A Legal Guide for Woodlot Owners in Nova Scotia

Prepared for

Nova Scotia Woodlot Owners and Operators Association

December 2012

by

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**Table of Contents**

1.0 Environmental Regulations …………………………………………………………………………………………………….. 3

1.1 Wildlife Clumps and Watercourse Buffers

1.2 Nova Scotia’s Endangered Species Act

1.3 Pesticides and Woodlots

2.0 The *Forests Act* and Silviculture Regulations and Funding ……….……………………………….…………….. 6

2.1 Silviculture Categories

2.2 Register Buyers Program

2.3 Registration and Statistical Returns Regulations

**2.4 Timber Loan Board Regulations**

3.0 Woodlot Organizations and the *Primary Forest Products Marketing Board Act* …………………….. 9

4.0 Trespass and Timber Theft …………………………………………………………………………………………………….. 10

4.1 Trespass at Common Law

4.2 Trespass Legislation

4.3 Angling Act

4.4 Timber Theft

5.0 Minerals and Mining ……………………………………………………………………………………………………………… 17

6.0 Taxes and Woodlots ………………………………………………………………………………………………………………. 18

7.0 Miscellaneous Acts and Regulations ………………………………………………………………………………………. 20

7.1 Forest Fire Protection Regulations

7.2 *Off-highway Vehicle Act*

7.3 *Trails Act*

7.4 *Private Ways Act*

7.5 *Woodmen’s Lien Act*

7.6 *Occupiers' Liability Act*

**1.0 Environmental Regulations**

*1.1 Wildlife Habitat and Watercourses Protection Regulations (WHWP)*

The WHWP Regulations fall under the *Forests Act*, and came into force in 2002. They apply to anyone who carries out forestry operations in a forest or on forest land. Anyone who disobeys these regulations is guilty of an offence. The regulations have two main provisions, “wildlife clumps” and buffers along water courses.

*1.1 (a) Wildlife Clumps (Section 4)*

Any time a person cuts a forest area greater than 3 hectares in size, the forest operator must leave at least 10 living or partially living trees per hectare of forest land cut. The trees must be clumped together, and the clumps must be reflective of the forest being cut, that is, similar in species composition and as large or larger in height and diameter as the forest being cut. The clumps must contain at least 30 trees, and there must be at least 1 clump present in every 8 hectares of cut area. Clumps must be no more than 200 metres apart, and be situated between 20 and 200 metres from the edge of the forest being cut. No trees within a clump may be cut during the harvest, and may not be removed before the next harvest.

Section 4(4) of the WHWP Regulations require that a forestry operator ensure that standing deadwood and coarse woody debris be maintained on the harvested site similar to natural patters to the fullest extent possible. This section of the regulations has yet to be enforced, and is generally ignored during harvest operations, particularly whole-tree harvests.

*1.1 (b) Watercourse Buffers (Sections 5 – 9)*

Some of the rules under these sections of the regulations apply to all watercourses, and some only to watercourses greater than 50 cm in width. The width of a watercourse is determined by measuring the width of the bed of the watercourse, at 10 spots (roughly same distance apart) along the portion of the watercourse that falls within or adjacent to the forestry operation.

*All watercourses*: Forestry operators must ensure that they do nothing that would result in sediment deposited in a watercourse, and, to the fullest extent possible, retain all understory vegetation and non-commercial trees within 20 metres of a watercourse.

*Watercourses less than 50cm wide*: Forestry operators shall not operate or permit the use of a vehicle for forestry operations within 5 metres of the watercourse (save for the use of watercourse crossings approved by the Department of Environment). No retention of commercial trees is required for watercourses less than 50 cm wide.

*Watercourses greater than 50 cm wide*: Forestry operators shall establish a “special management zone” at least 20 metres wide adjacent to the watercourse. If the slope of the land within 20 metres of the watercourse is greater than 20%, then the zone must be increased by 1 metre in width for every additional 2% of slope, up to a maximum of 60 metres in width.

Within the special management zone, forest operators must not

1. operate or permit use of a vehicle for forestry operations within 7 metres of the watercourse (unless crossing a watercourse as approved by Department of Environment);
2. reduce basal area of living trees to less than 20m2 per hectare; or
3. create an opening in the tree canopy larger than 15 metres at its greatest dimension.

*1.2 Nova Scotia’s* Endangered Species Act

Nova Scotia’s *Endangered Species Act* was created in 1998 to provide protection to designated species-at-risk and their habitat, and to enable actions towards the recovery of species-at-risk. Species-at-risk are by definition uncommon, and most woodland owners will never encounter one, nor need be concern with this Act. Nonetheless, landowners should be aware of Nova Scotia’s endangered species and where they might be found, and the legal obligations that might apply in the rare event that a species-at-risk is found on one’s land.

Of these, generally only American marten (in Cape Breton only), moose (Nova Scotia mainland only), eastern white cedar, eastern ribbonsnake, chimney swift, Canada lynx, boreal felt lichen, and Bicknell’s thrush might be found in forestland.[[1]](#footnote-1)

A Species-at-risk Working Group was created under the Act, the members of which are appointed by the Minister of Environment. The Working Group decides, based on the available science, which species are at risk and require protection under the Act. The Group also reviews each listed species from time to time to determine if its status has improved or worsened.

Under the Act, no one is allowed[[2]](#footnote-2) to harm, interfere with, sell, buy, trade or to possess a listed species (or a part or product thereof). As well, no one is allowed to destroy, disturb or interfere with (attempt to do these things) the dwelling place or area occupied by individuals or populations of a listed species. Such areas include the species’ nest, nest shelter, hibernaculum and den.

The Act requires the Minister to designate “core habitat” for all listed species, which is the habitat considered essential to the survival of the species. The Minister must designate Crown land as core habitat first, and can only designate private land as core habitat if Crown land is not sufficient to meet the recovery needs of the species.

Once core habitat is designated, the Minister can implement regulations that apply to the core habitat or parts thereof regarding the recovery of the listed species. If such a regulation restricts a particular use of private land, and if the landowner is making use of her or his land in that particular way, then the Minister is required to compensate the owner for the loss of that use.

Penalties for contravening the Act or its regulations include fines for individuals up to $500,000 or imprisonment up to 6 months, or both, and for corporations fines up to $1,000,000, plus an additional fine for any monetary award gained through the commission of the offence. Fines can be doubled for offences committed a second time or more. Where an offence is committed or continues over more than one day, the offender is liable for a separate conviction for each day the offence is committed or continues.

