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A Citizen's and Lawyer's Guide to Private Prosecutions in British Columbia

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The opinions expressed are those of the authors, and any errors and omissions are the responsibility of the authors alone.

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Cover image: A reconstructed area of Hazelton Creek, four years after the 2014 Mount Polley mine disaster. (Holly Pattison)

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PREFACE

This *Guide* was created to improve accountability for those who harm the environment, to empower citizens and their lawyers to take part in the enforcement of environmental laws and protection of the environment, and ultimately with the goal of deterring environmental crimes.

Private prosecutions are well suited to address this issue because they give concerned citizens a means by which to illuminate the failures of public regulatory agencies, and in some cases, obtain convictions and enforce the law.

The law governing private prosecutions is vast and complex; it includes legal areas such as environmental regulation, criminal procedure, and evidence, to name a few. These topics span entire legal textbooks and cannot possibly be condensed into a guide like this one. For that reason, the aim of this document is to provide practical guidance about the key considerations involved in bringing a private prosecution and to direct the user to supplementary resources which may be necessary to make case-specific decisions.

At the outset, it is crucial to note that in British Columbia ("BC"), there is a high likelihood that private prosecutions are stayed (halted) by the federal or provincial Attorneys General. In practice, most private prosecutions brought in BC are stayed before they can reach trial. Despite the high risk of a stay, the authors of this guide believe that private prosecutions can still be a powerful tool for change. By bringing a private prosecution as part of a broader campaign, a private prosecutor can direct public attention to an environmental issue, illuminate shortcomings in environmental laws, and put pressure on government agencies to enforce the law. Furthermore, the mere act of bringing an appropriate and well-prepared private prosecution lends strength to the argument that private prosecutions should not be stayed as a matter of policy, but instead assessed on their merits and their contribution to the public interest.

This *Guide* emphasizes the importance of bringing high-quality private prosecutions that meet or exceed the standard expected of public prosecutors. High-quality private prosecutions have a strong factual foundation and legal basis, and a clear public interest rationale. This *Guide* provides guidance for how to achieve this standard of quality throughout the various stages of a private prosecution, from identifying relevant laws and gathering evidence, to laying charges and navigating criminal procedure. It also draws on case studies of several influential private prosecutions in BC.

This *Guide* is intended to assist individuals in navigating the colonial law in BC. The authors acknowledge that Indigenous Nations have authority over their territories to protect the environment and enforce their laws. This jurisdiction is grounded in their laws, epistemologies, worldviews and relationships with the lands, waters, and wildlife, and has existed since time immemorial. As such, private prosecutions and colonial environmental laws are only one available route to safeguard the environment. That said, private prosecutions can be a powerful tool for Indigenous Nations to protect their territories and environment as evidenced by Case Study #6, a private prosecution brought by a First Nation for enforcement of its laws.

CAVEATS

It is critical for anyone embarking on a private prosecution, or exploring them generally, to keep in mind that it is an offence to threaten anyone with criminal prosecution or to insist anything be done on pain of prosecution.[1] It is permissible to inform someone that in your view they have broken the law, but prosecution must never be used as a threat to induce compliance with the law or for any other purpose. One should also always be aware of the potential for defamation.

The BC Court of Appeal in *Taseko Mines Limited v Western Canada Wilderness Committee* adopted this definition of defamation:

> *A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society.*[2]

Cost awards, or fees levied against the losing party in civil litigation, are generally not a concern in private prosecutions, but can be where the prosecution was brought improperly or with improper motive. A private prosecutor may also risk other forms of judicial sanction if they fail to abide by the duties and responsibilities of a prosecutor. More information about adverse cost awards and the tort of malicious prosecution is provided in Section 2.4.6.

It is also important to be mindful that the *Canadian Charter of Rights and Freedoms* (the "*Charter*") applies to private prosecutions.[3] The court has held that a private prosecutor "has a role parallel to that of the attorney general" and is "an expression of government policy" given that it is "entirely enabled by statute."[4] Therefore, private prosecutors must be mindful of the applicable sections of the *Charter*, including having a trial within a reasonable period of time.[5] It is important to seek legal advice so you are fully aware of your obligations and responsibilities.

This *Guide* was created with lawyer-client teams in mind. Legal advice is strongly advised for every for stage of a private prosecution discussed in this *Guide*, and for anyone considering a private

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[1] *Criminal Code*, RSC 1985, c 46 s 346 [*Criminal Code*]; *R v Bristow*, [1990] BCJ No 2218, 11 WCB (2d) 127.
[2] *Taseko Mines Limited v Western Canada Wilderness Committee*, 2017 BCCA 431 at para 45.
[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24) [*Charter*].
[4] *R v HMTQ et al*, 2017 BCPC 371 at paras 39, 41 [*R v HTMQ*] (while this decision was reversed in *R v Executive Flight Centre Fuel Services Ltd*, 2018 BCSC 2212, the applicability of the *Charter* to private prosecutions was upheld).
[5] Canada, Department of Justice, "Section 11(b) – Trial within a reasonable time" (last modified 29 June 2023), online: <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art11b.html> [https://perma.cc/L6TW-KG8A].

prosecution it is recommended to seek legal advice at the earliest possible stage. Only the most savvy and experienced non-lawyer could take on a private prosecution without legal counsel, and it is not recommended.

This *Guide* is provided for general information as a public and educational resource. The law is complex and ever-changing, and this publication is not and cannot provide a complete and accurate statement of the current law and should not be relied upon as such. We attempt to ensure the accuracy of the *Guide*; however, much of the information is prepared by students, not lawyers, and we cannot guarantee that it is correct, complete or up to date. The Environmental Law Centre does not guarantee the quality, accuracy or completeness of any information in this document. Such information is provided "as is" without warranty or condition of any kind. Many factors unknown to us may affect the applicability of any statement or comment that we make in this material to your particular circumstances. The information provided in this document is not intended to provide legal advice and should not be relied upon for that purpose. Materials included in the Case Studies Section (Section 4) are for consideration as materials that were filed in particular cases, they are not included for the truth of their contents.

This *Guide* is not legal advice, and the authors are not your lawyers. As stated throughout, please seek legal advice before proceeding with a private prosecution.

1. INTRODUCTION

1.1 WHAT ARE PRIVATE PROSECUTIONS?

A private prosecution is a type of legal action used to enforce laws, brought by a private individual who is not acting on behalf of the government, law enforcement, or a prosecution service.[6] Where a private individual has reasonable grounds to believe that someone has violated the law (committed an offence), they can "lay an Information," or in other words, begin a private prosecution.[7]

The right for private citizens to initiate and conduct private prosecutions is part of Canada's legal inheritance from England, originating in the early common law and dating back to at least the early 13th century.[8] Historically, under the English common law, every private citizen had the right to prosecute any statutory offence.[9] The ability of private citizens to act as prosecutors was considered to be not only a privilege, but in fact, a duty, [10] and until the mid-1500s all prosecutions in England were conducted privately, and public prosecutors were not appointed in Britain until

[6] Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook,* Catalogue No. J79-2/2014E-PDF (Ottawa: Public Prosecution Service of Canada, 2014), s 5.9, online: <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p5/ch09.html> [perma.cc/PSM5-4GF3] [PPSC Deskbook]; East Coast Environmental Law, "Bringing a Private Prosecution" (2009) at 1, online (PDF): <www.ecelaw.ca/media/k2/attachments/Summary_Series_3.pdf> [https://perma.cc/W62Z-BNLS] [ECEL Private Prosecution Report].

[7] *Criminal Code*, *supra* note 1, s 504; *Offence Act,* RSBC 1996, c 338, s 25 [*Offence Act*]; Ontario Court of Justice, *Guide for Applying for a Private Prosecution* (last accessed 18 July 2022) at 1, online (PDF): <www.ontariocourts.ca/ocj/files/guides/guide-private-prosecution-EN.pdf> [https://perma.cc/4ZAK-MPBB] [OCJ Private Prosecution Guide].

[8] Peter Burns, "Private Prosecutions in Canada: The Law and a Proposal for Change" (1975) 21:2 McGill LJ 269 at 271, online: *Hein Online* <heinonline.org/HOL/P?h=hein.journals/mcgil21&i=281> [Burns, "Private Prosecutions in Canada"]; Kernaghan R Webb, "Taking Matters Into Their Own Hands: The Role of Citizens in Canadian Pollution Control Enforcement" (1991) 36:3 McGill LJ 770 at 789, online: *CanLII* <canlii.ca/t/2bnr> [Webb, "The Role of Citizens in Canadian Pollution Control Enforcement"].

[9] John Swaigen, Albert Koehl & Charles Hatt, "Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment," in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary: University of Calgary Press, 2019) 240 at 242, online (pdf): <prism.ucalgary.ca/bitstream/handle/1880/109483/9781552389867_chapter19.pdf?sequence=21&isAllowed=y> [https://perma.cc/9MZP-UCG7] [Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment"].

[10] Burns, "Private Prosecutions in Canada," *supra* note 8 at 271.

1879.[11] The right to bring a private prosecution survives to this day and has been adopted into Canadian law under the *Criminal Code*.[12] The *Criminal Code* enshrines private citizens' rights to initiate private prosecutions for criminal offences or other offences under federal statutes.[13] In BC, the *Offence Act* confirms the right to initiate private prosecutions for offences under provincial statutes.[14]

1.2 THE IMPORTANCE OF PRIVATE PROSECUTIONS

Given their deep roots and continuing presence, private prosecutions continue to play an important role in the Canadian legal system. They provide for public participation in the law, which the Law Reform Commission of Canada has described as serving "to reinforce and demonstrate the integrity of basic democratic values."[15] They also provide access to justice and strengthen accountability, given that the government is unlikely to bring prosecutions against itself or other levels of government.[16] While public officials initiate the bulk of prosecutions in Canada, the power to privately prosecute offences has been described as "a vital form of reinforcement" for public (government) prosecutors.[17] This form of reinforcement is especially important given that law enforcement agencies "are often understaffed, under-resourced, untrained, and reluctant to prosecute or employ other enforcement tools."[18] In addition, the ability to initiate a private prosecution acts "as a democratic tool to counter the absolute discretion of the prosecutor and to remedy lazy, negligent, corrupt or ineffective law enforcement."[19] Through the use of private prosecutions, citizens can ensure that industry actors know that environmental protection laws are effective and enforceable.[20]

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[11] Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986) at 34-35, online (PDF): <sealegacy.com/pdf%20files/04%20-%20WorkingPaper-PrivateProsecution.pdf> [https://perma.cc/UZE8-9ELS] [LRCC, *Private Prosecutions*]; John Swaigen, Albert Koehl, and Charles Hatt, "Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment," J.E.L.P. 2013, 26(1), 31, at 34 (please note this article, published in 2013, is very similar, but not identical, to the later book chapter of the same name cited in note 9).

[12] *Criminal Code*, *supra* note 1 (Canada adopted the criminal law of England "except as altered, varied, modified or affected" by the *Code* or any other federal legislation at s 8(2)).

[13] *Criminal Code*, *supra* note 1, s 504.

[14] *Offence Act, supra* note 7, s 25.

[15] LRCC, *Private Prosecutions*, *supra* note 11 at 3-4.

[16] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 241, 243; See case studies Case Study #4 - Lemon Creek (2013) and Case Study #2 - Georgia Strait Alliance (2006).

[17] Burns, "Private Prosecutions in Canada," *supra* note 8 at 287-290.

[18] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 241.

[19] Kent Elson, "Taking Workers' Rights Seriously: Private Prosecutions of Employment Standards Violations" (2008) 26:2 Windsor YB Access Just 39 at 340 [Elson, "Private Prosecutions of Employment Standards Violations"].

[20] Keith Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution" 13 J Env L & Prac 153 at 153 [Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution"].

The case studies included in this report highlight the value of this form of legal action to reflect the inadequacy of environment laws and policies and push for meaningful change. The summaries highlight how initiating a private prosecution can either lead to the federal or provincial governments taking over the case (Case Study #3 - *Morton v. Marine Harvest Canada Inc.* (2009); Case Study #1 - *Morton v. Heritage Salmon Ltd.* (2005); Case Study #4 - Lemon Creek (2013)), or necessary policy and legislative reform and funding allocations (Case Study #2 - Georgia Strait Alliance (2006)). In addition, private prosecutions can bring much needed public awareness to an issue (Case Study #5 - Mount Polley (2016)).

Many countries have some form of private prosecution.[21] A notable example is the 1974 private prosecution of 35 members of the deposed Greek military junta, which included Greece's former head of state. The private prosecution was brought by a junior lawyer, Alexandros Lykourezos,[22] and had the beneficial effect of allowing the government to avoid the appearance of the litigation being politically motivated.[23]

We live in unprecedented times. We are in the sixth mass extinction, and climate change, which the Supreme Court of Canada has described as "an existential challenge" and "a threat of the highest order to the country, and indeed to the world,"[24] will challenge our understanding of the relationship between colonial law and the environment. Private prosecutions are a tool in the colonial toolbox, and it is up to imaginative citizens and lawyers to use them in new ways to protect the earth and our children's futures.

1.3 USING PRIVATE PROSECUTIONS AS A STRATEGIC TOOL TO PROTECT THE ENVIRONMENT

The purpose of this section is to provide additional information about the advantages and disadvantages of private prosecutions, and how they compare to alternative methods of pursuing environmental justice. Before deciding to embark on a private prosecution, it is critical that one understand the legal and practical characteristics that define private prosecutions. One of the most restrictive legal characteristics of private prosecutions is the federal and provincial Attorney Generals' discretionary ability to intervene. Due to the complexity and importance of government intervention in private prosecutions, government intervention in private prosecutions is discussed in Section 1.4.

