

- (1) “Section 3 (3) The rights conferred by this Section shall not in any way limit or restrict the right of any owner or occupant to compensation for actual damages caused by any person going upon or across such lands for the purpose aforesaid, and shall not be construed to give the right to build any fires upon such lands. R.S., c. 9, s. 2.”
- (a) Note the access right is restricted to uncultivated lands.

d. COURT INTERPRETATION

- i. Here are two cases which present conflicting views on trespass.

- (1) In the Manitoba case, R v Prince and Myron, [1963] 1 C.C.C. 129, the Manitoba Court of Appeal had to interpret Section 76 of the Game and Fisheries Act, R.S.M. 1954, c. 94, which stated that no person shall hunt the issue if the land had not been posted. The court held that hunters did have a right to enter upon another person's land to hunt provided the land had not been posted. Chief Justice Miller stated at page 132 of the decision:

I am satisfied that unless notices are posted on the land pursuant to S. 76(2) a person has access thereto for shooting purposes. The fact that the common law rights as to trespass are preserved does not make any difference to the right of access above mentioned.

- (2) Other courts have taken a less favourable view. The Supreme Court of Canada in the case Myran et al v R. (1975, 58 D.L.R. (3d) 1 held that hunters because of their activity are not in any better position than other trespassers. Mr. Justice Dickson commented that the carrying of a firearm did not immunize an act which would otherwise be a trespass. He went on to state that the posting of land and maintaining signs is a "tiresome and costly business". He stated that hunters enter private property with no greater rights than other trespassers, They have no right of access except with the owners permission and lacking permission are subject to both a civil action for trespass and prosecution under the Petty Trespasses Act, R.S.M. 1970, c. P 50.

e. NOVA SCOTIA WILDLIFE ACT

- i. There is no special legislation in the Wildlife Act like the Angling Act conferring similar trespass rights on hunters.

- ii. With regard to hunters, in Nova Scotia there appears to be no clear abrogation of traditional property rights by statute law so Mr. Justice Dickson's comments that hunters who enter upon private property without permission are subject to civil action in trespass appear to be the law in this Province. Whether hunters can be charged under the Protection of Property Act is another matter which will be discussed later.
- iii. Other statutes of Nova Scotia makes it perfectly clear that an occupier of land owes no duty of care towards any trespasser, whether a hunter or otherwise, except the duty not to create a danger with the deliberate intent of doing harm or damage to the trespasser. (See an Act Respecting the Liability of Occupiers of Land, S.N.S. 1977, c. 12.)
<http://www.gov.ns.ca/legi/legc/index.htm>

f. PROPERTY OWNER'S COMMON LAW RIGHTS

i. Who can sue?

- (1) The trespass must be voluntary. Trespass is an injury to a possessor's right. The proper plaintiff is the person who was in possession of the land at the time of the trespass. The plaintiff has to prove possession of the land. Failure to prove this point, the action will be dismissed. The burden of proof is on the plaintiff (that is, the person alleging there has been a trespass) to prove on the balance of probabilities that a trespass has taken place.

ii. What defences can be raised in a common law trespass action?

- (1) A defendant may prove a right of possession to the land at the time of the trespass.
- (2) The defendant may plea there was the leave or license of the plaintiff. This may arise through the express or tacit consent of the person in possession;
- (3) The defendant may be exercising a legal right under a statute . (ie: Section 96 (1) of the Wildlife Act,

<http://www.gov.ns.ca/legi/legc/index.htm> Conservation Officers have a statutory right to enter upon or pass over land when in the discharge of their duty, however, the officers shall be liable for any damage which they may cause in so doing, and similar legislation exist under Section 47 of the Crown Lands Act (<http://www.gov.ns.ca/legi/legc/index.htm>) for the Crown and it's Agents. The police have certain rights of entry while they are engaged in their duties;

- (4) The defendant can plea the action was an involuntary and inevitable accident happening without negligence.
- (5) The defendant may enter land to recover chattels which the possessor of the land has taken .
- (6) Necessity may also be a defence.
- (7) The defendant may be able to argue the action is statute barred.

iii. Remedies Available

- (1) Special Damages which the plaintiff has incurred.
- (2) General damages.
- (3) Exemplary or punitive damages
- (4) Injunctive relief.

g. Property Owner

- i. Any property owner in Nova Scotia has the option to commence a civil action in trespass for people, including hunters, who wrongfully enter upon other people's land. The property owners are required to hire their own lawyer who can then commence legal proceedings against the trespasser. If the plaintiffs are successful, they may be able to recover costs in bringing the action. This form of action is expensive and may take a great deal of time to be resolved by the courts.