*1.3 Pesticides*[[3]](#footnote-3)

Woodland owners who wish to apply pesticides, including herbicides, need first to determine if the pesticide is listed as a commercial or restricted class pesticide. If so, then the landowner must obtain a Class III (A) Forestry Certificate before applying the pesticide. The Certificate authorizes the holder to use the pesticide through ground application in site preparation, brushing, crop tree release, thinning, insect control, disease control and vertebrate control in forestry operations. The Certificate holder can also supervise a non-certificate holder (18 years of age or older) to apply pesticides that the holder is qualified to apply.

To obtain the Certificate, a landowner must submit an application (found on the Department of Environment website) and pass an examination.

Before applying a pesticide, a landowner generally must give public notice of the pesticide application (through a local newspaper for example) stating when and where it will occur, at least 20 days before the application.

If the application is for crop tree release, site preparation or forest insect control, then the landowner must post signs (of a type approved by the Department of Environment) at the site of the planned application (on all access roads to the site, and at the edge of the site) at least 30 days prior to the application, and, in cases of application to an area greater than 200 hectares, must also publish a notice approved by the Department of Environment in a local newspaper as to when and where the application will occur. The signs must identify when and where the pesticide will be applied, and include fluorescent decals to be applied once the spraying begins. In these situations, the applicator must also deliver written notice (of a type approved by the Department of Environment) to the owner or occupier of any dwelling, business, school, public building or other inhabited structure within 500m of the treatment site, identifying when and where the application will happen.

Any notice signs posted must stay up for at least 7 days following the application of the pesticide, but generally must be removed by November 1st of the year that the approval was given (provided the 7 days requirement has been met).

These requirements to give notice can be waived or modified by the Department of Environment if the applicator can provide acceptable reasons to do so. The Department of Environment also has the discretion to require buffer zones around areas believed to be sensitive to the application of a pesticide.

All handling, use, storage and disposal of pesticides, materials treated with pesticides and pesticide containers must be done according to the product directions (unless otherwise approved by the Department of Environment). However, notwithstanding the previous sentence, no person shall use, handle, store, or dispose of a pesticide, material treated with a pesticide or pesticide container in a manner that results or may result in contamination of the environment. This includes the cleaning or flushing of sprayers or other equipment used for or in association with the application of pesticides.

Unless otherwise authorized by the Department of Environment, containers for commercial class or restricted class pesticides must be disposed of at a container collection site, and all pesticides must be stored in the labelled containers supplied by the manufacturer.

Further, anyone who stores 25 litres or 25 kilograms or more of a commercial class or restricted class pesticide for their own personal or business use (but not for resale), must ensure that the pesticide is stored in a facility that prevents uncontrolled release of the pesticide. The person must also keep a list of the pesticides and estimated quantities stored that can be supplied on request to the local fire department. Warning signs must also be placed on doors leading into rooms where pesticides are stored, and emergency telephone numbers for the fire department, hospital, poison control centre, Department of Environment, police and Department of Justice must be displayed in the facility.

**2.0 The *Forests Act* and Silviculture Regulations and Funding**

Woodland owners in Nova Scotia have opportunity to access funds to help cover the costs of silviculture activities. The silviculture program flows from the Forest Sustainability Regulations (FSR), created under the *Forests Act*. Woodland owners seeking silviculture funding have two options. They can apply to the Association for Sustainable Forestry, which manages a government silviculture fund for woodland owners, or they can approach Registered Buyers (explained below) who are required to carry out silviculture activities on private land, in proportion to the annual amount of wood they purchase.

The *Forests Act* has a number of stated purposes, some of which relate directly to woodland owners and private land silviculture. These purposes include, among others,

1. to develop a healthier, more productive forest with higher volume yields of quality products;
2. to encourage the development and management of private forest land as the primary source of forest products for industry in the Province;
3. supporting private landowners to make the most productive use of their forest land;
4. maintaining or enhancing wildlife and wildlife habitats, water quality, recreational opportunities and associated resources of the forest;
5. enhancing the viability of forest-based manufacturing and processing industries;
6. doubling of forest production by 2025; and
7. creating more jobs through improved productivity.

The Act describes forest management techniques to be used on Crown land, and recommended for private land. These include using natural regeneration where practical, along with selective, patch or shelterwood cutting; planting whenever a site is not expected to regenerate adequately; spacing when necessary; removing unwanted competition; commercial thinning to enhance sawlog potential; and accounting for hazards such as forest insects, diseases and fire.

The Act also empowers the Department of Natural Resources to provide training, professional and technical advice and assistance, and financial incentives to private landowners to encourage more effective management of their land. The Department can also enter into agreements with private landowners with respect to forest management issues.

*2.1 Silviculture Categories*

There are seven categories of silviculture activities described in the Forest Sustainability Regulations (FSR)[[4]](#footnote-4): (1) natural regeneration and fill planting; (2) plantation establishment; (3) early competition control; (4) density control and release in plantations; (5) density control and release in natural stands; (6) commercial thinning; and (7) forest quality improvement. The technical requirements for each category can be found on the internet at <http://www.gov.ns.ca/just/regulations/regs/fosust.htm>. The FSR also stipulate (a) which categories of silviculture activities can be carried out on the same site in the same year, (b) that sites claimed for categories 7(a) and 7(c) are not subsequently eligible for categories 1 through 6, and (c) that once silviculture work is done and claimed for a site, that site cannot be reclaimed in the same silviculture category during the life of that forest stand, save for categories 7(a) and 7(c).

Silviculture funding that goes directly to private woodland owners and forestry contractors is handled by the Association for Sustainable Forestry (www.asforestry.com), operated under the authority of the Department of Natural Resources. Funding is not necessarily available for all categories of silviculture; the ASF’s website includes details on what silviculture activities are eligible to receive funding. Further, the ASF has some “in-house” silviculture technical criteria (found on their website) that differ from those described in the FSR.

*2.2 Register Buyers Program*

Registered buyers are those who meet any of the following criteria:

* owners or operates a wood processing facility in Nova Scotia;
* exports, or possesses for export, primary forest products;
* important primary forest products;
* sells or acquires for sale more than 1,000 cubic metres of primary forest products as a fuel; or
* acquires primary forest products for producing energy.

Those Registered Buyers who purchase 5,000 cubic metres of wood product in a given year must report how much wood is acquired by location, species and product, and to either contribute money to the Sustainable Forestry Fund (established under the *Forests Act*), or to carry out an equivalent amount of silviculture work in lieu of contributing to the fund. The amount of money (or silviculture work required in lieu of) to be contributed is set in the FSR at $3.00 per cubic metre of softwood acquired, and $0.60 per cubic metre of hardwood acquired.