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[21] Jamil Ddamulira Mujuzi, "The Power of Prosecutorial Heads to Intervene in Private Prosecutions in Commonwealth Countries" (2022) Loy J of Soc Sci 36:2 97 at 98-106 [this is particularly the case in Commonwealth countries].
[22] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton & Co., 2011) at 44-45 [Sikkink, *How Human Rights Prosecutions are Changing World Politics*].
[23] Sikkink, *How Human Rights Prosecutions are Changing World Politics,* supra note 22 at 45.
[24] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

1.3.1 THE ADVANTAGES OF PRIVATE PROSECUTION

Private prosecutions have long been recognized as particularly suitable for enforcing environmental laws, and "retain important roles to play, especially… where government enforcement is lax."[25] While current Crown policies make it unlikely that private prosecutions can be conducted privately to completion, they are still described as, at times, "the most effective legal tool available to individuals and Environmental Non-Governmental Organizations (ENGOs) to combat violations of environmental laws."[26]

One of the primary advantages of a private prosecution is the opportunity to secure a conviction and enforce consequences under the law.[27] Private prosecutions can also act as a broader deterrent, by demonstrating to environmental actors that their actions have legal consequences which may include fines, jail time, remediation, or other creative remedies, as well as reputational impacts.[28] In this way, private prosecutions can motivate others to remedy their actions where alternative persuasion or negotiation efforts have failed.[29] Even where a private prosecution is unsuccessful, the mere act of laying charges can draw significant public attention to the

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[25] Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution," *supra* note 20 at 153; Burns, "Private Prosecutions in Canada," *supra* note 8 at 287-290; LRCC, *Private Prosecutions*, *supra* note 11 at 3.
[26] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 240; BC Prosecution Service, "Crown Counsel Policy Manual: Private Prosecutions," (1 March 2018), online (pdf): <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/pri-1.pdf> [BCPS "Crown Counsel Policy Manual: Private Prosecutions"]; Two important cases that highlight the utility of private prosecutions in the context of enforcing environmental laws include *R v Syncrude Canada*, 2010 ABPC 229 [*R v Syncrude*] and *Podolsky v Cadillac Fairview Corp*, 2013 ONCJ 65 [*Podolsky v Cadillac*]. In *R v Syncrude*, Syncrude Canada Ltd was found guilty under the *Environmental Protection and Enhancement Act*, E-12 RSA 2000 and the *Migratory Birds Convention Act*, SC 1994, c 22 after 1600 migrating waterfowl were trapped in the Aurora Settling Basin (tailings pond) and subsequently died. This case was initiated through a private prosecution by Jeh Custer, then a member of the Sierra Club of Canada. The provincial and federal Crowns took over the case, subsequently leading to the 2010 ruling by the Alberta Provincial Court (see Shaun Fluker, "R v Syncrude Canada: A Clash of Bitumen and Birds," Case Comment on *R v Syncrude Canada* (2011) 49-1 Alberta Law Review 237, online: <https://canlii.ca/t/293n> [https://perma.cc/3CY4-EHZN]). In *Podolsky v Cadillac*, Liat Podolsky of Ecojustice brought a private prosecution case against the owners and managers of a building complex in Toronto for the death of hundreds of migratory birds, contrary to the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O36, the provincial *Environmental Protection Act*, RSO 1990, c E19, and the federal *Species at Risk Act*, SC 2002, c 29 [*SARA*]. Ecojustice prosecuted this case. While the court found that the prosecution established the essential physical elements (*actus reus*) of the strict liability offences, ultimately the Ontario Court of Justice found the defendants not guilty as they had done their due diligence or took reasonable care to address the problem.
[27] James S Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, 2nd ed (Edmonton: Environmental Law Centre, 2004) at 13, online (pdf): <https://elc.ab.ca/wp-content/uploads/2022/12/Enforcing-Environmental-Law.pdf> [Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*].
[28] Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 342; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 13.
[29] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 250-251.

government's failure to enforce the law, and spur investigation or prosecution where none would have otherwise occurred.[30]

Additionally, private prosecutions do not suffer from limitations regarding standing which can reduce the effectiveness of other legal avenues, such as civil actions. Standing is, in essence, the requirement that a party demonstrate a sufficient connection to, or harm from, the action they seek to challenge to ground their right to bring the case, or their "standing."[31] In contrast to a civil action, a private prosecutor does not need to demonstrate that they were personally affected or harmed by an environmental offence. Anyone who believes on reasonable grounds that an offence has been committed can initiate a private prosecution.[32] Also unlike civil actions, the likelihood of costs being awarded against a private prosecutor is low, and even where costs are awarded, the amounts are often nominal.[33] For more on costs, see Section 2.4.6.

1.3.2 THE DISADVANTAGES OF PRIVATE PROSECUTION

In the negative, private prosecutions can be a costly and time-consuming endeavour, requiring "tremendous informational, technical and financial resources."[34] The significant resources required to conduct a private prosecution flow from the high burden of proof that falls upon a prosecutor.[35] The process of obtaining evidence is more difficult and costly for a private prosecutor, who does not benefit from the investigative powers granted to public prosecutors and investigative bodies such as police or environmental investigators.[36] Administrative and legal costs may also be significant and are unlikely to be recovered from an offender.[37]

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[30] *Gouriet v Union of Post Office Workers*, 1977 2 WLR 310, [1977] 3 All ER 70 (HL) at 79 (per Lord Wilberforce), cited in PPSC Deskbook, *supra* note 6, s 59; Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 241; Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 344; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at iii, 13.

[31] Thompson Reuters, "Practical Law, Standing," online: <https://ca.practicallaw.thomsonreuters.com/5-507-5629?transitionType=Default&contextData=(sc.Default)&firstPage=true> [https://perma.cc/QT2H-6MQ6].

[32] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 27; ECEL Private Prosecution Report, *supra* note 6 at 1; Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 244.

[33] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 244, 249; Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 350; *Criminal Code*, *supra* note 1, s 840; Mallet, *supra* note 27 at 105-106.

[34] Webb, "The Role of Citizens in Canadian Pollution Control Enforcement," *supra* note 8 at 816.

[35] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 16; ECEL Private Prosecution Report, *supra* note 6 at 1; Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 244-245.

[36] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 245; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 18.

[37] Webb, "The Role of Citizens in Canadian Pollution Control Enforcement," *supra* note 8 at 828; Burns, "Private Prosecutions in Canada," *supra* note 8 at 286-287; See Section 2.4.6 on costs.

Additionally, private prosecutions are governed by stricter timelines than civil actions. Statutes which create offences may contain limitations periods ranging from one to five years, and a private prosecution cannot be pursued if the events at issue occurred outside of the limitations period. In some cases, this may create a high burden on the private prosecutor to gather necessary evidence and lay charges to avoid an offender escaping liability.[38]

1.3.3 THE DUTIES OF A PRIVATE PROSECUTOR AND CONSEQUENCES OF FAILING TO SATISFY THEM

Individuals seeking to pursue a private prosecution must also be aware of the special role and duties of the prosecutor in our legal system. Prosecutor's duties have been summarised as "extending beyond what is expected of other litigants. The Supreme Court of Canada characterises this as a public duty that must be executed fairly ."[39] It is important that private prosecutors "be careful to prosecute in the name of justice and not to be over-zealous in the conduct of prosecutions."[40] A private prosecutor must always act under the reasonable belief that an offence has been committed.[41] If it is apparent that a prosecution is being brought with a primary objective other than enforcing the law, such as to draw public attention to an issue, the success of the private prosecution is less likely and the private prosecutor may attract liability in the form of an adverse cost award or damages for malicious prosecution.[42]

As mentioned, while costs for private prosecutions tend to be nominal, the *Criminal Code* contains several provisions which allow an accused to claim costs against a prosecutor if the prosecutor has failed to diligently prosecute an offence or has otherwise acted improperly.[43] For more information on costs, see Section 2.4.6.

A private prosecutor can also attract civil liability in the form of damages for malicious prosecution. However, the bar is high. To be found liable for malicious prosecution, it must be proven on a balance of probabilities "that the prosecution was: (1) initiated by the defendant; (2) terminated in favour of the plaintiff; (3) undertaken without reasonable and probable cause; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect."[44] The Supreme Court of Canada recently clarified that an action for malicious prosecution must be based on malice or on an improper purpose, and that there is a "very high bar" for finding such liability

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[38] ECEL Private Prosecution Report, *supra* note 6 at 2-3; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 16-17.
[39] Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 347-348.
[40] Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 348.
[41] Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 344; Mallet, *supra* note 27 at 10, 13, 88, 106.
[42] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 105-106; PPSC Deskbook, *supra* note 6, s 5.9.
[43] See section 2.4.6 on costs; *Criminal Code*, *supra* note 1, ss 601(5),809(1), 826-827, 834(1)(b), 839(3).
[44] *Miazga v Kvello Estate,* 2009 SCC 51.

for Crown prosecutors.[45] It is not as clear that the same high standard would apply to private prosecutors, given that the rationale for this principle is that the decision to prosecute lies at the core of prosecutor's powers, is shielded from improper political influence, and is "so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched."[46]

As mentioned, all prosecutors owe a duty of disclosure.[47] In the process of pursuing a private prosecution, the person investigating an alleged crime will collect a large amount of evidence and information. As further outlined in Section 2.3.4, the Informant and their counsel must disclose all relevant information in their possession (except information protected by privilege) to the defence.[48] While clearly irrelevant information can be excluded from disclosure, the person or people with a disclosure obligation "must err on the side of inclusion."[49] It is therefore important to keep well-organized records of the evidence gathered, notes taken, statements received, and other information relevant to the case, and consult legal counsel to ensure the duty to disclose is properly fulfilled.[50] It is also important to keep in mind that emails, letters, or correspondence with witnesses or other people involved may be subject to disclosure.

1.3.4 ALTERNATIVES AND COMPLIMENTS TO PRIVATE PROSECUTION

Private prosecutions are not the only tool available to citizens who seek to participate in or promote the enforcement of environmental laws. In some cases, it may be possible to seek enforcement of environmental laws simply by notifying the relevant government authorities and communicating what the witness has observed. Some environmental laws also create a formal investigation request process. For example, the *Canadian Environmental Protection Act* allows any resident of Canada who is at least 18 years old to request the investigation of an offence, which can require the Minister to commission an investigation and provide progress reports.[51] A similar process is available under the *Species at Risk Act*.[52] Both informal and formal requests for investigation can serve to notify the government of the need to investigate a potential offence, and if the government has already begun the investigative process, can save you from duplicating their work.[53] Contacting government authorities is recommended in almost all cases, as it is a

[45] *Hinse v Canada (Attorney General)*, 2015 SCC 35 at paras 40-41 [*Hinse v Canada*].
[46] *Hinse v Canada, supra* note 45 at para 40.
[47] *R v Taillefer; R v Duguay*, 2003 SCC 70 at paras 59-60, [*R v Taillefer; R v Duguay*]; *R v Stinchcombe,* 1991 CanLII 45 (SCC) [*R v Stinchcombe*].
[48] *Ibid*.
[49] *Ibid*.
[50] Gordon Scott Campbell, *The Investigator's Legal Handbook* (Toronto, ON: Thomson Carswell, 2006) at 495-520 [Campbell, *The Investigator's Legal Handbook*].
[51] *Canadian Environmental Protection Act*, SC 1999, c 33, ss 17-21 [*CEPA*].
[52] *SARA*, *supra* note 26, s 93.
[53] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 57-58.

faster and less resource-intensive method to pursue compliance and does not jeopardize your ability to later bring a private prosecution if the government does not act.[54]

In addition to contacting government authorities, in some cases it may be possible to secure compliance by notifying the potential offender. A potential offender may be aware of potential civil or criminal liability stemming from their actions, and therefore be willing to take remedial action on their own. Where environmental harms are ongoing, a potential offender may be under additional legal requirements to act. Contacting a potential offender would include informing them that you have obtained information that indicates that the law may have been violated or is being violated. If you contact a potential offender, you must be certain that you are not threatening prosecution to influence their actions, because this is a form of extortion and is a criminal offence. Such statements could threaten the viability of a private prosecution should you decide to proceed with one.[55] Due to the risks inherent in notifying an alleged offender, you should only contact the potential offender if you have first sought legal advice. In the majority of cases, it can be assumed that a potential offender is aware of their actions and will act on their own accord if they so desire.

Other alternatives to private prosecution include civil actions, applications for judicial review, requests for licence review or suspension, environmental petitions, and boycotts. Guidance for how to bring an alternative type of legal action or launch a campaign is outside of the scope of this *Guide*, but users should note that a private prosecution will not always be the most effective course of action, and even where launching a private prosecution is an appropriate course of action, a private prosecution is most effective when combined with other efforts as part of a multi-faceted approach.[56] The case studies found in Section 4 provide examples of successful environmental campaigns that used private prosecutions as part of a broader strategy.

1.3.4.1 Private Prosecutions as Part of a Broader Campaign: Media Strategy and the Risks of Speaking to the Media

It is generally not advisable for prosecutors to talk about cases to the media, especially before charges have been laid, as doing so could lead to accusations of bias or threatening prosecution, the risk of releasing information that could breach the offender's privacy and could make the prosecutor vulnerable to damages.[57] However, this does not mean that your prosecution must be conducted in complete silence. In fact, private prosecutions of environmental offences often form

[54] See the directory for the BC Government: British Columbia, "B.C. Government Directory," online: <https://dir.gov.bc.ca/>; see the directory for the Government of Canada: Government of Canada, "Government Electronic Directory Services (GEDS)" (10 October 2020), online: <https://www.geds-sage.gc.ca/en/GEDS?pgid=002> [https://perma.cc/PY7C-P2TZ].

[55] Note that, where you have standing to raise a civil proceeding, threatening a civil proceeding is not an offence. *Criminal Code*, *supra* note 1, s 346; Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 349.

[56] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 241; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 21.

[57] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 463-468.

part of a wider campaign, but it must be reiterated that private prosecutors should exercise caution when considering speaking to the media, and of course, to seek legal advice before doing so.

As outlined in Section 4, some successful environmental campaigns have used prosecutions as part of a broader strategy.[58] Communication with the media can take the form of status updates, such as media releases upon filing the Information (see Case Study #2 - Georgia Strait Alliance (2006)), or at different stages of the process beyond.[59] Using the media can be especially helpful when faced with procedural roadblocks. For example, you may be able to activate the public around the wider campaign by drawing attention to delays caused by the Crown, or to the decision to intervene and stay.

1.4 A KEY LIMITATION: GOVERNMENT INTERVENTION IN PRIVATE PROSECUTIONS

The provincial and federal governments each have unique roles in controlling prosecutions. Under the *Constitution Act, 1867,* the federal government has jurisdiction over the criminal law and procedure, and the provincial governments have jurisdiction over "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts."[60] Together, these constitutional powers mean that the provincial government takes on a default role in prosecuting all offences that occur within the province, but the federal government can still prosecute offences under some federal statutes.[61] This also means that the provincial and federal Attorneys General have the power to intervene in a private prosecution at any point, but the Attorney General of Canada's authority is only triggered in prosecutions under certain federal statutes, and only if the relevant provincial Attorney General has not intervened.[62]

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[58] It is important to note that the media aspect of these campaigns did not stop or start with the commencement of a private prosecution.

[59] Note: As the duty to disclose evidence is triggered by a request from the defendant or the counsel for the defendant, a media release upon filing the Information may accelerate the timeframe for fulfilling the prosecutor's obligation of disclosure. See Section 2.3.4.

[60] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(27) [*Constitution Act, 1867*].

[61] *Criminal Code*, *supra* note 1, s 2; Public Prosecution Service of Canada, "Understanding Criminal Law in Canada, Chapter 2" (last modified 24 December 2008), online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch02.html#section2_2> [https://perma.cc/L499-9P4X] [PPSC, "Understanding Criminal Law in Canada"]; See PPSC Deskbook, *supra* note 6, Pt 1 Ch 2.

[62] *Criminal Code*, *supra* note 1, ss 579-579.1; Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 242-243; PPSC Deskbook, *supra* note 6, s 5.9; Burns, "Private Prosecutions in Canada," *supra* note 8 at 283-285; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 79.

Intervention can stop the prosecution, either in the form of a "stay" of proceedings, or withdrawal of charges.[63] A stay of proceedings is an "order preventing, either temporarily or permanently, any further action on a prosecution."[64] Importantly, as per sections 579 and 579.1(2) of the *Criminal Code*, Crown prosecutors are empowered to temporarily stay proceedings for a year.[65]

The policy in BC has generally been to stop private prosecutions from proceeding.[66] Due to this policy, very few private prosecutions have resulted in convictions.[67] The spectre of government intervention and stay is one of the most significant barriers to private prosecution in BC.