h. STATUTE LAW

i. General

- (1) In most provinces there is a special statute respecting trespasses on privately owned land. Often referred to as the Petty Trespass Act, these statutes outline the offenses created by the Act and the items that must be proved before a conviction can be obtained. The Act defines who can bring the action, what defences are available and the penalties that can be incurred. The statutes, in many cases simplify the elements required at common law to successfully bring an action in trespass. In Nova Scotia it is known as the Protection of Property Act.

ii. CRIMINAL ACTION

- (1) Certain trespass are both actionable and criminal in nature. Part IX of the Criminal Code deals with offenses against the rights of property including theft of goods from land. Section 177 covers trespassing at night near a dwelling house.

iii. CROWN LAND ACT

- (1) Section 38 covers trespasses that may occur on Crown lands. Any fine would be subject to the provisions of the Summary Proceedings Act S.N.S. 1972, chapter 18.

iv. FIREARM AND BOW REGULATIONS

- (1) This regulation made pursuant to the Wildlife Act establish offenses under which a hunter may be charged for discharging a fire arm or bow near buildings.
- (2) Section 11 of the Firearms and Bow Regulations states:
 - (a) No person shall at any time hunt, take or kill or attempt to hunt take or kill wildlife or discharge a weapon within 804 metres of a school.
 - (b) No person shall at any time discharge a firearm loaded with a rifle cartridge, single ball or slug within 440 yards (402 metres) of a dwelling, playground, golf course, athletic field, woods operation, place of business or public building other than a school.
 - (c) No person shall at any time discharge a shotgun loaded with shot or bow within 200 yards (182 metres) of a dwelling, playground, golf course, athletic field, woods operation, place of business or public building other than a school. 90 O.I.C. 841.
 - (d) No person shall hunt, take or kill or attempt to hunt

take or kill wildlife that is within 200 yards (182 metres) of a dwelling, playground, golf course, athletic field, woods operation, place of business or public building other than a school.

- (e) Notwithstanding subsections (1), (2), (3) or (4), of Section 11 the owner or occupier of a dwelling or person authorized by the owner or occupier who holds a valid licence may discharge a firearm or bow or hunt, take or kill wildlife within the distances stated if the point of discharge is not within the prescribed distances in subsections (1), (2), (3) and (4) from
- (f) any other dwelling; or
- (g) a school, public building, playground, golf course, athletic field, woods operation or place of business.
- (h) Notwithstanding subsections (1), (2), (3) and (4) of Section 11 the , a person who holds a valid licence to hunt or trap and who has wounded any wildlife may discharge a firearm or bow for the purpose of taking wounded wildlife within the prescribed distances in subsection (1), (2), (3) and (4) provided it is done in a safe manner and the consent of the owner or occupier of the land has been obtained.
- (i) Section 11 of the regulation does not apply to a conservation officer in the discharge of the officers duties.
- (j) The fine is subject to the Summary Proceedings Act with a voluntary out of court payment of \$330.00

v. PROTECTION OF PROPERTY ACT

(1) General

- (a) In Nova Scotia, an act called the Protection of Property Act, S.N.S. 1982, c. 13 became law on June 26th, 1982. Following is a review of this Act. The interpretation and comments which follow do not necessarily represent the views or interpretations of the Government of Nova Scotia.

(2) Who can sue under this Act?

- (a) The Act refers to an "occupier" of land which is defined under Section 2(b) as a person who is in possession of premises, or a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, notwithstanding there is more than one occupier of the same premises.
- (b) Section 2(b)(ii) allows people to sue who would not otherwise have that right in an action at common law.

(3) What property is covered by the Act?

- (a) The Act refers to "premises" which is defined in Section 2(d) as "premises" means lands and structures, or either of them, and includes trailers and portable structures designed or used for residence, business or shelter."

(4) Does the Act apply to Crown land?

- (a) The Nova Scotia Act is silent on this point. One interpretation is that the Department of Natural Resources is an "occupier" under Section 2(b)(ii) so charges could be laid against trespassers under this Act.

(5) Are there any restrictions on how the trespass is committed?

- (a) The Nova Scotia Act has no restriction on this issue. The trespass can be committed on foot, in a motor vehicle . This is given a wide definition in Section 2(a).