According to the Department of Natural Resources[[5]](#footnote-5), most Registered Buyers have opted to carry out their own silviculture work (either on their own land or on private landowners’ lands), and contributions to the fund have been minimal. The Department of Natural Resources awards credits to Register Buyers who carry out silviculture work based on the type of work and area of land (as per section 8(1) of the FSR). The credit value awarded off-sets the money (on a one credit to one dollar basis) that the Registered Buyers would otherwise have to contribute to the Sustainable Forestry Fund.

*2.3 Registration and Statistical Returns Regulations*[[6]](#footnote-6)

Register buyers are required, under these regulations, to submit an annual report on how much, what product types, which species and source location[[7]](#footnote-7) of primary forest products they acquire, by volume, for every year that they acquire 1,000 cubic metres or more of primary forest product. Registered buyers who operate a wood processing facility within the province must also specify their acquisitions by landowner type.

The regulations also include formulas for converting various units of forest product measurements to volume in cubic metres. Of interest is the conversion factor for determining volume of biomass harvesting: the total volume of fibre produced from whole-tree chipping is reduced by 30%, as it is assumed that 30% of the fibre is from tops and branches of trees. Registered buyers are not required to report volumes of tree tops and branches acquired, only stem wood fibre.

***2.4 Timber Loan Board Regulations***[[8]](#footnote-8)

These regulations allow for the creation of a timber land loan board. The board is empowered to loan funds to corporations or individual Nova Scotians for the purchase of forest lands. The board can loan up to 75% of fair market value of the land to be purchased, but not exceeding $300,000 per person without approval of the Governor in Council.

To qualify, a corporation must regularly carry on the business of a forest product mill, and a majority of its shares must be held by residents of Nova Scotia. A qualifying individual must be a resident of Nova Scotia and own a forest product mill that has satisfactory prospects of long-term operation, and regularly carry on the business of operating the mill.

**3.0 Woodlot Organizations and the *Primary Forest Products Marketing Board Act*[[9]](#footnote-9)**

The NSWOOA has its roots as a bargaining agent on behalf of woodlot owners and wood producers with Kimberly Clark pulp and paper company. The *Primary Forest Product Marketing Board Act* was and remains the legal framework in which the NSWOOA operates as a bargaining agent.

The Act was created to provide for the organization and funding of designated, registered bargaining associations within a framework that provided a formal arbitration and dispute resolution process. The Act is also intended to help enable woodlot owners to have a “fair share” of the demand for primary forest products (relative to Crown land), and to receive a reasonable return for those products.

To qualify as a bargaining agent, an association must be a group of wood producers or buyers of primary forest products, with a written constitution, rules or by-laws that define the conditions of membership. The Act stipulates that it is an offense for a person to take any retaliatory action against another because that person is or seeks to become a member of a group venture (company or co-operative implementing forest management activities on members’ lands). As well, it is an offence to refuse to purchase or sell or continue to purchase or sell any primary forest product from any person because that person has exercised or may exercise a right under the Act.

The Act defines primary forest products as trees cut and prepared primary for processing into wood pulp, paper, paper products, lumber, compressed board, or any product manufactured from wood fibre, including Christmas trees, sawmill chips, pulpwood chips, fuel chips and any wood fibre intended for use in heat or power generation. A producer of primary forest products is (a) the person who owns the product at the time it is cut and prepared for sale, (b) a woodlot owner, or (c) a person who is primarily a processor of primary forest products other than pulp and paper products.

The Act also enables the creation of a Primary Forest Products Marketing Board, the membership of which comprises of someone experienced in the sawmill industry, someone experienced in the pulp and paper industry, two woodlot owners not engaged in either the sawmill or pulp and paper industry, and three people not engaged in the production, marketing or processing of primary forest products.

The Board has an array of powers, including the development of a registration of producers or buyers of primary forest products, and the registering or de-registering associations as bargaining agents. The Board may also conduct investigations into any matters relating to the marketing of primary forest products, (including cost of marketing, producing, transporting forest products, trade practices, methods of financing, etc), as well as the wood supply from Crown and from private lands, and future wood fibre demand by the major users of primary forest products. The Act details other powers of the board, relating to the development of primary forest product markets and regulation of buyers of these products.

Associations that are registered under the Board become the sole bargaining agent for their members, and before being registered, must demonstrate that they have the support of the producers they represent. Registered associations must submit an annual statement of revenue and expenses, assets and expenses, and any other financial reports necessary to disclose the operations and financial condition of the association, prepared in accordance with generally accepted accounting principles.

Bargaining associations who wish to engage in bargaining apply to the Board for a declaration that a bargaining situation exists between the association and another person or bargaining agent. When such a situation is declared, the parties are required to bargain in good faith in attempt to reach a binding collective agreement. Where bargaining does not result in a collective agreement, the Act details the process for proceeding through mediation of the dispute.

In the event that a person violates any provisions of the Act, or any regulations under it, or refuses or neglects to fulfil, perform, observe or carry out a duty or obligation created or imposed under this Act or any regulations of the Board, the person is subject, upon conviction, to a penalty not more than $500 and costs for a first offence, and $1,000 and costs for a second and subsequent offence.

**4.0 Trespass and Timber Theft**

*4.1 Trespass at Common Law*

Trespass is a ‘wrong’ against a landowner that has been recognized in English law for some seven centuries. In Canada, save for Quebec, we’ve inherited the English common law, including the tort of trespass. As well, provinces have enacted various pieces of legislation that create offences of certain types of trespass. Both of these aspects of trespass are described below in the Nova Scotia context.

Entering another’s property by any means without permission or lawful excuse, regardless of whether damage is caused or not, is trespass at common law, and the owner or occupier of the land can ask the trespasser to leave and may take legal action against the person. Entering another’s land and doing something other than for what the permission was granted, or entered after permission has been withdrawn, is also trespassing. Allowing a pet or livestock to enter another’s land, or tossing something, trash for example, onto another’s land, even if the person does not enter the land, is also trespass. Note, people with legal authority to enter land, such as surveyors or conservation officers, are not liable for trespass while performing their duties. As well, someone entering another’s land in an emergency situation is not liable for trespass. Those who have permission to enter someone’s land are also not liable for trespass; permission can be verbal or written, and in some cases implied. A contractor invited to provide an estimate for a job on a property has implied consent to enter the property for the purpose of providing the estimate.