As will be discussed below, where the provincial or federal Attorneys General intervene in a private prosecution, there are select avenues for review and appeal of the decision, but such avenues require the prosecutor to establish that the Attorney General acted with "flagrant impropriety."[68] As the law and policies currently stand in BC, the best outcome for a private prosecution is for the Attorney General to intervene and take conduct of a prosecution, at which point the government will assume the costs of collecting the required evidence to establish the offence and litigating the offence as they would any other prosecution.[69]

1.4.1 INTERVENTION BY THE ATTORNEY GENERAL OF BC

In BC, the provincial Attorney General will, as a matter of policy, intervene in all private prosecutions.[70] After the Attorney General has intervened, Crown Counsel must decide whether to direct a stay of proceedings (stop the prosecution from going any further), take conduct of and continue the prosecution, or, in rare cases, retain outside counsel or a special prosecutor to take conduct of the file.[71] This decision is informed by the *Charge Assessment Guidelines* – in order to take over and continue the prosecution, Crown Counsel must determine:

1. whether there is a substantial likelihood of conviction; and, if so,

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[63] PPSC Deskbook, *supra* note 6, s 5.9; LRCC, *Private Prosecutions*, *supra* note 11 at 15-17; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 79-81.
[64] Steve Coughlan, *Criminal Procedure*, 3rd ed (Toronto, ON: Criminal Procedure) at 484.
[65] *Ibid*.
[66] BCPS, "Crown Counsel Policy Manual: Private Prosecutions," *supra* note 26; Policies vary by province, see Ontario's policy: "Crown Prosecution Manual D. 30: Private Prosecutions" (14 November 2017), online: <www.ontario.ca/document/crown-prosecution-manual/d-30-private-prosecutions> [https://perma.cc/NRJ8-WEES].
[67] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 13.
[68] Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution," *supra* note 20.
[69] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 13, 79; ECEL Private Prosecution Report, *supra* note 6 at 2; See *R v Syncrude*, *supra* note 26.
[70] BCPS "Crown Counsel Policy Manual: Private Prosecutions," *supra* note 26.
[71] *Ibid*.

2. whether the public interest requires a prosecution.[72]

When determining whether there is a substantial likelihood of conviction, Crown Counsel must consider the availability and reliability of admissible evidence at trial, and the viability of defences "that remove any substantial likelihood of a conviction."[73] However, in exceptional circumstances, the public interest weighs so strongly in favour of prosecution that this standard may be lowered in order to maintain public confidence in the administration of justice.[74] The *Charge Assessment Guidelines* include factors that would favour continuing the prosecution, factors that would favour a stay, and factors that could favour either depending on the circumstances.[75] The following table outlines some relevant factors:

Factors that would favour prosecution[76]	Factors that would favour a stay[77]
• Significant sentence is likely upon conviction. • There is evidence of premeditation. • The harm from the alleged offence is serious. • The alleged offender has a history of previous convictions or allegations. • Offences are frequent at the location where the alleged offence is committed. • The offence is likely to repeat or continue.	• The potential penalty is insignificant. • The offence was committed as a result of a genuine mistake or misunderstanding of fact. • The loss or harm was the result of a single incident and was minor in nature. • The public interest has been or can be served without a prosecution… including through restorative justice methods, alternative measures, Indigenous community justice practices, administrative or civil processes, or a prosecution by another prosecuting authority.

[72] BC Prosecution Service, "Charge Assessment Guidelines" (15 January 2021) at 2, online (pdf): <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1.pdf> [BCPS, "Charge Assessment Guidelines"]; BC Prosecution Service, *Environmental Prosecutions* (1 March 2018), online (pdf): <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/env-1.pdf> [BCPS, "Environmental Prosecutions"]; BCPS "Crown Counsel Policy Manual: Private Prosecutions," *supra* note 26.
[73] BCPS, "Charge Assessment Guidelines," *supra* note 72 at 2-3.
[74] BCPS, "Charge Assessment Guidelines," *supra* note 72 at 6-7.
[75] BCPS, "Charge Assessment Guidelines," *supra* note 72 at 3-5.
[76] BCPS, "Charge Assessment Guidelines" *supra* note 72 at 3-4.
[77] BCPS, "Charge Assessment Guidelines," *supra* note 72 at 4-5.

Factors that can weigh either way[78]
• The personal circumstances of the accused. • The alleged offender's degree of culpability in relation to other parties. • The length and expense of the prosecution in relation to the social benefit to be gained by it. • The time which has elapsed since the offence was committed. • The need to maintain public confidence in the administration of justice.

In addition, specific to environmental offences, any of the following can allow a prosecution to meet the public interest element of the test:

- Other methods of enforcement have proven ineffective in relation to previous offences, or there is reason to believe that other enforcement methods will not be effective.
- The accused is a repeat offender.
- The action of the offender was wilful or fell significantly below the standard of due diligence.
- There is more than minimal damage to the environment, or there is substantial potential for damage to the environment.
- There is significant non-compliance with environmental legislation, regulations, or standards.
- The lives or safety of persons were endangered; or
- The public interest in the maintenance of environmental values otherwise requires a prosecution.[79]

1.4.2 INTERVENTION BY THE ATTORNEY GENERAL OF CANADA

The Attorney General of Canada can only intervene in a private prosecution if the offence is under a federal statute and the provincial Attorney General has not intervened.[80] This is a list of situations in which the Attorney General of Canada has authority to prosecute:

a. Under all federal statutes, where the prosecution takes place in the Yukon Territory, the Northwest Territories or Nunavut.
b. Where a prosecution is conducted pursuant to the *Controlled Drugs and Substances Act*.

[78] BCPS, "Charge Assessment Guidelines," *supra* note 72 at 5.
[79] BCPS, "Environmental Prosecutions," *supra* note 72 at 1-2.
[80] *Criminal Code*, *supra* note 1, ss 579-579.1; Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 242-243; PPSC Deskbook, *supra* note 6, s 5.9; Burns, "Private Prosecutions in Canada," *supra* note 8 at 283-285; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 79.

c. Where federal officials lay an Information for a non-*Criminal Code* offence and a federal prosecutor conducts the proceedings.
d. Where persons other than federal officials lay an Information which is then by arrangement or practice referred to a federal prosecutor to conduct the proceeding.
e. Where a provincial Attorney General has conferred authority to prosecute a specific charge; and
f. Where the *Criminal Code* provides specific authority to the Attorney General of Canada to conduct a prosecution.[81]

Given the provincial policies described above (to always intervene), this is highly unlikely in BC. The Attorney General of Canada's decision to intervene in a private prosecution is informed by the following factors:

1. The need to strike an appropriate balance between the right of the private citizen to initiate and conduct a prosecution as a safeguard in the justice system, and the responsibility of the Attorney General of Canada for the proper administration of justice.
2. The relative seriousness of the offence – generally, the more serious, the more likely it is that the DPP (Director of Public Prosecutions) should intervene.
3. There are detailed or complex disclosure issues to resolve.
4. The prosecution requires the disclosure of highly sensitive material, or the conduct of the prosecution involves applications for special measures or for witness anonymity.
5. There is a reasonable basis to believe that the private prosecutor lacks the capacity or the funding to effectively carry the case forward to its completion.
6. There is a reasonable basis to believe that the decision to prosecute was made for improper personal or oblique motives, or that it otherwise may constitute an abuse of the court's process such that, even if the prosecution were to proceed, it would not be appropriate to permit it to remain in the hands of a private prosecutor; and
7. Given the nature of the alleged offence or the issues to be determined at trial, it is in the interests of the proper administration of justice for the prosecution to remain in private hands.[82]

Of these, factors 2 through 6 are the most relevant to the decision of whether to pursue a private prosecution. A case that is more serious, involves detailed or complex disclosure issues, requires sensitive materials, or requires funding or resources beyond your means, is more likely to see intervention.[83] In addition, in cases where the private prosecutor appears to be motivated by reasons other than a desire to enforce the law, the Crown is more likely to intervene and issue a stay, even where there may be evidence indicating an offence has been committed.[84]

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[81] PPSC, "Understanding Criminal Law in Canada," *supra* note 61.
[82] PPSC Deskbook, *supra* note 6, s 5.9.
[83] *Ibid*.
[84] *Ibid*. See Section 4.1 for a definition of stay of proceedings.

Regarding the relationship between federal and provincial prosecutions, it is worth noting that, as a general rule, governments may not prosecute themselves, and conversely will be unlikely to intervene to stay a prosecution against themselves.[85] This was the case in the Lemon Creek private prosecution described in Section 4, where federal *Fisheries Act* charges were laid against the province and a private entity, and the federal crown intervened, stayed, and later reissued and prosecuted the charges.

1.4.3 REVIEWING THE DECISION TO INTERVENE

The Attorney General's decision to intervene in a private prosecution is considered a matter of prosecutorial discretion.[86] As such, while it is possible to apply for review of a decision to intervene, the likelihood of success is low.[87] The courts have determined that such review is only available in cases where the Crown has demonstrated "flagrant impropriety."[88] The process for seeking review of this decision, and related law, is discussed in more detail in Section 3.

[85] Regarding the government prosecuting itself, see: *R v Canada (Minister of National Defence)* (1993), 125 NSR (2d) 208). Regarding staying a prosecution against itself, this could raise potential conflict of interest issues.
[86] *Krieger v Law Society of Alberta*, 2002 SCC 65 at paras 46-47 [*Krieger v Law Society of Alberta*].
[87] *Krieger v Law Society of Alberta*, *supra* note 86 at para 49; Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution," *supra* note 20.
[88] *Krieger v Law Society of Alberta*, *supra* note 86 at para 49.

2. PRIVATE PROSECUTION: A STEP-BY-STEP APPROACH

This section lays out the main steps in filing a private prosecution. To clarify terminology, an "Information" is the document used to initiate a criminal proceeding. An "Informant" is the person who swears and signs the Information. They become the "private prosecutor" although in practice their lawyer will generally act in their stead. "Crown" refers to the Crown Prosecution Service and/or the Crown prosecutor with carriage of the file.

2.1 STEP 1: IDENTIFYING RELEVANT LEGISLATION AND POTENTIAL OFFENCES

Before bringing a private prosecution, a private prosecutor must have a basic understanding of the various laws which create environmental offences. The private prosecutor's ability to initiate a private prosecution is grounded in their reasonable belief that an offence has been committed.

Environmental law is not a specific class of law – it is a mix of many different types of laws that apply to human activities that affect the natural environment and wildlife. Responsibility over the environment is shared between the federal and provincial branches of government, each with different powers to enact legislation under the *Constitution Act, 1867.*[89] Pursuant to their legislative powers, the provincial and federal governments have created laws (also referred to as legislation, acts, or statutes) which prohibit or regulate certain activities affecting the environment. These laws may also authorize government officials to create regulations, which are another type of law that typically apply within a more narrowly defined area. Regulations can also create prohibitions or obligations, which a private prosecutor could seek to enforce.

The federal government has the authority to create laws applying to fisheries, shipping, interprovincial trade and commerce, migratory birds, species at risk, boundary waters, and criminal law.[90] Provincial governments have authority to create laws applying to local works and undertakings, property and civil rights, provincially owned lands, and natural resources.[91] Municipalities also fall under provincial jurisdiction and have been granted authority under

[89] *Constitution Act, 1867*, *supra* note 60, ss 91-92; See also Penny Becklumb, "Federal and Provincial Jurisdiction to Regulate Environmental Issues" (last modified 29 October 2019), online: *Library of Parliament* <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201386E> [https://perma.cc/P6V9-M983] for a general overview of the split federal-provincial responsibility over the environment.
[90] *Constitution Act, 1867*, *supra* note 60, ss 91(2, 10, 12, 27, 28).
[91] *Constitution Act, 1867*, *supra* note 60, ss 92(5, 10, 13) and 92A.

provincial law to create by-laws, which can also apply to activities that affect the environment and wildlife.

To illustrate the division of powers, consider the *Migratory Birds Convention Act, 1994,*[92] which is an act passed by the federal government. Pursuant to the *Migratory Birds Convention Act, 1994,* Canada has created the *Migratory Birds Regulations, 2022,*[93] which prohibits, amongst other things, disturbing or harming the nest of a protected species.[94] In BC, the provincial *Wildlife Act*[95] also extends protection to birds by prohibiting the taking, injuring, molestation or destruction of a bird or its egg.[96] Both of these laws create offences that a private prosecutor could seek to enforce. They also illustrate that provincial and federal environmental laws may overlap, and a private prosecutor should not assume that only one category of environmental protection law applies to their situation.

The following sections provide an overview of select federal and provincial environmental laws and the offences they create. The selected laws are organized alphabetically under the federal and provincial branches of government. It is important to note that this is not an exhaustive list, and there are almost certainly other laws and offences not mentioned here which may be relevant to your situation. Before bringing a private prosecution, it will be necessary for you to conduct an in-depth review of any relevant law to identify the components of an offence, limitations periods, possible statutory exceptions, and any alternative methods to pursue compliance. These considerations are central to determining whether you have a reasonable belief that an offence has been committed.

2.1.1 FEDERAL LEGISLATION

TITLE	OVERVIEW
CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999[97]	The *Canadian Environmental Protection Act, 1999* is the core federal statute focussed on pollution prevention. It deals with international air and water pollution and the management of toxic wastes and substances. There are a large number of regulations that have been created pursuant to the *Act*.[98] These regulations prohibit and regulate activities

[92] *Migratory Birds Convention Act, 1994,* SC 1994 c 22 [*Migratory Birds Convention Act*].
[93] *Migratory Birds Regulations,* SOR/2022-105 [*Migratory Birds Regulations*].
[94] *Migratory Birds Regulations, supra* note 93, s 5(1).
[95] *Wildlife Act,* RSBC 1996, c 488 [*Wildlife Act*].
[96] *Wildlife Act*, *supra* note 95, s 34. It is important to look at the regulations for any exceptions.
[97] *CEPA*, *supra* note 51.
[98] Canada, Environment and Climate Change Canada, "Canadian Environmental Protection Act: enforcement and compliance" (last modified 12 December 2021), online: <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/enforcement-compliance.html>.

	involving toxic substances, ranging from formaldehyde in wood products[99] to microbeads in toiletries products.[100] The *Act* and regulations contain numerous prohibitions on handling, disposing of, or producing specific materials or substances without approval.[101] The *Act* also creates a multi-faceted enforcement process which allows enforcement officers to issue warnings, tickets, and compliance orders.[102] The Government of Canada's enforcement policy dictates that environmental enforcement officers will only prosecute an offence if they determine that other compliance options are not sufficient, or the case is a serious one involving wilfully non-compliant behaviour or a serious risk to human health or the environment.[103] The *Act* encourages public participation through the creation of an Environmental Registry, and a process to report or request investigation of potential offences.[104] The limitation period under the *Act* is five years unless both the defendant and the prosecutor agree to extend it.[105] Due to the complexity of this regulatory scheme, it is recommended that private prosecutors first attempt to secure compliance by requesting an investigation or reporting an offence, as prosecution under the *Act* is secondary to other enforcement mechanisms.
***CANADA NATIONAL PARKS ACT*[106]**	The *Canada National Parks Act* was created to designate national parks in Canada and preserve them for the benefit of all Canadians. The *Act* only applies to federal national parks and reserves, listed in Schedule 1 and 2 of the *Act*.[107]

[99] *Formaldehyde Emissions from Composite Wood Products Regulations,* SOR/2021-148.
[100] *Microbeads in Toiletries Regulations*, SOR/2017-111.
[101] See, for example, *CEPA*, *supra* note 51, s 125(1) (prohibition on disposing of substances in any area of the sea, except in accordance with this *Act*).
[102] CEPA, *supra* note 51, Part 10.
[103] Canada, Environment and Climate Change Canada, "Canadian Environmental Protection Act: compliance and enforcement policy: chapter 7" (last modified 8 July 2019), online: <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/publications/compliance-enforcement-policy/chapter-7.html>.
[104] *CEPA*, *supra* note 51, Part 10.
[105] *CEPA*, *supra* note 51, s 275.
[106] *Canada National Parks Act,* SC 2000 c 32 [*Canada National Parks Act*].
[107] *Canada National Parks Act, supra* note 106, Schedules 1, 2.