(6) Exclusions

- (a) Section 13 states that persons under 12 years of age cannot be charged with violation under the Act.
- (b) Section 16 states that the Act does not apply to a person who is engaged in a lawful activity of employees on strike including picketing or in a peaceful demonstration in the vicinity of premises to which the public normally has access.
- (c) Section 15(2) states that no person may be prosecuted for contravening any notice given pursuant to this Act prohibiting entry or prohibiting activity on "forest land" as defined in the Act if that person is hunting as defined in the Wildlife Act, fishing, picnicking, camping, hiking skiing or engaged in another recreational activity or engaged in the study of flora or fauna.
- (d) On first reading of this section, it appears any person who is hunting under the Wildlife Act is exempt. However, the section must be reviewed more carefully. The person must be hunting as defined under Section 3(1)(ad) of the Wildlife Act:
- (e) "hunting" means chasing, driving, flushing, attraction, pursuing, worrying, following after or on the trail of, searching for, trapping, attempting to trap, snaring or attempting to snare, shooting at, stalking or lying in wait for any wildlife whether or not the wildlife is then or subsequently captured, killed, taken or wounded, but does not include stalking, attracting, searching for or lying in wait for any wildlife by an unarmed person solely for the purpose of watching or taking picture of it.
- (f) Hunters who hunt out of season and without a licence or in any other way violate the Wildlife Act or regulations are not hunting as provided for in the

Wildlife Act and therefore may not be excluded from being charged under this Act.

- (g) The statute exempts people who contravene any "notice" given under the Act. The Act provides for verbal or written notices. What about a landowner who simply does not post any notice about trespassing on the land? The land owner may or may not have to post the forest land depending on the interpretation of Section 15(1). It may be possible to charge a hunter under the Act. It's going to take a court case to determine the limits of this exclusion.
- (h) If hunters dump garbage on lands covered in the "forest land" definition, they may be charged. Because the person is a hunter it does not exempt them from all liabilities.
- (i) Does the definition of "forest land" cover persons crossing the land? It is not clear that the exclusion covers activities once the hunter comes out of the woods onto the dirt road going through the property. A court will have to interpret the scope of the term "forest land".
- (j) Section 15(1) of the Protection of Property Act defines what "forest land" as:
- (k) "forest land" means a wooded area, forest stand, tract covered by underbrush, barren ground, marsh or bog, but does not include:
 - (i) an area which is apparently a tree plantation area or a Christmas tree management area;
 - (ii) a special forestry study area;

- (iii) the immediate area where any activity is apparently being carried out on woodlands for the purpose of harvesting a forest product;
 - (iv) a commercial berry growing area.
- (l) If a hunters enters upon any of the following four types of forest land, they may be charged under the Act.
- (i) Apparent tree plantations or Christmas Tree management areas:
 - 1) If these areas are "apparently" used for such purposes. Apparent means visible to the eye, so there appears to be no onus on the occupier to post these lands before a charge can be laid.
 - (ii) A Special Forest Study Area:
 - 1) It would appear these areas must be posted and identified as study areas. Such areas may include nesting areas in woods for birds, areas where experimental work has been carried out on trees (herbicide areas, special silviculture work) or unique tree stands. The Court would have to interpret the meaning of this exclusion.
 - (iii) Apparent Industrial Wood Operations:
 - 1) The immediate area surrounding a woodlands operation is exempted. The limits how far this exclusion goes may have to be interpreted by the courts. The word "apparently" is used

again so there appear to be no need to post these areas with signs before a charge can be laid.

(iv) Commercial berry growing area:

- 1) This may include blueberry areas (if it is not considered to be an agriculture crop, cranberry bogs) The word "apparent" is not used so it may be necessary to post these areas before a charge can be laid.

(7) Offenses

- (a) Once it is determined whether or not a person is excluded from being charge under the Act, it is useful to identify the various offenses created by the Act.
- (b) Section 3(1): This Section states that every person who, without legal justification whether conferred by an enactment (ie. Act, Regulation) or otherwise or without the permission of the occupier or person authorized by the occupier, is guilty of an offence punishable on summary conviction if the person:
 - (i) enters on premises that is a lawn, garden, orchard, vineyard, golf course or acreage managed for agricultural crops;
 - (ii) enters on premises that is apparently a tree plantation area or a Christmas tree management area;
 - (iii) enters on premises that is enclosed in a manner that indicates that occupier's intention to keep persons off the premises or to keep animals on the premises;

- (iv) dumps or deposits material of any kind or causes, suffers or permits material to be dumped or deposited on premises;
- (v) enters on premises where entry is prohibited by notice; or
- (vi) engages in an activity which is prohibited on the premises by notice.

(8) Comments

- (a) It appears that entry is prohibited without any notice under Sections 3(1)(a), (b) and (c). The courts have held that "hay" in some instance may be considered to be an agricultural crop so fields may be included in the areas covered in Section 3(1)(a). Blueberry fields may also be considered to be an agriculture crop. Note that any sort of agriculture land is given special protection under this Act. Section 3(1)(c) talks about fenced areas. There are no particulars on the type of fencing needed.
 - (i) Section 3(1)(d) may be helpful if someone dumps garbage or debris on the land.
 - (ii) Sections 3910(e) and (f) cover areas where notices have been posted prohibiting entry or prohibiting certain named activities on the premises.
 - (iii) Section 3(5) makes it an offence for a person to remove a sign or notice posted by a occupier. Defacing a sign is not covered.
 - (iv) Section 3(6) makes it an offence for any person other than an occupier or a person acting on the owner's behalf to post a sign or notice restricting entry or prohibiting activity on premises. This section appears to address the situation where people other

than the owners post the land to set up their own exclusive berry picking preserve.