Under the common law tort of trespass, any action taken is at the sole discretion of the owner or occupier of the land in question. Government plays no role in charging someone with trespass at common law on private land, and unless a trespasser does something that contravenes legislation, there is no role for law enforcement officers. In other words, the owner or occupier of the land in question is responsible for bringing the claim to court.

If no damage is caused by a trespasser, it may not be cost effective to pursue legal action for trespass at common law. In a 1998 Nova Scotia case[[10]](#footnote-10), a landowner brought a claim in trespass against another, and the accused party brought a counter-claim against the first landowner for trespass as well. In the end the judge held that each had trespassed on the other, but no damages had been proven by either party, and ordered each to pay the other $100. Similarly, in a case involved a boundary dispute, the judge held that damages as a result of trespasses by each party against the other were of equal value, thus off-set.[[11]](#footnote-11) In any event, if there’s no damage caused by a trespasser, then the most a landowner can claim against the trespasser is the price that a reasonable person would pay for the right to pass over the land. Is it not certain what this amount is, but in a 2010 Nova Scotia case, where no harm had been established, the judge ordered the trespasser to pay $1.00 to the other party.[[12]](#footnote-12)

If damage is caused, however, a landowner may wish to attempt to recover money for the damages through a claim against the trespasser in court. The landowner will have to prove that the damage occurred, and that the trespasser caused it. A trespasser is liable for nearly all damages resulting from an unlawful entry, even those not anticipated or done on purpose by the trespasser. A judge can also order an injunction against the trespasser to refrain from trespassing again, or to stop an on-going trespass. In a 1989 Nova Scotia case, a road-building contractor company was ordered to pay for the restoration of all damages they caused to a neighbouring property during a road-building job, including a new retaining wall, repair of soil erosion, and re-sodding, as well as an order to pay punitive damages plus interest.[[13]](#footnote-13)

A trespass can also be in the form of an object put or caused to be put on another’s property. A fence erected on another’s property, for example, is a trespass that continues for every day that the fence remains. A blasting company whose work results in a rock from a blast landing on another’s property is trespassing at common law (and perhaps also liable under the tort of nuisance and/or negligence), even though no one from the company physically entered the property at issue. In a Nova Scotia case, a landowner sued a company that had placed a water drain across her property when the drain overflowed causing damage to her property. The court held that, among other things, the drain was a continuing act of trespass each day that it remained, thus no time limitation applies even though the drain had been placed on the property many years previously.

*4.2 Trespass Legislation*

Nova Scotia’s *Protection of Property Act*[[14]](#footnote-14) makes it an offense to trespass on certain lands while engaged in certain activities. This law is in addition to trespass at common law; someone committing an offence under this Act can be charged, convicted and fined by the government, and could also be sued by the landowner on a claim of common law trespass. The law essentially relieves landowners of some of the burden of dealing with certain kinds of trespassing; the government will step in and charge a trespasser in certain situations, as described below.

Under this Act, unlike the situation with criminal theft as described in section 5.4 below, the onus is on the accused to prove reasonable justification for the trespass. Essentially, this makes it easier for police to obtain a conviction for an offence under this Act than for theft under the Criminal Code.

Importantly, the law is not directed at people who enter another’s forest land for the purpose of lawful hunting, fishing, picnicking, camping, hiking, skiing or who are engaged in another recreational activity or who are studying flora or fauna. Lawful hunting means hunting in a manner prescribed by the *Wildlife Act* and without dumping garbage or otherwise disturbing the land. Forest land, for the purposes of the Act, includes barrens, bogs and marshes as well as treed land. It does not include, however, Christmas tree management areas, readily identifiable tree plantations, active forest harvesting areas, and commercial berry areas. Commercial berry areas may have to be posted as such to be considered as non-forest areas, but Christmas tree areas, tree plantations and active forest harvesting area need not be posted so long as these areas are visibly identifiable as such.

In addition to the areas noted above, anyone entering the following areas is guilty of an offence under the Act: lawns, gardens, vineyards, golf courses, land managed for agriculture crops, land enclosed to keep in animals, any land prohibited by notice. It is also an offence to dump or deposit material of any kind on any lands, to engage in an activity prohibited on the land by notice, to remove a sign or notice posted by an occupier or owner of the land, and for a person operating a motor vehicle during a trespass under this Act to refuse to give his or her name and address when requested to do so. Further, it is also an offence to remain on the land without legal justification once being directed to leave by the occupier or owner of the land or person so authorized, although there is reasonable time allowed to get a stuck vehicle unstuck.

Prohibiting entry upon land, or detailing acceptable activities on the land, under this Act, can be given by way of verbal or written notice. Signs that give notice must be clearly visible from the approach to each usual point of access to the property. However, remember that no one commits an offence under this Act who is engaged in one of the activities listed above on forest land, regardless of whether the property is posted or not.

A court can fine a person convicted under this Act up to $500, and order the person to pay up to $2,000 in damages to a person who has suffered, as well as potentially make some award of costs. If the damages exceed $2,000, the landowner can pursue a civil action on his or her own, that is, a claim of trespass at common law (that is, a successful conviction under this Act does not preclude the landowner from taking additional action against the trespasser).

Note, there are additional restrictions to operating an off-highway vehicle on another’s land, primarily the need for written permission to do so; see section 7.2.

Useful publications on trespassing include the Public Legal Education and Information Service of NB guide, *Know Trespassing*[[15]](#footnote-15), and *Trespass Interpretation for NS Hunters, Fishers and Landowners* by John Monbourquette, NS Department of Natural Resources.[[16]](#footnote-16)

*4.3* Angling Act[[17]](#footnote-17)

Residents of Nova Scotia have the right to pass, by foot, along the banks of any river, stream or lake, upon and across any uncultivated lands for the purpose of lawfully fishing with rod and line. Residents of Nova Scotia may also go on, upon or across any river, stream or lake in a boat or canoe or otherwise for the purpose of lawfully fishing with rod and line. However, these rights no not include a right to cause any damages or the right to build any fires upon such lands.

Uncultivated land refers to land in its natural wild state, but also includes land that has been wholly or partially cleared, but otherwise in its natural state.

*4.4 Timber Theft*

For Nova Scotia landowners, timber theft is a frustrating, often emotionally devastating, and anecdotally an all-too-common occurrence. Landowners, again anecdotally, have not been satisfied with their attempts to seek justice for the thefts; some believe that there is little disincentive to dissuade would-be timber thieves and little access to justice for landowners who suffer a theft or trespass against their forestland.