	There are a number of regulations under the *Act,* which apply to specific national parks or activities that occur in national parks.[108] The following sections contain prohibitions and requirements under the *Act* that a private prosecutor might seek to enforce: • **Section 25(1):** Prohibition on trafficking in any wild animal, plant, or naturally occurring object taken in or from a park. • **Section 26:** Prohibition on hunting in national parks, except as permitted by the *Act* or regulations. • **Section 32(1):** Requirement that a person who has charge, management or control of a potentially harmful substance take reasonable measures to prevent the substance from degrading the natural environment, injuring fauna, flora, or cultural resources, or endangering human health. The limitation period under the *Act* is five years unless both the defendant and the prosecutor agree to extend it.[109]
***FISHERIES ACT*[110]**	The *Fisheries Act* was created with the goal of protecting fish and fish habitat, and regulating activities that affect fish. The key prohibition in the *Act* is in **sections 34(1) and 35(1),** which prohibit harming fish or fish habitat, or placing "deleterious substances" in waters that could come in contact with fish or fish habitat, without government approval under the *Act*. The *Fisheries Act* applies to all waters in the fishing zones of Canada, all waters in the territorial sea of Canada, and all internal waters of Canada.[111] The protections in the *Fisheries Act* apply to the Canadian government and each of the provinces, meaning that provincial or federal actors could be held responsible for breaching the *Act*.[112] There are numerous regulations created under the *Fisheries Act,*[113] which includes regulations that apply to specific fisheries, and regulations that apply to certain activities, such as paper and pulp mills.

[108] For a full list of regulations, see Canada, Department of Justice, "Canada National Parks Act (S.C. 2000, c. 32): Regulations made under this Act" (last modified 31 August 2023), online: <https://laws-lois.justice.gc.ca/eng/acts/N-14.01/> [https://perma.cc/V399-5P3C].
[109] *Canada National Parks Act, supra* note 106, s 31.1.
[110] *Fisheries Act,* RSC 1985, c F-14 [*Fisheries Act*].
[111] *Fisheries Act, supra* note 110, ss 2(1), 2.2(1).
[112] *Fisheries Act, supra* note 110, s 3(2).
[113] Canada, "Justice Laws Website: Fisheries Act (R.S.C., 1985, c. F-14): Regulations made under this Act" (last modified August 31, 2023), online: <https://www.laws-lois.justice.gc.ca/eng/acts/F-14/> [https://perma.cc/678S-8THR].

	The following sections create prohibitions that a private prosecutor might seek to enforce: • **Section 29(1)**: Prohibition on using fishing equipment or other materials, while fishing, to obstruct the passage of fish or obstruct more than two thirds the width of any river or stream. • **Section 40(1):** Prohibition on activities other than fishing that cause fish to die, or result in the harmful alteration, disruption or destruction of fish habitat. • **Section 40(2)-(3):** Prohibition on the throwing overboard or depositing of certain pollutants, such as "ballast, coal ashes, stones or other prejudicial or deleterious substances," "remains or offal of fish or of marine animals" in certain waterways and adjacent areas. The limitation period for offences under the *Act* is five years.[114]
MIGRATORY BIRDS CONVENTION ACT, 1994[115]	The *Migratory Birds Convention Act, 1994* was created to implement a treaty between the United States and Canada, with the goal of protecting migratory bird populations. To be protected under the *Act*, a bird species must be listed in Article 1 of the convention, must be native or naturally occurring in Canada, and must be known to regularly occur in Canada. A list of birds protected under the Act is maintained by the government of Canada.[116] The following sections contain prohibitions that a private prosecutor might seek to enforce: • **Section 5:** Prohibition on possessing, buying, selling, exchanging, or giving a migratory bird or nest or making it the subject of a commercial transaction except as authorized by the regulations. • **Section 5.1(1):** Prohibition on a vessel or person depositing a substance that is harmful to migratory birds, or permitting such a substance to be deposited, in waters or in an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.

[114] *Fisheries Act, supra* note 110, s 82.
[115] *Migratory Birds Convention Act, supra* note 92.
[116] Canada, Environment and Climate Change Canada, "Birds Protected In Canada" (last modified 10 July 2023), online: <https://www.canada.ca/en/environment-climate-change/services/migratory-birds-legal-protection/list.html#toc1>.

	The limitation period under the *Act* is five years unless both the defendant and the prosecutor agree to extend it.[117]
SPECIES AT RISK ACT[118]	The *Species at Risk Act* is a federal statute that was created to protect species at risk of extinction or extirpation. The *Act* extends protections to any plant, animal, or other organism that is listed by the federal government following a listing process detailed in the *Act*. The list of protected species can be found in the Species at Risk Public Registry.[119] Because it is a federal enactment, the *Species at Risk Act* generally only applies on federal lands, and to aquatic species and migratory birds. The following sections contain prohibitions that a private prosecutor might seek to enforce: • **Section 32(1):** Prohibition on killing, harming, harassing, capturing, or taking an individual of a wildlife species that is listed as an extirpated species, an endangered species, or a threatened species. • **Section 32(2):** Prohibition on possessing, collecting, buying, selling or trading an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part of derivative of such an individual. • **Section 33:** Prohibition on damaging or destroying the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada. • **Section 34**: This section contains a broad exception to the prohibitions in sections 32 and 33 regarding terrestrial species on provincial land. The limitation period for prosecuting offences under the *Act* is two years from when the competent minister learns of the offence.[120]

[117] *Migratory Birds Convention Act, supra* note 92, s 18.
[118] *SARA*, *supra* note 26.
[119] Canada, Environment and Climate Change Canada, "Species at risk public registry" (last modified 7 September 2023), online: <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry.html>.
[120] *SARA*, *supra* note 26, s 107(1).

TRANSPORTATION OF DANGEROUS GOODS ACT, 1992[121]	The *Transportation of Dangerous Goods Act, 1992* was created to promote public safety when dangerous goods are being handled or transported by road, rail, air or water. The *Act* creates safety and licencing requirements that apply to "dangerous goods," which are listed in Schedule 1 to the *Transportation of Dangerous Goods Regulations*.[122] It is an offence, under Section 5 of the *Act,* to import, transport, or handle dangerous goods unless a person complies with all safety, documentation, and transportation requirements set out in the *Act* and regulations. The limitation period for prosecuting offences under the *Act* is five years from the day of the offence.[123]

Other Federal Statutes: The *Criminal Code of Canada* is a federal statute that is not generally thought of as being relevant to environmental matters. However, a few sections do arise in the environmental context at times and are worth keeping in mind, such as: mischief (section 430), nuisance (section 180), breach of trust by public officer (section 122), cruelty to animals (section 445.1), and proceeds of crime, (section 462).

[121] *Transportation of Dangerous Goods Act, 1992,* SC 1992, c 34 [*Transportation of Dangerous Goods Act*].
[122] *Transportation of Dangerous Goods Regulations,* SOR/2001-286 [*Transportation of Dangerous Goods Regulations*].
[123] *Transportation of Dangerous Goods Act*, *supra* note 121, s 35.

2.1.2 PROVINCIAL LEGISLATION

TITLE	OVERVIEW
DRINKING WATER PROTECTION ACT[124]	The *Drinking Water Protection Act* applies to all domestic drinking water systems other than single-family dwellings. It creates requirements to ensure the provision of safe drinking water. The following section contains prohibitions that a private prosecutor might seek to enforce: • **Section 23:** Prohibition on introducing or allowing anything to be introduced into a domestic water system, water source, or area adjacent to a drinking water source that will or is likely to result in a drinking water health hazard, unless authorized under the *Act* or as is necessary for the proper operation, maintenance or repair of a domestic water system. The limitation period under the *Act* is two years, starting when the drinking water officer is informed of the facts of the offence.[125]
ENVIRONMENTAL MANAGEMENT ACT[126]	The *Environmental Management Act* regulates industrial and municipal waste discharge, pollution, hazardous waste, and contaminated sites. Under the *Act*, polluters can obtain authorization to introduce waste into the environment, subject to specific conditions. It is an offence under the *Act* to introduce waste into the environment without an authorization. The Government of BC maintains an Authorization Management System (AMS), which contains information about authorizations granted under the *Act,* including discharge limits and reporting requirements. The AMS can be searched using a company or person, type of industry, or location.[127] The following sections contain prohibitions that a private prosecutor might seek to enforce: • **Section 6:** Prohibition on allowing waste to be introduced into the environment, except as authorized under the act or regulations.

[124] *Drinking Water Protection Act,* SBC 2001, c 9 [*Drinking Water Protection Act*].
[125] *Drinking Water Protection Act*, *supra* note 124, s 45(6).
[126] *Environmental Management Act,* SBC 2003, c 53 [*Environmental Management Act*].
[127] British Columbia, "Find authorization information" (last accessed 13 April 2023), online: <https://www2.gov.bc.ca/gov/content/environment/waste-management/waste-discharge-authorization/find-authorization>.

	• **Section 7(1):** Requirement that a person who stores, transports, handles, treats, recycles, deals with, processes, or owns hazardous waste to keep the hazardous waste confined in accordance with the regulations. • **Section 7(2):** Prohibition on releasing hazardous waste, except in accordance with the regulations. • **Section 11:** Prohibition on using, distributing, or selling single-use products, or any materials used in packaging, product containers, or single use products, except as authorized by the Act or regulations. • **Section 12:** Prohibition on littering in public places. • **Section 13:** Prohibition on discharging domestic sewage or waste from a trailer, camper, transportable housing unit, or boat into a reservoir or into any lake, pond, stream or other natural body of water except in compliance with a permit or at a disposal facility. The limitation period under the *Act* is five years from the date of the offence, or, with a certificate from the competent minister, 18 months from the date when the minister learns of the offence.[128]
FOREST AND RANGE PRACTICES ACT[129]	The *Forest and Range Practices Act* governs forestry activities on public lands in BC, including timber harvesting. The *Act* applies to all public forest and range lands in BC, and to anyone who holds an agreement under the *Forest Act* or *Range Act*, which are the statutes that allow the government to grant authorizations (licences, permits, etc.) for forestry and animal foraging on public lands. The following sections contain prohibitions that a private prosecutor might seek to enforce: • **Section 46:** Prohibition on carrying out activities that result in damage to the environment, unless the person is acting in accordance with a plan, authorization or permit, and the person did not know or could not reasonably be expected to know that their actions would result in damage. • **Section 52:** Prohibitions on cutting, damaging or destroying Crown timber without authorization.

[128] *Environmental Management Act, supra* note 126, s 124.
[129] *Forest and Range Practices Act,* SBC 2002, c 69 [*Forest and Range Practices Act*].

	The limitation period under the *Act* is three years from the date when an "official" (employee of the relevant ministry or the Oil and Gas Commission designated as an "official") learns of the offence.[130]
***INTEGRATED PEST MANAGEMENT ACT*[131]**	The *Integrated Pest Management Act* creates restrictions on the sale, storage, and use of pesticides which could cause harm to human health and the environment. The *Integrated Pest Management Regulation* was created pursuant to the *Act*, and creates a licencing process and legislated standards for the sale, storage, and use of pesticides classified under the regulation.[132] The following sections of the *Act* create prohibitions that a private prosecutor might seek to enforce: • **Section 3:** Prohibition on using, handling, transporting, disposing of, or selling a pesticide in a manner that causes or is likely to cause an unreasonable adverse effect or that is not in accordance with the Act or regulations. • **Section 4:** Prohibition on selling a pesticide, using a pesticide for a prescribed use, or offering to provide any service respecting pesticides without a licence or not in accordance with the terms and conditions attached to a licence. The limitation period under the *Act* is three years from the date of the offence, or, with a certificate from the competent minister, 18 months from the date when the minister learns of the offence.[133]
***OIL AND GAS ACTIVITIES ACT*[134]**	The *Oil and Gas Activities Act* regulates oil and gas activities in BC, including wells, facilities, oil refineries, natural gas processing plants, and pipelines. The *Act* creates a system of permits and authorizations required to carry out oil and gas activities. The *Act* also creates several general prohibitions and obligations that a private prosecutor might seek to enforce, including: • **Section 35:** Obligation to minimize waste, and damage and disturbance to oil and gas sites when carrying out oil and gas activities.

[130] *Forest and Range Practices Act, supra* note 129, ss 1, 86.
[131] *Integrated Pest Management Act,* SBC 2003, c 58 [*Integrated Pest Management Act*].
[132] *Integrated Pest Management Regulation,* BC Reg 19/2022 [*Integrated Pest Management Regulation*].
[133] *Integrated Pest Management Act*, *supra* note 131, s 29.
[134] *Oil and Gas Activities Act,* SBC 2008, c 36.

	• **Section 36:** Obligation to prevent spillage, and if spillage occurs, to promptly remedy the cause of the spillage, contain and eliminate the spillage, and remediate any land or body of water affected by the spillage. The limitation period under the *Act* is three years from the date of the offence, or, with a certificate from the Oil and Gas Commissioner, 3 years from the date when the Oil and Gas Commissioner learns of the offence.[135]
PARK ACT[136]	The *Park Act* provides for the establishment, classification and management of provincial parks, conservancies, and recreation areas in BC. Pursuant to the *Act,* the Government of BC has created the *Park, Conservancy and Recreation Area Regulation,*[137] which contains regulations and offences related to permitting, fires, domestic animals, hunting, public conduct, the use of vehicles, and waste management within provincial parks. The following sections of the *Act* create prohibitions that a private prosecutor might seek to enforce: • **Section 9:** Various prohibitions that apply to hunting, fishing, and natural resource activities that occur in provincial parks. • **Section 13:** Prohibition on constructing, installing, erecting, or placing any structure, improvement or work of any nature in a park except under a valid park use or resource use permit. • **Section 14:** Prohibition on transporting or depositing any garbage, refuse, or industrial waste in a provincial park except as authorized by a valid park use or resource use permit.

[135] *Oil and Gas Activities Act,* SBC 2008, c 36, s 85, online: <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/08036_01>.
[136] *Park Act,* RSBC 1996, c 344.
[137] *Park, Conservancy and Recreation Area Regulation,* BC Reg 123/2022, online: <https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/180_90_00>.