- (v) Section 4 states it is an offence to remain on premises without legal justification after being directed to leave by the occupier of the premises or person authorized by the occupier. (If a persons vehicle is stuck they may require time to get it out.)
 - (vi) Section 7 makes it an offence to disturb an occupier of premises by the unreasonable operation for recreational purposes of a motor vehicle on or in the vicinity of the premises or disorderly behaviour.
 - (vii) Section 8(3) makes it an offence for the owner of a motor vehicle or any other person who is requested to supply the name and address of a person operating a motor vehicle and who refuses, fails, neglects or is unable to supply the same.
- (9) Fine: The fine to be paid upon conviction is set at no more than \$500.00.
- (10) Defence: Three statutory defences are provided to any person who may be charged under the Act.
- (a) Section 5(1) states that it is not an offence if the person charged "reasonable believed" he had legal justification or permission of the occupier or person authorized by the occupier to enter on the premises or do the act complained of. This is a question of fact and will depend upon the circumstances of each case.
 - (b) Section 5(2) states it is a defence to a charge of violating a written notice prohibiting entry on premises if the person is unable to see or understand the notice.

- (c) Section 8(4) provides a defence to a charge under Section 8 (identity of motor vehicle operation) if the owner or person who had the vehicle with the consent of the owner can prove the vehicle was being operated at the time of violation without his knowledge or consent, either express or implied.

(11) Signs

- (a) Section 3(1)(a), (b) and (c) entry is prohibited without the need for a notice.
- (b) Section 3(1)(e) and (f) implies that notices are required to prohibit entry or certain activities on the premises. For example, fields may need to be posted unless the hay is grown there for agricultural crops.
- (c) Section 3(2) states the notice may be given orally or in writing.
- (d) Section 3(3) states written notices must be clearly visible in daylight under normal conditions from the approach to each usual point of access to which it applies.
- (e) The notice may be given in respect of any part of the premises of the occupier.
- (f) There is no specific wording that has to go on the sign.

(12) Legal action which may be taken, Arrests

- (a) A police officer (defined as an RCMP officer or a member of a municipal police force, not a conservation officer) is granted a general power of arrest under Section 6(1) if the officer has reasonable to believe the arrest and detention are necessary to prevent the continuation or repetition of the offence or to establish the identity of the person.

- (b) Shopping Centre Arrests: In shopping centres (4 stores and more) there is to be no arrest unless the person persists in committing the offence after they are told to leave and they are warned by the occupier or the police officer they may be arrested if they remain or return.
- (c) Seizure of motor vehicle: Section 9 authorized a police officer to seize and detain a vehicle for a period not exceeding 48 hours.

(13) Remedies available under the act

- (a) Once a conviction is entered the court may provide various remedies.
 - (i) Prohibition Order: Under Section 10 the court may issue a prohibition order for up to 6 months to restrain a person from entering an area generally open to the public.
 - (ii) Restoration Order: Section 11 states that where a person is convicted and another person has suffered damage, restitution may be ordered up to \$2000.00
 - (iii) Costs: Section 11(3) states that in a private prosecution if the court feels that the prosecution was necessary to protect the occupier, costs may be awarded up to \$500.00 (unless a larger amount is approved by Cabinet) to the private prosecutor.
 - (iv) Other Remedies: A civil action may also be brought against a person convicted. This would allow a person to sue if the claim exceeded the \$2000.00 limit set.
 - (v) Section 14 allows the plaintiff to bring other

actions against a trespasser other than charges under this Act. This would allow claims to injunctive relief, exemplary or punitive damages, etc.

i. SUMMARY

- i. Hunters, unlike anglers, do not have special rights of access on privately owned land without the permission of the landowner.
- ii. Hunters who trespass may be subject to a civil action in trespass.
- iii. Hunters may be charged under Section 11 of the Firearms and Bow Regulations with respect to firearm or bow near buildings.
- iv. Without the permission of the occupier, hunters may be charged under the Protection of Property Act if they trespass on the 4 classes of forest land listed in Section 15(1) of the Act.
- v. Without the permission of the occupier, hunters may be charged under the Protection of Property Act if they trespass on those lands more fully defined in Section 3 of the Act which includes all agriculture lands, gardens and lawns.
- vi. Even if hunters are lawfully hunting on forest land, they may be charged under the Protection of Property if they litter on the privately owned property.