The first option for landowners to consider is to discuss the situation with the person committing the trespass. It may, or may not, be an honest mistake. It is also possible that the landowner is mistaken as to the location of the boundary line. In any event, some landowners are able to resolve situations with the trespass without involving police, lawyers or the courts. In one situation in New Brunswick, for example, where a neighbour cut over onto an adjoining property, the neighbour decided to gift a section of his land to the other who had lost the trees, which was a mutually acceptable solution. A landowner might wish to seek the help of a mediator, as well as a forester or forest technician who can help determine the value of the loss and damage. Finally, the landowner might choose to (1) contact police to request that they lay theft or mischief charges under the Criminal Code, or charges under NS’s Protection of Property Act; (2) obtain a lawyer to sue the trespasser in court; or (3) consider doing several actions at once.

*Theft under the Criminal Code:*

A central question in cases of timber theft is whether the defendant reasonably believes that he or she is cutting on the correct property. Before laying a charge, law enforcement officers must be convinced that there are reasonable and probable grounds that the person cutting the trees knew that he or she was not in the right.[[18]](#footnote-18) If charged, the government must prove to the court, beyond a reasonable doubt, that the defendant knew he or she did not have the right to cut on the land in question. In other words, the onus is on the government to prove that the defendant had the intent to unlawfully cut the trees.

For example, in a 1999 Nova Scotia criminal case on wood theft[[19]](#footnote-19), the judge concluded, beyond a reasonable doubt, that the defendant (a) removed trees from the property in question, (b) did so without consent or colour of right, and (c) did so either with willful blindness as to the true owner of the property, or with full knowledge that he did not have the right to cut on the property at question. In this situation, the defendant actually continued to remove wood after he was asked to stop by the landowners, and after police had asked him to stop.

*Theft under the* Protection of Property Act:

If the police decide not to lay theft charges, the police could opt instead to lay charges under Nova Scotia’s *Protection of Property Act*, as described above, whereby the person could be fined up to $500, plus ordered to pay the landowner up to $2,000 in restitution, as well as possible legal costs. As mentioned above, under this Act, the burden is on the accused to prove that he or she has legal justification for the trespass. This provision of the Act makes it easier for police to obtain a conviction, compared to a conviction for theft, wherein the onus is on the government to prove, beyond a reasonable doubt, that the accused had a “guilty mind” when removing the timber.

*Mischief under the Criminal Code:*

Timber theft can also result in a charge of mischief through willful damage to property,[[20]](#footnote-20) if the police believe that the defendant intended to act in such a manner that resulted in damage to the property. As with theft, if the police decide to lay charges against the accused, then the government must prove, beyond a reasonable doubt, that the accused did the damage in question with intent. In the one case found for Nova Scotia regarding a charge of mischief, the accused plead guilty to theft, and the charge for mischief was dropped.[[21]](#footnote-21)

Mischief also encompasses, specifically, damage to boundary lines; anyone who, with intention, pulls down, defaces, alters or removes anything planted or set up as the boundary line is guilty of the offence of mischief. Again, to lay a charge, the police must believe that the accused intended to do the action, and to be convicted, the government must prove, in court, that the accused intended to do the action beyond a reasonable doubt.

*Civil Claim for Loss of Trees through Trespass:*

If the police decide not to lay any charges, or if the court holds that the defendant reasonably believed he or she was in the right in the case of theft or mischief, then the landowner’s only option is to bring a private claim against the defendant for trespass and the resulting damage to the property. Unlike a criminal charge of theft, a landowner does not need to prove that a trespasser knowingly removed trees from the property; rather, the landowner only need prove that the person did the act, however innocently it may have been done.

*Damages:*

When a judge does find that a theft has occurred, the judge can order the perpetrator to pay damages for the loss, as determined by the judge. In a 1989 Nova Scotia civil trespass case[[22]](#footnote-22), a judge awarded a landowner $6.00 per cord of wood taken, being the stumpage value determined by the court. A judge may also decide to require a defendant to pay punitive damages if the defendant’s trespass was found to be of sufficient malice or wantonness.[[23]](#footnote-23) In a 1999 Nova Scotia criminal case of wood theft[[24]](#footnote-24), the judge ordered the defendant to pay restitution to the landowners rather than to serve jail-time. Specifically, the judge ordered the defendant to pay the total amount ($15,000) that he received from the sale of the stolen wood (that is, not just the stumpage value); for trees damaged by wind following the theft ($1,000), as he held that the tree theft led to this damage; as well as an amount to cover some restoration work to the woodland ($2,500). In cases of theft, the burden is on the government to prove the value of the stolen property.

The judge is this case referred to amendments in the Criminal Code that encourage courts to place stronger emphasis in providing compensation to victims of crime and to the community (as per ss 718-718.2 of the Criminal Code). The judge also noted that wood theft “strikes at the very heart of the commercial forestry community… the sentence must be such that it will act as a deterrent to others,” and that “the major factor I think that should be highlighted by this sentence is to bring clearly to the minds of the general public that this type of offence will now be prosecuted in the courts and that perpetrators will suffer financial consequence in addition to the criminal stigma.” The judge mentioned in his decision he had considered a period of incarceration for the defendant as well, but stopped short of this.

In a more recent (2002) criminal case of wood theft,[[25]](#footnote-25) the accused plead guilty to the charge, and was given a suspended sentence to jail time, that is, was given three years’ probation and one of the conditions of probation was that he must pay the landowner restitution in the amount of $18,000, along with $50,000 to the landowner for damages caused. In this case the landowner also requested damages for the cost of thinning the woodland, but the judge held that the landowner had the opportunity to take advantage of provincial silviculture programs that covered the costs of thinning, thus should not be entitled to a separate damage award for this issue. The defendant in the case declared bankruptcy two years after the trial, but at a subsequent trial,[[26]](#footnote-26) the judge held that the restitution order survived the bankruptcy, and therefore remained in force.

If the loss of wood is determined to be only as a result of innocent trespass, (that is, the accused was acting in good faith when cutting the trees), then the landowner is likely only able to recover the stumpage value of the trees.[[27]](#footnote-27) If the landowner can prove that the trespass was willful (done with knowing intent), then the court may award more damages (such as the entire value of the wood removed, and possibly general damages for loss of enjoyment of the property).[[28]](#footnote-28)

In any case of loss of timber (either through theft or just trespass), it will be necessary to determine the value of the wood taken from the property. This may be done by accessing bills of sale of the wood, and/or having a professional forester or forest technician cruise the area of the trespass to estimate the amount and value of wood removed.

In any event, a landowner can request that the court assess damages based on the highest and best sale of the trees, regardless of how the trees were actually sold by the trespasser or offender.