WATER PROTECTION ACT[138]	The *Water Protection Act* operates to affirm the province's ownership of freshwater resources by limiting bulk water removal or diversion of water to outside BC. • **Section 5** of the *Act* prohibits the removal of water from BC, unless the person removing water has an authorization under the *Act* or is removing water in containers of 20 litres or less. • **Section 6** of the *Act* also prohibits constructing or operating a large-scale project capable of transferring water from one major watershed to another major watershed.
WATER SUSTAINABILITY ACT[139]	The *Water Sustainability Act* manages the diversion and use of water resources in the province. Under the *Act*, a person can apply for a licence to divert water or construct works to divert water for various purposes. The *Act* contains prohibitions on using or diverting water, or making changes in and about a stream without an authorization. The *Water Sustainability Regulation*[140] also contains additional requirements that apply to persons carrying out approved activities under the *Act*.[141] The following sections contain prohibitions that a private prosecutor might seek to enforce: • **Section 106:** Several prohibited actions including diverting water from a stream or aquifer, using diverted water, or making changes in and about a stream without authorizations under the *Act* or regulations. • **Section 107:** High penalty prohibited actions including constructing a bank-to-bank dam contrary to section 45 of the *Act* and contravening a fish population protection order under section 60 of the *Act*.

[138] *Water Protection Act,* RSBC 1996, c 484.
[139] *Water Sustainability Act,* SBC 2014, c 15.
[140] *Water Sustainability Regulation,* BC Reg 84/2022.
[141] See, for example, *Water Sustainability Regulation,* BC Reg 84/2022 ("a person making an authorized change to a stream must ensure that … (a) making the change does not cause a significant adverse impact on the ambient water quality of the stream" at s 43).

WILDLIFE ACT[142]	The *Wildlife Act* is BC's core statute for conserving and managing wildlife. The *Act* provides for the conservation and management of wildlife and habitat and regulates hunting and fishing activities by creating a licencing system. The *Act* contains general offences regarding these activities and for harming wildlife without authorization. Several regulations have been created by the provincial government pursuant to the *Wildlife Act*.[143] These include regulations which prohibit possessing, transporting, or trafficking certain species of freshwater fish.[144] The following sections contain prohibitions that a private prosecutor might seek to enforce: • **Section 26:** Prohibition on hunting, taking, trapping, wounding or killing wildlife: that is an endangered species or a threatened species in a wildlife sanctuary at a time not within the open season; with a firearm or bow during prohibited hours; by the use or with the aid of a light or illuminating device; with poison; with a set gun; or with a pump, repeating or auto loading shotgun. • **Section 27(1):** Prohibition on wounding or killing wildlife with a firearm from a motor vehicle or motor-propelled boat. • **Section 27(2):** Prohibition on herding or harassing wildlife with the use of a motor vehicle, aircraft, boat or other mechanical device. • **Section 27(4):** Prohibition on hunting game within 6 hours after being airborne in an aircraft, unless the aircraft is a regularly scheduled commercial aircraft. • **Section 27(2):** Prohibition on hunting from an aircraft, or using a helicopter for the purposes of transporting hunters or game, except as authorized by the regulations. • **Section 28:** Prohibition on hunting or trapping without reasonable consideration for the lives, safety or property of other persons. • **Section 29:** Prohibition on attempting to capture wildlife unless authorized by the Act, regulations, or a permit.

[142] *Wildlife Act, supra* note 95.
[143] For a list of regulations, see British Columbia, "Public Statutes and Regulations: Wildlife Act [RSBC 1996] c. 488: Regulations," online: <https://www.bclaws.gov.bc.ca/civix/content/complete/statreg/901199259/96488/reg96488/?xsl=/templates/browse.xsl>.
[144] *Freshwater Fish Regulation,* BC Reg 76/2022.

	• **Section 30:** Prohibition on hunting, taking, wounding, or killing big game while it is swimming. • **Section 33.1:** Prohibition on intentionally feeding or attempting to feed dangerous wildlife or leaving an attractant with the intent of attracting dangerous wildlife. • **Section 34:** Prohibition on possessing, taking, injuring, molesting, or destroying a bird or its egg, the nest of an eagle, peregrine falcon, gyrfalcon, osprey, heron or burrowing owl, or the nest of a bird not referred to in paragraph (b) when the nest is occupied by a bird or its egg. • **Section 35:** Prohibition on hunting, killing, or injuring wildlife and failing to make every reasonable effort to retrieve the wildlife to include in the person's bag limit, or failing to remove the edible portions of the carcass.
INTEGRATED PEST MANAGEMENT ACT[145]	The *Integrated Pest Management Act* creates restrictions on the sale, storage, and use of pesticides which could cause harm to human health and the environment. The *Integrated Pest Management Regulation* was created pursuant to the *Act* and creates a licencing process and legislated standards for the sale, storage, and use of pesticides classified under the regulation.[146] The following sections of the *Act* create prohibitions that a private prosecutor might seek to enforce: • **Section 3:** Prohibition on using, handling, transporting, disposing of, or selling a pesticide in a manner that causes or is likely to cause an unreasonable adverse effect or that is not in accordance with the *Act* or regulations. • **Section 4:** Prohibition on selling a pesticide, using a pesticide for a prescribed use, or offering to provide any service respecting pesticides without a licence or not in accordance with the terms and conditions attached to a licence.

[145] *Integrated Pest Management Act, supra* note 131.
[146] *Integrated Pest Management Regulation, supra* note 132.

TRANSPORT OF DANGEROUS GOODS ACT[147]	The *Transport of Dangerous Goods Act* is the provincial statute that governs the transportation and handling of dangerous goods. While it is similar to the federal statute, it only applies to the transportation of dangerous goods within the province on highways and rail vehicles within provincial jurisdiction (e.g., railways that operate strictly within the boundaries of the province). The *Transport of Dangerous Goods Regulation* adopts the federal regulations, which deems certain goods to be "dangerous goods."[148] Section 5 of the *Act* prohibits handling or transporting dangerous goods unless all prescribed safety, container, packaging, and transport requirements are complied with. • **Section 21** of the *Act* requires that if dangerous goods are emitted or escape from any container, packaging or vehicle while being transported, that the person in control of the goods take all reasonable emergency measures to repair or remedy a dangerous condition caused by the escape, or to reduce or mitigate danger to life, health, property, or the environment.

Other Potentially Relevant Acts:

- *Riparian Areas Protection Act*[149]
- *Heritage Conservation Act*[150]
- *Metal Dealers and Recyclers Act*[151]
- *Pipeline Crossings Regulation*[152]

For more information regarding the prosecutions of environmental laws and environmental regulatory systems, see Berger's *Prosecution and Defence of Environmental Offences*.[153] This should be available in most university law libraries.

[147] *Transport of Dangerous Goods Act,* RSBC 1996, c 458.
[148] *Transport of Dangerous Goods Regulation*, BC Reg 203/85.
[149] *Riparian Areas Protection Act*, SBC 1997, c 21.
[150] *Heritage Conservation Act*, RSBC 1979, c 165.
[151] *Metal Dealers and Recyclers Act*, SBC 2011, c 22.
[152] *Pipeline Crossings Regulation*, BC Reg 147/2012.
[153] Stanley D. Berger, *The Prosecution and Defence of Environmental Offences* (current to 2019) (Toronto, ON: Emond Montgomery Publications Ltd, 1994) [Berger, *The Prosecution and Defence of Environmental Offences*].

2.2 STEP 2: A POTENTIAL OFFENCE HAS OCCURRED, WHAT NOW?

While every private prosecution involves different facts and applicable laws, this section introduces the high-level questions you should ask yourself when deciding whether to initiate a private prosecution.

These include:

- Who will the Informant be?
- Does the Informant have reasonable grounds to believe that an offence has been committed?
- Did the offence occur within the applicable limitations period?
- Who is/are the responsible party(s), and can they be prosecuted?
- Are there other means of securing compliance?
- Has all necessary evidence been collected to prove beyond a reasonable doubt that the offence has been committed, and if so, is all the evidence admissible in court?
- Does the private prosecutor / Informant have sufficient resources and capacity to take on a private prosecution?

2.2.1 THE INFORMANT'S REASONABLE GROUNDS TO BELIEVE AN OFFENCE HAS BEEN COMMITTED

The determination of whether an offence has been committed is case specific and will require you to identify the applicable federal or provincial laws and apply them to the facts of your case. You must also consider *who* has a reasonable ground to believe an offence has been committed. As described in Section 1.1, the right for a private citizen to launch a private prosecution is a long-standing element of Canadian law and is enshrined in both federal and provincial legislation.[154] While a private prosecution can be conducted by any legal person – an individual, a group, or an incorporated body (for example, a non-profit society) – the person launching the private prosecution by laying an Information (known as the "Informant") must be an individual.[155]

[154] *Criminal Code*, *supra* note 1, s 504; *Offence Act, supra* note 7, s 25.
[155] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 27-28; Burns, "Private Prosecutions in Canada," *supra* note 8 at 269; ECEL Private Prosecution Report*, supra* note 6 at 2.

The crucial question is whether the Informant, on the basis of the information available to them, has a "reasonable belief" that an offence has been committed.[156] Persuading a Provincial Court Judge to issue a summons for a private prosecution can sometimes be easier if there is jurisprudence from their own court.

The Informant does not need to have witnessed the offence themselves and can rely on credible information from someone who has.[157] A key principle regarding who can be an Informant is: "if the [I]nformant is not a witness to the events constituting the alleged offence, [they] must have reasonable and probable grounds for [their] belief that it was committed by the accused. Thus, if [they are] acting on information, the 'Informant' must ensure that it is objectively reliable."[158] Also implicit in this standard is an expectation that the Informant understands the law which creates the offence they believe to have occurred. A belief that an offence has been committed will not be reasonable if it is based on an incorrect interpretation of the law.

At the outset, you should also determine whether the applicable limitations period has passed. If it has, your prosecution will not succeed. Determining the applicable limitations period will require you to consult the law which creates the offence and identify the point at which the limitations period began running.

Importantly, continuing offences can impact limitation periods. As the Supreme Court of Canda defined in *Bell v R*, a continuing offence:

> *[I]s not simply an offence which takes or may take a long time to commit … The conjunction of the two essential elements for the commission of an offence [actus reus and the mens rea] continues and the accused remains in which might be described as a state of criminality while the offence continues.*[159]

[156] *Re: TLF*, 2014 BCPC 100 ("An informant must have both a subjective and an objective basis for the belief that an offence has been committed. In *Nelles v. Ontario* 1989 CanLII 77 (SCC), [1989] 2 S.C.R. 170, the Supreme Court of Canada held that a reasonable belief is a belief which would lead an ordinarily prudent and cautious person to conclude that a prospective accused is "probably guilty" of the offence charged" at para 9).
[157] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 28.
[158] Burns, "Private Prosecutions in Canada," *supra* note 8 at 274.
[159] *R v Bell*, 1983 CanLII 166 (SCC); *R v Marsh*, 2014 BCPC 235 citing *R v Pickles*, 2004 CanLII 60020 ("where the statute includes a penalty-giving provision for each separate day the accused omits to perform a duty or fails to rectify the wrongful activity, then it will be fairly obvious that the offence is a continuing one" at para 38).

If a statute specifies that an offence is a continuing offence,[160] then where the limitation period is initiated by the commission of a crime, the time limitation will not apply.[161] In contrast, if the limitation period in the statute is clearly based on the discovery of the crime, then the time limitation will apply, regardless if it is a continuing offence.[162]

2.2.2 THE RESPONSIBLE PARTY

In addition to considering your eligibility to raise a private prosecution, you must also consider whether the alleged offender, the person who you hope to pursue, can be prosecuted. In general, you can start a prosecution by laying an Information against any person, including an individual, the government, an incorporated body, or any other kind of organization if you have "reasonable grounds" to believe that they committed an offence.[163] Corporations may also be prosecuted, or their officers or directors, although liability is often based on the specific relevant laws and the nature of the offence.[164]

However, there are exceptions. For example, the Crown (both provincial and federal) is not bound by legislation unless explicitly provided for in the specific law.[165] As a result, you may not be able to prosecute some offences if committed by the government. Certain laws, such as the *Fisheries Act*, the *Canadian Environmental Protection Act*, the *Migratory Birds Convention Act*, and the *Species at Risk Act* explicitly bind both the federal and provincial governments, so if either has committed offences under any of these acts, a private prosecution may be possible.[166] Federal laws that expressly apply to the "Crown" apply to both the federal and provincial governments.[167] See Case Study #4 – Lemon Creek (2013), where a number of parties were charged including the driver of the truck.

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[160] The BC Supreme Court found that the phrase "[e]ach day that a violation is permitted to exist shall constitute a separate offence" in a Vancouver building bylaw constituted a continuing offence. This was further supported by the language in the bylaw which recognized the possibility for continuing offences (see *R v Sadolims Enterprises Ltd*, 2013 BCSC 2172 at para 67); The Ontario Court of Justice held that if there is "clear legislative language importing the discovery principle into a statute… the intent of that language should be given effect" (see *R v Boucha*, 2021 ONCJ 141 [*R v Boucha*] at para 100).

[161] *R v Boucha*, *supra* note 160.

[162] *R v Boucha*, *supra* note 160 at para 100; *British Columbia (Securities Commission) v Bapty*, 2006 BCSC 638.

[163] *Criminal Code*, *supra* note 1, ss 2, 504.

[164] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 38-44; ECEL Private Prosecution Report, *supra* note 6 at 2.

[165] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 44-45; ECEL Private Prosecution Report, *supra* note 6 at 2.

[166] *CEPA*, *supra* note 51, s 5; *Migratory Birds Convention Act*, *supra* note 92, s 3; *Fisheries Act*, *supra* note 110, s 3(2); *SARA*, *supra* note 26, s 5.

[167] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 45.

2.2.3 GATHERING SUFFICIENT AND ADMISSIBLE EVIDENCE

Collecting evidence is essential to the success of a private prosecution. In the preliminary stages, evidence is necessary to provide "reasonable grounds" for the belief that an offence has been committed.[168] Once a private prosecution has been initiated, the success of the private prosecution will depend on the strength of the evidence and its ability to establish that an offence as been committed.

At the preliminary stages of the private prosecution, it is sufficient for you to adduce evidence that, if believed, would establish the elements of the offence. However, in order to convict the alleged offender, the offender's guilt must be proven. For most criminal offences, the standard is "beyond a reasonable doubt."[169] However, for other offences, such as strict liability and absolute liability offences, the standard is much lower. For both types, the prosecution does not need to prove intent of the accused, just that an unlawful act or omission took place. However, for the former, the accused is allowed to use the defence of due diligence.[170] In the context of environmental law, there are strict liability offences under the *Canadian Environmental Protection Act* as well as the *Maritime Liability Act*.[171]

While some facts and evidence may only come to light later in the process, it is important to be as diligent as possible in investigating and collecting evidence at an early stage. The Attorney General may consider the quality and sufficiency of your evidence when deciding whether to intervene or stay the prosecution.[172] It is advisable to seek assistance in determining what evidence will be necessary, which could include a lawyer, government officials, or environmental organizations.[173] If you are unable to collect sufficient evidence your private prosecution is unlikely to succeed.

As noted in Section 2.3.4, private prosecutors owe a duty to disclose all relevant information to the defence.[174] This includes any evidence that you collect while pursuing the private prosecution. It is crucial that you keep the duty of disclosure in mind when collecting and documenting evidence. Good recordkeeping and a well-formulated disclosure strategy will help to ensure that

[168] Evidence is also relevant for alternative or parallel measures, such as filing a formal complaint.
[169] The role of the prosecutor, whether public or private, is not to convict an alleged offender, but to seek a just result; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 47.
[170] Caramanna Friedberg Barristers & Solicitors LLP, "What is the Difference Between Absolute Liability, Strict Liability and Full Mens Rea?," online: <https://cflaw.ca/practice-area/41oronto-quasi-criminal-prosecutions-lawyer/quasi-criminal-prosecutions-what-is-the-difference-between-absolute-liability-strict-liability-and-full-mens-rea> [https://perma.cc/7URQ-W48S].
[171] *CEPA*, *supra* note 51, s 205; *Maritime Liability Act*, SC 2001, c 6, s 77(3).
[172] PPSC Deskbook, *supra* note 6, s 5.9.
[173] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 150; ECEL Private Prosecution Report, *supra* note 6 at 4.
[174] *R v Taillefer; R v Duguay*, *supra* note 47 at paras 59-60; *R v Stinchcombe*, *supra* note 47.

you are able to fulfil the duty of disclosure and guard against the risk of your prosecution failing on procedural grounds.[175]

The following is a brief summary of the rules of evidence and tips for gathering evidence.

2.2.3.1 Rules of Evidence

In order to be admissible, or accepted by the court, evidence must be both material and relevant.[176] Evidence is relevant if it can be used to prove or disprove a particular fact at issue in front of the court.[177] No matter how relevant the evidence is, it is only admissible if it is material, and materiality refers to whether the particular fact goes towards an issue or proposition that is before the court, such as establishing the alleged offence, the identity of the accused, or intent.[178]

Evidence must also be reliable.[179] The reliability of evidence is measured based on factors including how it was collected, the credibility of the witness providing the evidence, if the evidence may have been tampered with, and the form that the evidence takes.[180] For example, statements made out of court (such as written statements) are presumed to be inadmissible when sought to be admitted by any person other than the person who gave the statement.[181]

Evidence should generally take the form of fact but may include the opinions of expert witnesses (expert evidence is discussed in Section 2.2.3.4).[182]

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[175] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 495-520.
[176] *R v Pires*; *R v Lising*, 2005 SCC 66 at para 3; Sophie Gaillard, *Guide to Private Prosecution of Animal Welfare Offences under the Federal Health of Animals Act* (May 2013) at 23, online (pdf): *Animal Justice Canada* <https://www.animaljustice.ca/wp-content/uploads/2013/06/Animal-Justice-Guide-002-Private-Prosecution-of-Animal-Welfare-Offences-under-the-Health-of-Animals-Act-13.05.29.pdf> [https://perma.cc/CC9F-SPV7] [Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 3.
[177] Lamer, J., dissenting in *R v Morris*, 1983 CanLII 28 (SCC); *R v J-LJ*, 2000 SCC 51 [*R v J-LI*] at para 47; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 148; ECEL Private Prosecution Report, *supra* note 6 at 3; David M Paciocco & Lee Stuesser, *The Law of Evidence*, 1st ed (Concord: Irwin Law, 1996) at 19, cited in *R v J-LJ*, 2000 SCC 51, at para 47; Provincial Court of BC, "The first rule about evidence – it must be relevant" (8 September 2015), online: <www.provincialcourt.bc.ca/enews/enews-08-09-2015>.
[178] *R v Arp*, 1998 CanLII 769 (SCC) at para 38; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 148; ECEL Private Prosecution Report, *supra* note 6 at 3.
[179] For hearsay evidence, see *R v Khan*, 1990 CanLII 77 (SCC) at 542; For reliability of the evidence in weighing whether the admissibility of evidence would breach the accused's rights under the *Charter*, *supra* note 3, see *R v Grant*, 2009 SCC 32 at 97; for admissibility of confessions, see *R v Hart*, 2014 SCC 52; for prior inconsistent statements and self-serving evidence, see *R v B (KG)*, 1993 CanLII 116 (SCC); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 148; ECEL Private Prosecution Report, *supra* note 6 at 3; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 24.
[180] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 148; ECEL Private Prosecution Report, *supra* note 6 at 3; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 24.
[181] *R v Bradshaw*, 2017 SCC 35 at para 1.
[182] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 149.

In addition to these general rules of evidence, for offences under federal laws, the *Evidence Act* sets out requirements for compelling witnesses to testify, what evidence can be admissible, and how evidence can be admitted.[183] All evidence, regardless of what form it takes or what it pertains to, must be introduced to the court through a witness. This means that generally, all evidence must be introduced by sworn *viva voce* (in person, oral) testimony. Affidavit evidence is not admissible in trials.

The admission against interest rule is the one exception to the rule requiring in personal oral testimony.[184]

The above rules of evidence are only a general summary, and there are many exceptions that apply to the admissibility of evidence. Further research may help you better understand the rules of evidence and their application,[185] but you should seek assistance from a lawyer to help determine what evidence is necessary and whether it can be adduced in court.

2.2.3.2 Collecting the Evidence

In addition to eyewitness testimony, the types of evidence you may need to collect can be divided into three categories: documentary evidence, physical evidence, and expert evidence. Documentary evidence includes notes, photographs, and videos. This type of evidence is especially helpful in establishing the identity and conduct of the accused.[186] Physical evidence may include air or water samples, and are often necessary to prove offences involving pollution or material alteration of the environment.[187] For both documentary and physical evidence, it is important to take and keep diligent records as there may be a significant gap in time between your collection of evidence and presenting it at trial.[188] The form and treatment of evidence can influence whether or not it is accepted at trial, as well as the Crown's decision to intervene.[189]

Witness testimony will likely play an important role in your prosecution. You may need to collect written or video statements from witnesses, which they will need to corroborate by testifying at trial.[190] For any witness statement, it is necessary to collect the name and contact information of witnesses in order to compel them to appear at a hearing or trial. You should also record the

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[183] *Canada Evidence Act,* RSC 1985, c C-5.
[184] *R v Terrico*, 2005 BCCA 36, para 15, leave to appeal to SCC refused, 2006 Canlii 1902 (SCC).
[185] See also David M Paciocco, Palma Paciocco, and Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto, ON: Irwin Law Inc, 2020); Berger, *The Prosecution and Defence of Environmental Offences*, *supra* note 153.
[186] ECEL Private Prosecution Report, *supra* note 6 at 4.
[187] Environmental Bureau of Investigation, "The Citizens Guide to Environmental Investigation and Private Prosecution" at s 5.0, online: <https://ebi.probeinternational.org/citizens-guide/> [https://perma.cc/CAK4-HBZW] [EBI, "Citizens Guide to Environmental Investigation and Private Prosecution"].
[188] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 147-154; ECEL Private Prosecution Report, *supra* note 6 at 3-4.
[189] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 147-154; ECEL Private Prosecution Report, *supra* note 6 at 3-4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 15; PPSC Deskbook, *supra* note 6, s 5.9.
[190] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 153.

witnesses' profession and/or connection to the offence.[191] Statements should be recorded as accurately as possible and signed by the witness.[192] You will also need to summarize the statements and expected testimony of the witnesses when preparing the brief (see Section 2.3.1).[193]

There are many tools available to you when collecting documentary evidence, and which should be used simultaneously. A cell phone can be a particularly useful tool for collecting documentary evidence, as they are ubiquitous and can capture video, photographs, and sound recordings. Cell phones also often document the time, date, and location for recordings. Taking notes can also help you to create a summary of events surrounding the alleged offence and ensure that your testimony is accurate where there is a long period of time before trial (see Section 2.4).[194] When taking notes, you should include:

- Your name and the names of any others present with you.
- The date, time, and weather.
- The name and address and/or location.
- The names and any identifying markers of the people or corporations involved.
- Your observations of the site, events, and any relevant activities (this may include steps taken to mitigate the effects of the problem – recording these when they occur can help establish impartiality and reliability of notes as evidence).
- Reference to any photos or videos that you have taken; and
- Page numbers.[195]

Taking notes in pen on waterproof paper can reinforce their credibility and protect them from the elements.[196] Alternatively, you may be able to take notes electronically on your cell phone or other devices. You may be able to obtain other documentary evidence by contacting government

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[191] *Ibid*, ECEL Private Prosecution Report, *supra* note 6 at 4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 15.

[192] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 153; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 15.

[193] Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 25-26; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 69.

[194] The BC Court of Appeal has held that while there is no requirement for contemporaneous notes at trial, it is desirable and can go to reliability and credibility of the evidence (*R v Acosta*, 2014 BCCA 218 at para 15); The Ontario Court of Justice has held that these notes promote "accuracy and a fulsome independent account," and can start as rough notes and later be edited (*R v McKennon*, 2004 CarswellOnt 5237, [2004] OJ No 5021 at para 23); ECEL Private Prosecution Report, *supra* note 6 at 4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 14-15; Keep in mind that all evidence will be admitted via affidavit or as *viva voce* evidence (in-person oral testimony). The purposes of a witness statement are to preserve the witness's memory at an early date, and to know what they will say in their evidence at trial.

[195] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 150-151; ECEL Private Prosecution Report, *supra* note 6 at 4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 23.

[196] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.4; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 151.

officials,[197] searching publicly available records,[198] or submitting Freedom of Information (FOI) requests.[199] Such documentary evidence may include recorded interviews, government reports, permits, land titles, certificates of incorporation, and corporate records, among other forms of evidence.[200] This evidence can be useful in tying the alleged offender to the alleged offence, contextualizing their course of action, or otherwise supporting your case for prosecution.[201]

Physical evidence can include air, water, or soil samples, or even affected animal and plant matter.[202] You should collect samples from all relevant areas, including areas that may not be affected by the alleged offence, as these samples can provide an important reference point, or even show that the alleged offence has had a greater environmental impact than what was visibly obvious.[203] It is important that you set and follow a procedure for collecting, labelling, and storing samples – you may want to seek assistance from scientists or local community groups.[204] You should always collect samples with a partner, not only for safety and ease of collection, but also so they can act as a witness and verify the events and collection of samples.[205] Supplementing samples with notes, videos, and/or photos will further support the reliability of your samples as evidence.[206] Samples should be sealed after collection and labelled with your name, the date, location and time of collection, and an identifier that can be cross-referenced against your notes.[207]

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[197] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 150; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 4.11; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 15.

[198] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at ss 4.8-4.10.

[199] See Kimberlea Cartwright et al, *FOI How To Get Government Records* (2005), online (pdf): *Environmental Law Centre University of Victoria* <https://elc.uvic.ca/wordpress/wp-content/uploads/2014/08/Citizens-Guide-to-FOI_2005May.pdf> [https://perma.cc/4HKH-LPLL]; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 18-20.

[200] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 4.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 18-20.

[201] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 4.0.

[202] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.0; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 151.

[203] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 151; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.2.

[204] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.0; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 150-152; ECEL Private Prosecution Report, *supra* note 6 at 4.

[205] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.0; ECEL Private Prosecution Report, *supra* note 6 at 4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 17.

[206] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.0; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 150-152; ECEL Private Prosecution Report, *supra* note 6 at 4.

[207] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27at 150-152; ECEL Private Prosecution Report, *supra* note 6 at 4.

As a private prosecutor, you have no special rights to access areas or information that is restricted to the public.[208] When collecting evidence, you should be careful not to trespass or break any laws, as evidence collected in such a manner may not be accepted by the court and will certainly undermine your case.[209] If you are not able to gain permission to access a site or property in order to collect evidence, you may need to seek assistance from someone who has permission.[210]

It is also worth mentioning the law regarding recording conversations. Generally, in Canada a person can record a conversation they participate in without notice to the other participant(s) but may not record a conversation in which they are not participants.[211] However, it is very important to get legal advice before doing so as doing it the wrong way or with the wrong equipment can lead to serious consequences.[212]

2.2.3.3 Handling the Evidence

How you handle the evidence that you have collected can affect whether the court will accept it as admissible. It is important to establish the "continuity of evidence," i.e., showing that you have had continuous control over the evidence and that it has not been tampered with.[213]

You should keep all relevant documents and correspondence (such as emails and text messages), and organize them chronologically.[214] In addition, you may want to take notes of and confirm the contents of conversations with the person you spoke to.[215] While you may make copies or

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[208] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152; ECEL Private Prosecution Report, *supra* note 6 at 4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 14.
[209] *R v S (RJ)*, 1995 CanLII 121 (SCC) [*R v S (RJ)*] ("at common law … all relevant evidence, even if obtained illegally, is generally admissible at the trial of the accused," and the utility of which is then subject to "weighing probative value against prejudicial effect … Section 24(2) of the *Charter* was … a remedial rule permitting the exclusion of evidence obtained in violation of one or more substantive rights guaranteed under the *Charter*, where the admission of that evidence would tend to bring the administration of justice into disrepute" at paras 240 – 241); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152; ECEL Private Prosecution Report, supra note 6 at 4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 14, 16.
[210] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152; ECEL Private Prosecution Report, *supra* note 6 at 4; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 14, 16.
[211] *Criminal Code*, *supra* note 1, ss 184, 191; *Goldman v R,* 1979 CanLII 60 (SCC)*;* See *R v Sanelli*, 990 CanLII 150 (SCC) for applicability of the *Charter*.
[212] Prowse Chowne LLP, "Implications Of Recording Private Conversations In Canada," online: <https://www.prowsechowne.com/blog/implications-recording-private-conversations-canada> [https://perma.cc/6CX2-LRVT].
[213] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152-153; ECEL Private Prosecution Report, *supra* note 6 at 4.
[214] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 4.0; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 149-151.
[215] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at ss 4.0, 4.11; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 149-151; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 15, 18.

summarize your notes for storage and reference, you must keep the originals.[216] These steps can help establish a timeline of events and support the reliability of your documentary evidence.[217] Any evidence should be kept securely, under lock and key.

You may need to send physical samples to a laboratory for analysis. In that case, you will need to take care in order to establish continuity of possession.[218] This means that you should deliver the samples in a sealed, tamper-proof container, ideally in person, but if necessary, through registered mail or a reputable courier.[219] You should notify the laboratory that the samples will be used in a criminal prosecution as they should have policies to ensure that the chain of custody is maintained and samples are not tampered with.[220] When the laboratory returns the samples, they should be stored in a secure location using a sealed container, which should not be opened until required at trial.[221] Where possession of evidence must be transferred between people, such as when delivering samples to a laboratory, you should obtain a written, signed statement to help establish the chain of custody and ensure the court that the evidence has not been altered or tampered with.[222] The statement must be dated and state the relevant time, as well as the name and contact information of the person handling the sample.