*New Brunswick response to Timber Theft:*

In 2000, in response to growing reports of wood theft from both Crown and private land, the New Brunswick government established a wood theft working group to assess the magnitude of the problem, and to develop recommendations to reduce wood theft. Their full report is available at <http://www.woodtheft.ca/e/report_e.htm>, and includes recommendations to improve enforcement, public education, legislation and prevention. The New Brunswick government did establish a wood tracking program to create a better paper trail for the sale of wood, whereby wood truckers report the amount and source of wood acquired from harvesters (known as the Load-slip Program). The government also increased the minimum fine for wood theft to $5,000. A public education program on wood theft was launched, along with workshops for the RCMP and Crown prosecutors on the issue.

The New Brunswick Federation of Woodlot Owners has several articles with useful information for those who face wood theft: <http://www.nbwoodlotowners.ca/?section=10&subsection=59>.

**5.0 Minerals and Mining**

As is the case throughout Canada, all minerals in or upon the land in Nova Scotia belong to the province. As such, the province has the right to explore for, work and remove any such minerals, anywhere in the province, including privately owned property. The province itself is not in the mining business, and so confers these rights to mineral prospectors and mineral exploration and mining companies, by way of mineral licences. In additional to mineral licences, those engaged in excavation for minerals, including any trenching, pitting, or underground exploration, must submit and have recorded an excavation registration document.

As owner of the mineral rights, the province also has the prerogative to restrict mineral prospecting, exploration and mining, from time to time, on any lands within the province. Certain protected natural areas, for example, are subject to this restriction.

Minerals are defined by their standard geological definition, but the government (through the Governor in Council) may also declare gypsum or limestone, or a certain deposit of gypsum or limestone, as a mineral and thus subject to ownership by the province. In the same way, the government can also designate areas to be known as geothermal resource areas, and declare geothermal resources within such designated areas to be treated as if they were minerals, thus subject to ownership by the province.

As all minerals (and other resources designated as minerals) are reserved to the province, landowners do not receive compensation for removal of minerals themselves. The province is entitled to receive royalties from the removal of minerals, wherever in the province they are found.

However, landowners do have limited rights with respect to mineral exploration and mining on their lands. Prospectors or mining companies must seek permission of a landowner before entering upon the landowner’s property, or carrying out activities such as line flagging and soil sampling. Note, a prospector need not have a licence to a mineral right to carry out preliminary searches for minerals, but whether the prospector has a licence or not, he or she must seek permission of the landowner. The landowner can choose to ask for compensation from the prospector or mining company in exchange for granting this permission. If anyone passes over, enters upon or performs surface work without the consent of the landowner, or without obtaining a surface rights permit, is guilty of an offence, and can be fined up to $10,000, as well as, if the landowner wishes, be ordered to compensate the landowner for damages caused by the offender. Further, anyone who engages in mining without a lease or registration of the operation, if convicted, is subject to a fine of up to $10,000 for each day the offence occurs or continues.

If the landowner does not grant permission, then a mineral license holder can apply for a surface rights permit from the Department of Natural Resources, which enables the permit holder to pass over, enter upon and work the lands covered by the mineral licence. The Minster of Natural Resources will hear arguments from both parties, and decide whether to grant the surface rights permit, and, if so, how much if any compensation should be paid to the landowner. The Minister can elect to put conditions on the permit, such as requiring that payment be made before work begins or progresses on the land in question. The Minister’s decision can be made a rule or an order of the Supreme Court of Nova Scotia.

There is no formal appeal process from decisions by the Minister regarding the granting of surface rights permits. However, as with any ministerial decision, affected parties can attempt to pursue an appeal of the decision in the Supreme Court of Nova Scotia. The Minerals Act stipulates such an appeal must be within 30 days from the date of the decision.

**6.0 Taxes and Woodlots**

A full discussion of tax law as it relates to woodlot and farming operations is beyond the scope of this report. It is a complex subject, and is not without a degree of grey area; those interested in learning more are encourage to read Canada Revenue Agency tax interpretation bulletin IT-373R2.[[29]](#footnote-29) The Nova Scotia Department of Natural Resources has a helpful woodlot management module available on-line titled Income Tax and Estate Planning, which provides an excellent overview of the issue, and contains links to the necessary tax forms and additional information resources; woodland owners interested in learning more about these issues on their own are strongly encouraged to read NS DNR’s material on the subject.[[30]](#footnote-30)

Any woodland owner with significant woodlot business activity and investment is also encouraged to seek the services of an accountant and/or lawyer well-versed in farm and woodlot tax issues. With this caveat, the following gives a brief, cursory overview of taxes and woodlots.

The key questions to consider are (1) is the woodlot a commercial, or non-commercial woodlot?; (2) if yes, is the woodlot a commercial farm woodlot, or a commercial non-farm woodlot?; and (3) if yes again, is farming the chief source of income for the owner of the woodlot? The way that income from a woodlot is taxed, and the capital gains tax on an inter-generational transfer of the property, differs according to the answers to these questions.

To be considered as a commercial woodlot, it must be operated with a reasonable expectation of profit. No single factor is determinative, and not doing one of the listed things does not automatically mean the woodlot is non-commercial. Factors to be considered include the following:

* + Extent of planning (for example, a management plan, business plan, and records of implementation of the plans);
  + Effort made to personally acquire (through, for example, courses) or hire expertise to successfully implement woodlot plans, and the actual implementing of the plans;
  + Amount of time spent on woodlot operation, relative to other employment;
  + How the activity on the woodlot compares with other woodlot operations of comparable nature and size; if, for example, the size of the woodlot is much too small to allow for a reasonable expectation of profit, it will be assumed that it is a hobby woodlot;
  + Whether the woodlot owner qualifies for government woodlot owner assistance programs;
  + The annual record of revenue and profits or losses, and whether gross revenue and profits rise over time; however, it is recognized that woodlots do not necessarily generate revenue every year, and that lengths of time may pass with no income from a woodlot;
  + The nature of expenses claimed and their relation to the woodlot operation; and
  + The woodlot owner’s qualifications (education and experience) related to the woodlot business, as well as membership in an association of woodlot owners or other professional or business organizations.

In cases of non-commercial woodlots, the owner is generally not permitted to claim losses on any income from the woodlot, and sales of timber more than $1,000 are likely subject to capital gains tax.