2.2.3.4 Expert Evidence

Expert evidence is a final and less common type of evidence you may need to collect and prepare. Expert evidence is unique, because it is the only form of evidence which may be presented as an opinion, rather than fact. Expert evidence is only permitted where the court deems it relevant and necessary, meaning that it provides information "which is likely to be outside the experience and knowledge of a judge or jury."[223] The rules for expert witnesses in criminal trials are found in sections 657.3(1) to 657.3(7) of the *Criminal Code*. The expert's evidence must be given by means of a report accompanied by the affidavit or solemn declaration of the person, setting out, in

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[216] Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 14; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 150-151.
[217] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152-153.
[218] While a disruption in the continuity of possession can lessen the weight given to that piece of evidence (see *R v Macpherson and Oset*, 2005 BCSC 381), "Canadian case law makes it clear that proof of continuity is not a legal requirement and that gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity" (*R v Larsen*, 2001 BCSC 597 at para 62). If there is a break in the chain of continuity, then any "doubt must be resolved in the accused's favour" (*R v Bailey*, 2020 BCSC 2245 at para 45); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152-153; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.5; ECEL Private Prosecution Report, *supra* note 6 at 4.
[219] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152-153; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.5; ECEL Private Prosecution Report, *supra* note 6 at 4.
[220] *Ibid*.
[221] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152-153.
[222] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 152-153; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 5.5.
[223] *R v Abbey*, 1982 CanLII 25 (SCC); *R v Mohan,* 1994 CanLII 80 (SCC) at 23.

particular, the qualifications of the person as an expert if: (a) the court recognizes that person as an expert; and (b) the party intending to produce the report in evidence has, before the proceeding, given to the other party a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence.[224]

If expert evidence is necessary, you must give at least 30 days notice to the accused party, including the name of the proposed expert witness, a statement of the witness's qualifications, and a description of the witness's expertise that is sufficient for the accused to inform themselves about that area of expertise and retain their own expert if necessary. You must also provide a copy of the witnesses' expert report, or if there is not an expert report, a summary of what the expert witness will say.[225]

2.2.3.5 Sources of Information

Tracking down evidence can involve a lot more than a trip to the scene of a crime. You may need copies of permits or government records, corporate records, or other documents. Many documents are available online, but hard to find. Others may be obtained through FOI requests, either federally or provincially.

FOI

There are number of guides to FOI requests, the following are a place to start:

- ELC's: *A Citizen's Guide to Freedom of Information (FOI): How To Get Government Documents*: https://elc.uvic.ca/publications/foi_press_release/ [https://perma.cc/X2AV-4XH2]
- The UBC Library has a collection of useful information on FOI requests: BC and Canada - Freedom of Information / Access to Information - Research Guides at University of British Columbia (ubc.ca) [https://perma.cc/3DK3-UT43]
- The BC Office of the Information and Privacy Commissioner has useful information on their website: Office of the Information and Privacy Commissioner for B.C. | Home (oipc.bc.ca) [https://perma.cc/XJT3-4CVS]
- Federal FOI requests can be made at: Access to information and privacy - Canada.ca
- The Canada Council has a guide to federal FOI requests: Access to Information and Privacy Acts (canadacouncil.ca) [https://perma.cc/3P8J-A3HK]

Court Records

- BC court records can be found on the BC Courts website: The Courts of British Columbia - Home (bccourts.ca) [https://perma.cc/N7Q2-LDRA] or BC Court Services online: CSO - Home (gov.bc.ca) [https://perma.cc/3DXQ-YJFU]

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[224] *Criminal Code*, *supra* note 1, s 657.3(1).
[225] *Criminal Code*, *supra* note 1, s 657.3(3)(a).

Corporate Records

- Many corporate records can be obtained from the Victoria corporate registry or BC OnLine: BC OnLine (gov.bc.ca) [https://perma.cc/U3AZ-8HP6]
- *Globe* Investor: Globe Investor - The Globe and Mail [https://perma.cc/DH4J-N5J4]
- System for Electronic Disclosure by Insiders – SEDI
- System for Electronic Document Analysis and Retrieval (SEDAR): SEDAR Home Page [https://perma.cc/99H6-NXTT]
- Toronto Stock Exchange: TMX [https://perma.cc/KBD9-F9UF]

Land Title and Ownership Information

- BC OnLine: BC OnLine (gov.bc.ca) [https://perma.cc/U3AZ-8HP6]
- BC Assessment: BC Assessment - Independent, uniform and efficient property assessment [https://perma.cc/KZ4P-SWCF]
- Land Title and Survey Authority of BC: Home - LTSA [https://perma.cc/6D9D-MJLZ]

Permitting and Enforcement Records

- BC Oil and Gas Commission: BC Energy Regulator (BCER) (bc-er.ca) [https://perma.cc/R7G8-3RLB]
- BC Oil and Gas Commission Records and Reports: Reports | BC Energy Regulator (BCER) (bc-er.ca) [https://perma.cc/3XJR-GSQN]
- BC Oil and Gas Commission Compliance & Enforcement: Compliance & Enforcement | BC Energy Regulator (BCER) (bc-er.ca) [https://perma.cc/EVL7-K9H8]
- Crown Land Registry: Crown Land Registry (Tantalis) - Province of BC (gov.bc.ca) [
- DataBC Maps: BC Map Services - Province of BC (gov.bc.ca)
- Environmental Reporting BC: Environmental Reporting BC - Province of BC (gov.bc.ca)
- FracFocus Chemical Disclosure Registry: Home | FracFocus Chemical Disclosure Registry
- Natural Resource Compliance and Enforcement Reporting: Natural Resource Compliance & Enforcement Reporting - Province of BC (gov.bc.ca)
- Impact Assessment Agency of Canada: Impact Assessment Agency of Canada - Canada.ca
- EPIC, BC Environmental Assessment Office permitting information: EPIC (gov.bc.ca)

Other Information

- Water licences: Water Licences Report (gov.bc.ca)
- BC Government Staff Directory: BC Government Directory Home Page
- BC Hansard: Debates (Hansard) (leg.bc.ca) [https://perma.cc/K4DE-5H8J]
- Federal Open Data site: Open Data | Open Government, Government of Canada [https://perma.cc/LV52-HF4V]
- Envirohansard (federal): My Blog – My WordPress Blog (envirohansard.ca) [https://envirohansard.ca/]

There is much more information publicly available, but these are some of the main sources to find public information.

2.2.4 CAPACITY TO CARRY OUT A PRIVATE PROSECUTION TO ITS FULL POTENTIAL

As a final consideration before initiating a private prosecution, you should consider whether you have sufficient capacity to use a private prosecution as a tool to secure beneficial results. As stated above, private prosecutions often require significant administrative and legal resources, as well as time and energy for all involved. Being prepared to take on a private prosecution means that you understand what will be required of you when you step into the role of a private prosecutor, and you have sought out adequate legal and administrative support.

Additionally, you should consider the strategic constraints that will define your effective use of private prosecutions. Perhaps the most important constraint is the high likelihood that the provincial or federal Attorneys General will intervene. If you are armed with an understanding of the federal and provincial charge assessment processes, you stand a better chance of advocating with Crown counsel for a beneficial result when they are deciding whether and how to intervene. This also means that you have canvassed other alternative options and decided that a private prosecution is a necessary step to take.

Finally, communication and outreach are crucial components of using a private prosecution to its full effect. You should consider whether you or your organization are prepared to conduct media appearances and issue press releases to use a private prosecution to garner awareness and support for stronger environmental laws and accountability for offenders. It is advisable to prepare a media strategy for how you are going to discuss the private prosecution publicly before you initiate it.

2.3 STEP 3: BRINGING A PRIVATE PROSECUTION

The following section provides practical information about the steps that you must take to initiate a private prosecution.

As mentioned, it is important to note that the *Charter* applies to private prosecutions.[226] Therefore, in bringing a private prosecution, you must ensure that you are not violating the defendant's rights, as outlined in the *Charter*. As described in Section 2.4.6, costs can be awarded to the defendant if a judge finds that their *Charter* rights have been violated.[227] You should seek legal advice to ensure you are respecting the *Charter* rights of the defendant.

[226] *R v HMTQ et al*, *supra* note 4 (while this decision was reversed in *R v Executive Flight Centre Fuel Services Ltd*, 2018 BCSC 2212, the applicability of the *Charter* to private prosecutions was upheld).
[227] *Ontario v 974649 Ontario Inc*, 2001 SCC 81.

2.3.1 PREPARING THE BRIEF AND INFORMATION

The first step to initiating a private prosecution is to transfer your evidence and legal research into documents that will be used to begin the private prosecution and usher it through the initial stages. The following section contains instructions about the two crucial documents that you must prepare: the Information and the brief. For examples of an Information, see Appendix A.

2.3.1.1 The Information

The Information is the form used to initiate the private prosecution. It provides only basic details about the alleged offence. [228] For federal offences, the form for an Information can be found in the *Criminal Code*.[229] For provincial offences, the form can be found in the *Offence Act*.[230] Appendix A contains several examples of Informations.

The Information begins with the statement that the Informant believes on reasonable grounds (or has personal knowledge) that the accused committed the offence(s).[231] Following this statement, the Information lists the particulars of each individual alleged offence. These listed statements are called "counts," and an Information may include multiple counts.[232] Each count must contain sufficient detail so that the accused can be reasonably informed of the charges against them, mount a full defence, and avail themselves of their right to a fair trial.[233] The following is a basic template for an Information:

> This is the Information of [Informant's Name] ("the Informant") of [Informant's Place of Residence], [Informant's Occupation].
>
> The Informant says that [he/she] has reasonable and probable grounds to believe and does believe that:
>
> Count 1. [The Identity of the Accused], on/between [Date(s) of the Offence], at [Location of the Offence] did [Action Constituting the Offence], contrary to [Section of the Act Breached, and Act Breached], thereby committing an offence under [Section of the Act Which Makes Breaching the Other Provision an Offence].

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[228] *R v Whitmore*, 1987 CanLII 6783 at 562 – 563 aff'd 1989 CanLII 7229 (ON CA); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 69.
[229] *Criminal Code*, *supra* note 1, Form 2.
[230] *Offence Act, supra* note 7, Form 2.
[231] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 62-69.
[232] *Criminal Code*, *supra* note 1, ss 581(1), 789(1); *R v Eusler and Budovitch*, 1978 CanLII 2713 (NBCA) at para 10; André Marin, *The Guide to Investigations and Prosecutions* (Aurora, ON: Canada Law Book Inc, 1995) at 142-143 [Marin, *The Guide to Investigations and Prosecutions*]; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 66; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 456-457.
[233] *Criminal Code*, *supra* note 1, s 581(3); *R v Côté,* 1977 CanLII 1 (SCC) [*R v Côté*]; Marin, *The Guide to Investigations and Prosecutions*, *supra* note 232 at 142-143.

The elements of the Information are described with additional detail in the following table:[234]

Element	Description
Informant's Identity	If you will be acting as the informant in this private prosecution, the information will start with identifying you, stating your name, place of residence, and occupation.[235] If someone else is acting as the Informant, they must be identified by name, place of residence, and occupation.
Personal Knowledge or Reasonable Grounds	You may have personal knowledge that the accused committed an offence, having witnessed the act itself. If not, it is prudent to identify that you believe on reasonable and probable grounds that the accused committed the offence.[236]
The Identity of the Accused	Identify the accused by their full name and address.[237] For individuals, this includes their surname and all given names.[238] Corporations should be identified by their full registered name (note that this may not be the same as the name used in everyday business and may even consist of a seemingly random combination of numbers) and address.[239] It is also important to be clear if the accused is a parent or subsidiary company. Government officials and Crown corporations should be identified with their title or name of office, which can often

[234] For an example of an Information sworn as per Form 2 of the *Offence Act*, *supra* note 7, see *Vancouver (City) v Batalha-Conceicao*, 2005 BCPC 34 at paras 16-17 [*Vancouver (City) v Batalha-Conceicao*].
[235] *Criminal Code*, *supra* note 1, Form 2; Offence *Act, supra* note 7, Form 2; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 62.
[236] *Criminal Code*, *supra* note 1, Form 2; *Offence Act, supra* note 7, Form 2; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 62-63; See the sample Informations in the appendices; *R v Nielsen*, 2015 BCPC 361 at paras 27-31 citing *R v Awad*, 2015 NSCA 10 ("as set out in *R v Kamperman* [[1981] NSJ No 494 (QL), 63 CCC (2d) 531], an information sworn without reasonable grounds is a nullity. It is neither a defect in form nor in substance, and cannot be amended under s. 601 of the *Code"* at para 83).
[237] *R v Edge*, 2004 ABPC 55 ("the identity of the accused must be known before an Information is valid on its face: *Re Buchbinder v the Queen*, 20 CCC (3d) 481 (Ont CA), 47 CR (3d) 135" at para 30) [*R v Edge*]; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 63-64; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 449; *R v D'Angola*, 2015 BCSC 1337 (s. 504 of the Criminal Code requires "the names of all the intended accused persons and where they reside and where the alleged offences occurred" at para 108); *Vancouver (City) v Batalha-Conceicao*, *supra* note 234 at para 16.
[238] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 63; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 449.
[239] Some people operate businesses as sole proprietorships instead of as corporations. In these cases, the accused should be identified as "[the individual's full name], operating as [registered business name]." Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 63; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 449.

	be found in statutes or enabling legislation.[240] Federal and provincial government bodies must be identified as: "His Majesty the King in Right of [Canada, or the name of the relevant Province], as represented by [Minister of DEPARTMENT].[241] A government department can only be identified as the accused if the relevant statute includes a government department under the definition of a "person."[242] A government department is not a "person" under the common law.[243] BC municipal governments can be identified by the name used in their letters patent or enabling legislation.[244]
Date of the Offence	Identify the date the offence was committed.[245] If the precise date is unclear, a range of dates may be given.[246] Depending on the nature of the offence, it may be helpful to err on the side of caution and include a slightly wider date range, as long as the accused can still have the "possibility of a full defence and a fair trial."[247] When using a range of dates, the first and last dates provided will not be included unless followed by the indication "(inclusive)" in parentheses, so it is important to err on the side of caution and broaden the range of dates provided (e.g., instead of "between the 6th day of December and the 8th day of December, 2021 (inclusive)" using "between the 5th day of December and the 9th day of December, 2021 (inclusive)" to ensure that both the 6th and 8th are included).[248]

[240] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 63.
[241] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 63; *R v Manitoba (Transportation and Government Services)*, 2009 MBPC 31 ("where the Crown is to be charged with an offence the named accused should be the legal entity representing the Crown, namely, Her Majesty the Queen in right of the Province or as represented by a particular Minister in charge of a specific department" at para 33) [*R v Manitoba*].
[242] *R v Manitoba*, *supra* note 241.
[243] *Ibid*.
[244] Letters patent can be found by searching the BC Gazette. British Columbia, "Letters Patent" (last visited 26 April 2023), online: <https://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/legislative-framework/letters-patent> [https://perma.cc/J846-XTL6].
[245] It is appropriate to write the date as: "on or about" (see e.g. *Vancouver (City) v Batalha-Conceicao*, *supra* note 234 at paras 16-17).
[246] The SCC held in *R v B(G)*, 1990 CanLII 7308 (SCC) at para 48 that while the exact time is not required in an Information, the particulars of the case and the offence alleged may warrant greater specificity; André Marin, *The Guide to Investigations and Prosecutions*, *supra* note 232 at 143; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 64-65; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 449-450.
[247] *Criminal Code*, *supra* note 1, s 581(3); *R v Côté, supra* note 233; Marin, *The Guide to Investigations and Prosecutions*, *supra* note 232 at 143; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 64-65; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 449-450.
[248] Marin, *The Guide to Investigations and Prosecutions*, *supra* note 232 at 143; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 449-450.