To be considered a commercial farm woodlot, the owner must be engaged in farming activity (crops and/or livestock), or be engaged in the planting, nurturing and harvest of trees within the context of a forestry plan, and the owner devotes time and effort to the growth, health, quality and composition of the stands within the woodlot. If the focus of a business is logging, and not growing, nurturing and harvesting trees, even if some reforestation activities are carried out, then the business is not considered to be a commercial farm woodlot. Note, Christmas tree operations are generally considered to be farming.

If operated as a commercial farm woodlot, then capital gains tax is deferrable on inter-generational transfers (through sale or gift) so long as the woodlot continues to be operated as a commercial farm woodlot. Deferring capital gains tax on inter-generational transfers is not allowed, however, for transfers of non-farm commercial woodlots.

In order words, so long as ownership of a commercial farm woodlot is kept within the family, the capital gains tax that would otherwise be payable on any increased value of the property, is deferred indefinitely. In days past, it was a common story that the children inheriting a woodlot would have to have it cut just to pay the capital gains taxes owing due to the increased value of the land since it had last changed hands.

Further, if farming is considered to be the chief source of income, then the taxpayer is able to fully deduct any expenses or losses against all of the taxpayer’s income, not just farm- (or woodlot-) generated income. The factors considered in determining the chief source of income are (1) the taxpayer’s time commitment to the farming operation relative to other sources of income, (2) the taxpayer’s level of capital investment in the operation, and (3) whether there is a reasonable expectation of significant profitability from the operation.

A helpful brochure entitled *Taxation and the Managed Woodlot* can be found at <http://nbwoodlotowners.ca///uploads//Website_Assets/PWSI_Primer_6_En.pdf>.

**7.0 Miscellaneous Acts and Regulations**

*7.1 Forest Fire Protection Regulations*[[31]](#footnote-31)

Through these regulations, the Department of Natural Resources mandates a fire season in the province, by location, and requires permits for outdoor fires in locations where a fire season is in effect. The regulations also mandate certain fire prevention equipment to be had on site of forestry operations, according to the size of the operation.

*7.2 Off-highway Vehicle Act*[[32]](#footnote-32)

No-one is permitted to operate an off-highway vehicle (OHV) on private land without written permission of the owner or occupier of the land. Written permission can be given to individual OHV operators, or through a recognized club or association of OHV operators. OHVs include snow vehicles, all-terrain vehicles, motorcycles, mini bikes, four-wheel-drive or low-tire-pressure vehicles, dune buggies, or other vehicle so-designated by regulation. OHVs do not include vehicles registered as per the *Motor Vehicle Act*, or vehicles exempted by regulations.

Further, anyone owning, operating or riding as a passenger on an OHV on land, whether with or without permission of the landowner or occupier of the land, is deemed to have willingly assumed all risks of owning or operating the OHV, save for any danger created by the owner or occupier of the land with the deliberate intent of doing harm or damage to the person or owner, operator or passenger of the OHV. As well, anyone operating an OHV on land other than his or her own land must carry third-party liability insurance in at least the amount required by regulation.

Anyone using an OHV must ensure that the noise-level of the vehicle is not above the level originally set by the manufacturer due to removal or modification of the muffler or other noise-dampening device. Those using OHVs must also ensure that the vehicle is operated with due care and attention, with reasonable consideration for other persons (including passengers) and property, not at an excessive speed, and in a way so as not to annoy or worry domestic or farm animals or wildlife.

Some areas of the province, whether on private or Crown land, are off-limits to OHVs. These include sand dunes, coastal or highland barrens, and wetlands (including swamps and marshes) unless covered by compact and groomed snow at least 30cm deep; non-frozen watercourses (as defined by the Environment Act); and sensitive areas (as designated or defined by regulations). The Minister may issue an order or licence to authorized use of an OHV in a coastal or highland barren, sand dune or sensitive area. OHVs can be restricted from drinking-water supply areas as well in order to protect water quality in the supply area.

Other off-limit areas to OHVs include beaches (as defined by the *Beaches Act*); core habitat of species at risk (as defined by the *Endangered Species Act*); provincial parks or park reserve (as defined by the *Provincial Parks Act*); and protected or ecological sites (as designated by the *Special Places Protection Act*); wilderness areas (as defined in the *Wilderness Areas Protection Act*), save as excepted for by these various Acts. The Minister of Natural Resources may also designate certain trails as for the use of OHVs or certain classes of OHVs. Finally, OHV rallies are not permitted unless a permit is obtained to hold the rally. A permit requires that the owners or occupiers of the land where the rally is to be held give permission for the use of their land, that local enforcement authorities are notified of the event, and that all necessary precautions to protect the environmental have been taken.

Anyone violating a provision of the Act is subject upon conviction to a penalty of between $250 and $2,000 for a first offence, and between $500 and $2,000 for subsequent offences. The registered owner of an OHV is liable to be charged for any offence committed with his or her OHV, unless the OHV is being used without his or her permission. If the owner of the OHV is on or in the OHV at the time of a violation, then both the owner and the operator is guilty of an offence.

Landowners can also pursue private legal action against those who trespass or cause damage to property through the use of an OHV.

*7.3 Trails Act*[[33]](#footnote-33)

This Act enables the province, with the written permission of the landowners involved, to establish trails on private lands, and helps to reduce the liability to such landowners resulting from the trail. Once the province designates a trail, the province must let the landowners involved know that the trail has been designated, and provide a plan and description of the trial. The province must also post trail signs at the usual point of access to the trail.

A landowner can give permission either for an indefinite period of time, in which the permission is binding on the owner or occupier of the land and all subsequent owners or occupiers of the land, or for a defined period of time, in which the permission is binding on all owners or occupiers of the land for the time specified. In either event, the permission is filed with the appropriate office of the registry of deeds.

The province can recommend special management zones along trails to protect the appearance and long-term diversity and stability of forests and to provide for suitable wildlife habitat along trails on private lands. The Act also gives the province power to acquire land, through gift or purchase, to be used as a trail or access to a trail.

The Act limits liability to landowners by deeming that users of designated trails voluntarily assume all risks encountered on the land when using the trail, even if the person ventures off of the trail. Except for not creating a danger with deliberate intent of doing harm, owners and occupiers of land owe no duty of care to those who use such trails.

The Act also stipulates that users of designated trails shall not be impaired by alcohol or drugs, act in a noisy or disorderly manner, create a disturbance, cause a safety risk or annoyance to other trail users, purposefully damage property along the trail, or dump garbage along the trail.

*7.4 Private Ways Act*[[34]](#footnote-34)

A woodland owner who lacks access to his or her land by way of a public road or other right of way, and cannot obtain agreement from the private owners of the land needed to be crossed, can petition the Governor in Council for an order for a right of way across the land in question. The petition may be expected to pay a fee for the right of way.

*7.5 Woodmen’s Lien Act*[[35]](#footnote-35)

Anyone performing any labour or service in connection with any logs or timber has a right against those logs or timber for any amount owed to that person for the labour or service performed. The right has priority over any other claims against the logs or timber, save for a claim by the province. No one may “contract out” of the provisions of this Act.

*7.6 Occupiers' Liability Act*[[36]](#footnote-36)

Occupiers of land (that is, anyone who owns, or is in possession of, or who has responsibility for and control over land and activities that take place on the land) in Nova Scotia have limited liability when people enter certain types of land thanks to this Act. The Act replaces the common law rules regarding an owner’s liability to others entering upon the land.

Anyone, save for the exceptions below, who enters certain lands is deemed under this Act to have willingly assumed the risks of doing so. That is, the land owner or occupier is under no duty of care towards such people, beyond not creating a hazard with the intent to cause harm to people entering the land, or acting with reckless disregard of such a person or the property of that person. Essentially, this Act creates a ‘use at one’s own risk’ requirement for those to enter onto another’s land. The lands covered by this limitation of liability include undeveloped rural land, land used for forestry or agriculture, wilderness land, utility rights-of-way, private roads on these lands, gated roads not on these lands but which are marked as private, and recreational trails marked as such.

The willing assumption of risk does not apply to those who enter the land for a purpose connected with the occupier or someone usually entitled to be on the land, to those who pay a fee to enter or for an activity on the land, or to anyone provided with living accommodation in exchange for some form of payment by the occupier.

In cases where the willing assumption of risk does not apply, the occupier of the land or premises may modify the duty of care owed (that is, the occupier’s liability) to those who enter the land or premises by way of an express agreement (such as a waiver), express stipulation or notice. However, this option is limited by what the court would hold to be a reasonable modification of the duty owed (based on all the circumstances of the specific situation). In other words, if a waiver of rights, in the circumstances, is not a reasonable restriction or modification of rights in the eyes of the court, then the court is not bound to uphold the waiver.

With respect to contractors who come onto another’s land to perform work (such as independent forest harvesting or silviculture contractors), the occupier is not liable to the contractor provided that the occupier exercised reasonable care in the selection of the contractor and it was reasonable that the work engaged in by the contractor actually needed doing.

1. See the Species at Risk List Regulations, made under sections 10 and 12 of the *Endangered Species Act*,for the complete list [↑](#footnote-ref-1)
2. Some exceptions apply; see the Act for details. [↑](#footnote-ref-2)
3. Pesticide Regulationsunder s 84 of the *Environment Act* NS Reg 61/95 [↑](#footnote-ref-3)
4. described under Schedule 1 of the Forest Sustainability Regulations (NS Reg 148/2001) [↑](#footnote-ref-4)
5. Department of Natural Resources website: http://novascotia.ca/natr/forestry/registry/fund-background.asp [↑](#footnote-ref-5)
6. **N.S. Reg. 3/2004 (under s 40 of the *Forests Act*)** [↑](#footnote-ref-6)
7. By county within NS, by province within Canada, and by country for international acquisitions [↑](#footnote-ref-7)
8. **under subsection 20(4) of the *Forests Act*, NS Reg 85/84** [↑](#footnote-ref-8)
9. RS, c 355, s 1. <http://nslegislature.ca/legc/statutes/primary.htm> [↑](#footnote-ref-9)
10. *Canadian Pacific Ltd v Lowe*, 1998 172 NSR(2d) 89 (NS SC) [↑](#footnote-ref-10)
11. *Gillis v Budge*, 1992 CanLII 4664 (NS SC) [↑](#footnote-ref-11)
12. *Crocker v Dubois*, 2010 NSSC 279 [↑](#footnote-ref-12)
13. *Patterson v Municipal Contracting Ltd*., 1989 CanLII 1470 (NS SC) [↑](#footnote-ref-13)
14. http://nslegislature.ca/legc/statutes/protect.htm [↑](#footnote-ref-14)
15. http://www.legal-info-legale.nb.ca/en/know\_trespassing [↑](#footnote-ref-15)
16. <http://www.gov.ns.ca/natr/enforcement/pdf/trespass_2.pdf> [↑](#footnote-ref-16)
17. RS, c 14, s 1. http://nslegislature.ca/legc/statutes/angling.htm [↑](#footnote-ref-17)
18. s 322(1) of the Criminal Code requires the theft to be without colour of right, and with intent; and (2) occurs when the accused moves the item or begins to cause it to be movable. [↑](#footnote-ref-18)
19. *R v Leslie* 1999 Canlii 2864 (NS SC) [↑](#footnote-ref-19)
20. s 430(3) of the Criminal Code [↑](#footnote-ref-20)
21. *MacDonald v Earle*, 2010 NSSC 151 [↑](#footnote-ref-21)
22. *Styger v Brow*, 1989 CanLII 1485 (NS SC) [↑](#footnote-ref-22)
23. As described but not awarded in *DeGruchy v Pettipas*, 2004 NSSC 212 [↑](#footnote-ref-23)
24. *R v Leslie* [↑](#footnote-ref-24)
25. Case citation not available [↑](#footnote-ref-25)
26. MacDonald v Earle,  2010 NSSC 151 [↑](#footnote-ref-26)
27. MacDonald v Earle,  2010 NSSC 151 [↑](#footnote-ref-27)
28. Saulnier v Bain, 2006 NSSC 27, at para 55 [↑](#footnote-ref-28)
29. http://www.cra-arc.gc.ca/E/pub/tp/it373r2-consolid/it373r2-consolid-e.pdf [↑](#footnote-ref-29)
30. http://www.gov.ns.ca/natr/Education/woodlot/modules/module10b/ [↑](#footnote-ref-30)
31. <http://www.gov.ns.ca/just/regulations/regs/fofire.htm> [↑](#footnote-ref-31)
32. RS, c 323, s 1. http://nslegislature.ca/legc/statutes/offhighw.htm [↑](#footnote-ref-32)
33. RS, c 476, s 1. <http://nslegislature.ca/legc/statutes/trails.htm> [↑](#footnote-ref-33)
34. RS, c 358, s 1. http://nslegislature.ca/legc/statutes/privways.htm [↑](#footnote-ref-34)
35. RS, c 507, s 1. <http://nslegislature.ca/legc/statutes/woodmens.htm> [↑](#footnote-ref-35)
36. 1996, c 27, s 1. http://nslegislature.ca/legc/statutes/occupier.htm [↑](#footnote-ref-36)