	Some offences may occur over the course of several consecutive days ("continuing offences"). In these cases, you may provide a range of dates, but be sure that all dates provided fall within the limitation period.[249] However, some statutes, like the *Fisheries Act*, require that continuing offences be counted as separate offences for each day, meaning that each date would be listed out in a separate count.[250]
Location of the Offence	The information must include the location of the offence.[251] While it is recommended that the full address be provided, if not available, listing the municipality or province can be sufficient to meet this criterion.[252]
The Offence	As described in Section 2.1, there are several environmental laws under which the accused may have committed an offence. It is important that you seek legal advice to ensure that you have identified the correct offence. You should specify both the alleged offence and the acts or omissions constituting the offence.[253] Use the wording as close to the exact wording from the statutory provisions creating the offence, making only slight grammatical changes as necessary (e.g., changing the tense of a verb).[254] For multiple offences, you must clearly identify each transaction.[255]

[249] See Section 2.2.1 for applicable time periods; *R v Greenough*, 2004 NBBR 371 citing the Honourable R.E. Salhany, Q.C., *Canadian Criminal Procedures* 6th ed (Toronto, ON: Canada Law Book Inc) ("it appears to be settled that the court has the right to hear and determine any part of the subject-matter of the information that is within the limitation period. Moreover, where the course of conduct is treated as a continuing offence, the court is entitled to consider those acts outside the limitation period in so far as they form part of and explain the continuous conduct; falling within the limitation period" at para 37); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 64.
[250] *Fisheries Act*, *supra* note 110, s 78.1; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 64-65.
[251] *R v Lawson*, 2012 BCSC 356; *R v 0721464 BC Ltd*, 2011 BCPC 90 [*R v 0721464 BC Ltd*].
[252] *R v 0721464 BC Ltd*, *supra* note 251.
[253] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 65-66; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 450-453; The BC Court of Appeal in *MacLean v British Columbia*, [1988] BCWLD 3730, [1988] BCJ No 2042 provided a good overview of the law. As the court held, the courts will not quash an Information before a plea provided it "states the time of the offence […], the place, the victim and the offence (in the language of the enactment)" (at para 33). However, if "there is a possibility of prejudice to the accused (as *in R. v. WIS Dev. Corp.*)," then further information will be needed (at para 33). This is informed by the 'golden rule': "The golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial" (at para 19, as per *R v Côté*, *supra* note 233 at para 11). The BCSC in *R v Pickton*, 2006 BCSC 341 at para 25 confirmed that "this golden rule is applied contextually."
[254] Courts have found that having the wrong section of the *Criminal Code* is not fatal to an information, provided that the accused is able to identify the transaction and is not prejudiced in bringing forward their defence (see *T v Tomshak*, 2016 ABQB 718); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 65-66; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 451-453.
[255] *Vancouver (City) v Laffy-Stadnyk*, 2004 BCPC 439.

	Ensure that you cite to the correct statutory provision(s) creating the offence. Some statutes define the conduct that constitutes an offence in one section but only define the offence in another section.[256] For example, a violation of section 36(3) of the *Fisheries Act* is an offence pursuant to section 40(2) of the *Fisheries Act*.[257] In this case, you would use the language from and cite to section 36(3), followed by the phrase "and did thereby commit an offence pursuant to section 40(2) of the *Fisheries Act*."[258] You must provide enough information for the accused to be "Reasonably informed of the transaction against [them]… thus giving [them] the possibility of a full defence and a fair trial."[259] However, avoid being overly specific or providing details that may be difficult to prove later on.
Electing the Mode of Trial	At the request of the private prosecutor, some offences can be prosecuted either as summary conviction offences, which may result in less severe penalties and are subject to limitation periods, or indictable offences, which have no limitation periods and may result in more severe penalties but are more complex and cannot be appealed by a private prosecutor.[260] You may want to indicate on the Information which mode you are pursuing, following the advice of a lawyer more fully explaining the benefits and drawbacks of each, or delay your decision until the first appearance (See Sections 2.4.2).[261]

[256] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 450-454.
[257] *Fisheries Act, supra* note 110, ss 36(3), 40(2).
[258] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 66-69; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 450-454.
[259] *Criminal Code*, *supra* note 1, s 581(3); *R v Joubert*, 2019 BCPC 366 citing *R v Côté*, *supra* note 233; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 65-66; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 450-454; see *Regional District of Central Okanagan v Sisett*, 2023 BCPC 100 for a good explanation on the required substance of an Information so the accused can appropriately answer the charge.
[260] *Amfoubalela v Prince Edward Island (Attorney General*), 2015 PECA 7 at para 11 [*Amfoubalela v PEI*]; For example, section 78 of the *Fisheries Act*, *supra* note 110, provides that offences can be prosecuted as either summary conviction or indictable offences. Summary convictions generally have a limitation period of 12 months (*Criminal Code*, *supra* note 1, ss 676, 786-787), except where otherwise defined by law, such as in the *Fisheries Act,* which defines the limitation period as five years (*supra* note 110, s 82); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 102-103.
[261] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 66, 102-103.

2.3.1.2 Preparing the Brief

In addition to the Information, you should prepare a brief. There is no set format for a brief. In Appendix B, there are extracts from a brief, but note that your brief will likely require different information and formatting depending on the facts of your case and the offence at issue. Your objective when preparing the brief should be to summarize the applicable law and how the evidence you have collected establishes that an offence has been committed. Inasmuch as possible, it should resemble a Crown brief, and having a former Crown prosecutor review it at some stage is always helpful.

A brief may contain a:

- List of those being accused of committing the offence.
- Summary of the circumstances leading to your discovery of the offence, with references to supporting documents and your evidence.
- Summary or discussion of the applicable law, and how the law applies to the facts.
- List of the evidentiary exhibits that you will seek to rely on.
- List of potential witnesses and their respective areas of expertise; and
- Witness statement for each witness summarising the evidence that you anticipate they will provide given their expertise and/or knowledge of events.[262]

The brief should be well-organized, and you will need to create at least four copies: one for yourself, one for the justice to whom you will be laying the Information, one for the accused, and one for the Crown.[263]

2.3.2 SWEARING THE INFORMATION

The process of initiating a private prosecution begins with "laying" the Information.[264] In other words, attending a provincial courthouse and swearing (i.e., signing and affirming) the Information before a provincial court judge or a "justice of the peace."[265] The first step in doing so is to identify the correct courthouse to submit the Information. While that is generally a provincial court,[266] it is critical to call the courthouse well beforehand and explain that you intend to swear a private Information, to confirm the right location for doing so, that a justice of the peace will be available, and everything you or the Informant need to bring. That will generally include an unsigned copy of

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[262] Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 25-26; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 69; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0.

[263] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 69; To note, it is unlikely that you will give a copy to the accused at this stage as there is no need to notify the accused until after the process hearing.

[264] *Criminal Code*, *supra* note 1, s 504.

[265] *Criminal Code*, *supra* note 1, ss 2, 504.

[266] *Holland v British Columbia (Attorney General)*, 2022 BCSC 1388 [*Holland v BC*].

the Information[267] (extras may be useful), your brief or list of witnesses and what they will say, identification, and any other documentation or records. You do not need to tell court staff who the accused is at this stage but should be prepared to tell them what legislation the person will be charged under and roughly where the alleged offence took place. You may wish to make an appointment. The next step is to go there to swear or affirm and sign it before a justice of the peace or provincial court judge.

Once you have submitted your "Information," the justice or provincial court judge will briefly review it and determine whether the criteria set out in section 504 of the *Criminal Code* are met (it must allege an offence known to law, describe an identified accused, be within the court's jurisdiction, and other criteria).[268] If the criteria are met, the Informant will be required to "swear" the Information (i.e., sign the Information and affirm the information it contains is true).[269] The role of the judge or justice receiving the Information is to ensure "the [I]nformation is valid on its face."[270] It is important to note that "[i]f the prerequisites are met, the justice has no discretion and the information must be received, i.e., sworn, by the justice, and then referred to a judge."[271]

After the Information has been sworn, you must communicate with the court registry to set a date for the "process hearing" (also known as a *pre-enquête* hearing).[272] At this point, you must also ensure that the Attorney General receives a copy of the Information and, once the process hearing has been scheduled, a notice of the process hearing.[273] While it is not a legal requirement to deliver the Attorney General a copy of your brief, it is strongly recommended to do so, because your brief will be relevant to the Attorney General's decision to intervene.[274]

Once the Information has been sworn, Crown counsel can intervene to stay the proceeding at any point. As described in Section 1.4, intervention by the Attorney General could lead to the prosecution being stopped indefinitely or the Crown taking over the prosecution.[275] This is another reason why it is important for you to be fully prepared to share the details of your case with the Crown when you lay the Information.

The next major step is the Process Hearing, but after filing the Information you or your lawyer may engage in communicating with Crown counsel via emails, calls, or letters.

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[267] *Vancouver (City) v 262109 BC Ltd*, 2002 BCPC 201 at para 15.
[268] *Criminal Code*, *supra* note 1, s. 504, and *Re: TLF*, 2014 BCPC 100 at para 6.
[269] OCJ Private Prosecution Guide, *supra* note 7 at 1; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 69-71; ECEL Private Prosecution Report, *supra* note 6 at 5.
[270] *Holland v BC, supra* note 265 at para 23.
[271] *Ibid*.
[272] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 70; OCJ Private Prosecution Guide, *supra* note 7 at 1.
[273] *Criminal Code*, *supra* note 1, ss 2, 507.1(3).
[274] If the Crown intervenes to continue the prosecution, your brief may prove helpful in supplementing their work in carrying out the prosecution; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 69.
[275] PPSC Deskbook, *supra* note 6, s 5.9; *R v McHale,* 2010 ONCA 361.

2.3.3 THE PROCESS HEARING

The process hearing is a hearing where a justice decides whether or not to "issue process," i.e., a summons for the accused to appear before the court to answer the charges raised in the Information.[276] The process hearing is held *ex parte*, meaning without the accused present (the accused has no right to be notified or to participate in this hearing), and *in camera*, meaning the Court is not open to the public.[277] In this hearing, the justice will hear your allegations and the evidence of any witnesses.[278] In addition, the Attorney General may cross-examine you or your witnesses and present evidence of their own.[279]

During the hearing, the onus is on you, the private prosecutor, to establish a *prima facie* case. In other words, it is your duty to provide evidence about all of the essential elements of the offence – showing some evidence that the offence was committed by the accused.[280] The evidentiary standard that applies is the "*prima facie*" standard, or, "[i]n other words, the justice must be satisfied that there is some evidence before him from the Informant and/or his witnesses that the accused has committed the offence against him and that there is some evidence against him on all the essential elements of the offence."[281]

The justice cannot issue process unless they have heard and considered the allegations of the Informant and also the evidence of witnesses.[282] Where the Informant has first-hand knowledge of the offence, the Informant's testimony alone may be sufficient.[283] The justice also cannot issue process unless they are satisfied that the Attorney General has received a copy of the Information and notice of the hearing and has had an opportunity to attend the hearing, cross-examine witnesses, and call their own witnesses.[284]

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[276] *Criminal Code*, *supra* note 1, ss 2, 507.1; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 73.

[277] See *Ambrosi v British Columbia (Attorney General)*, 2014 BCCA 123, see paras 18-34 for a detailed discussion of the reasons for holding the process hearing *ex parte*, including that a failure to do so is not fatal to the court's decision [*Ambrosi v BC*]; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 73; PPSC Deskbook, *supra* note 6, s 5.9; Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 248; Irwin Law, "In camera," online: <https://irwinlaw.com/cold/in-camera/> [https://perma.cc/K4N7-X37S]; OCJ Private Prosecution Guide, *supra* note 7 at 2.

[278] *R v Edge*, *supra* note 237 at para 38; *Criminal Code*, *supra* note 1, ss 2, 507.1(3); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 73-74.

[279] *Criminal Code*, *supra* note 1, s 507.1(3).

[280] PPSC Deskbook, *supra* note 6, s 5.9.

[281] *Aasland Informations, Re*, 2000 CanLII 8548 (MB PC), citing *R v Whitmore*, 1987 CanLII 6783 (ON SC) [*R v Whitmore* ONSC], aff'd 1989 CanLII 7229 (ON CA) [*R v Whitmore* ONCA]; *R v Whitmore* ONSC was confirmed as the law in BC here: *Ambrosi v BC*, *supra* note 276 at paras 10, 11, 15, 34. *Ambrosi v BC*, *supra* note 276 gives useful details regarding the process hearing.

[282] *Criminal Code*, supra note 1, s 507.1(3)(a); *Ambrosi v BC*, *supra* note 277 at paras 32, 35.

[283] *R v Edge, supra* note 237 at para 100; *R v Orr*, 2018 BCSC 1626 at paras 28-33 [*R v Orr*], citing *R v Whitmore* ONCA, *supra* note 281.

[284] *Criminal Code*, *supra* note 1, ss 2, 507.1(3); *R v Edge, supra* note 237 at para 100; PPSC Deskbook, *supra* note 6, s 5.9.

If the justice is satisfied that there is a *prima facie* case and the other requirements are satisfied, they will "issue process," i.e., a summons for the accused to appear at trial.[285] Once process is issued, the summons can be delivered to the accused by a peace officer, or you may arrange the date and time of appearance by contacting counsel for the accused.[286] You should consider the availability of your witnesses when setting the date for the first appearance.[287] Should the justice decide not to issue process, the Information is deemed to never have been laid, in which case, there may be options for review (described in Section 3), and you may be able to swear a new Information if you have new evidence.[288]

Note that once process has been issued, the prosecution has commenced, which means the Crown can intervene to withdraw the charges or take over the prosecution.[289] Before process is issued, the Attorney General / Crown can only intervene to issue a stay.

For a detailed resource on the process hearing, see Jeffrey Jones, "Private Prosecutions in Canada: A Citizen Enforcement Alternative" (Materials prepared for the Renewing Environmental Law Conference, Vancouver, 4 February 2011) [unpublished], online (pdf): <https://www.scribd.com/document/446992434/private-prosecutions-in-Canada-Guide-pdf> [https://perma.cc/6JWN-PSYY].

2.3.4 DISCLOSURE

As a private prosecutor, you have a duty to disclose (i.e., send or give) all relevant information to the accused.[290] Failing to disclose relevant information can result in charges being stayed by the court as a matter of fairness.[291] If the Crown believes that you are ill-equipped or unable to handle disclosure, it may influence their decision to intervene and stay the prosecution.[292]

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[285] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 73-74; PPSC Deskbook, *supra* note 6, s 5.9; *R v Orr*, *supra* note 283 at paras 28-33 aff'd 2021 BCCA 42 citing *R v Whitmore* ONCA, *supra* note 28); See *R v Jenkins*, 2007 ONCJ 371 for an example of how serving a summons can go wrong.

[286] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 75.

[287] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," supra note 187 at s 9.0. If your witness(es) do not show up, you may be able to reschedule. However, this is unlikely, and many criminal cases are dropped on this basis.

[288] *Criminal Code*, *supra* note 1, s 507.1(7); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 5; PPSC Deskbook, *supra* note 6, s 5.9; OCJ Private Prosecution Guide, *supra* note 7 at 2; ECEL Private Prosecution Report, *supra* note 6 at 5.

[289] PPSC Deskbook, *supra* note 6, s 5.9.

[290] The duty to disclose extends only to relevant information not protected by privilege. Clearly irrelevant evidence may be excluded, but prosecutors "must err on the side of inclusion" (*R v Stinchcombe*, *supra* note 47 at 339); *R v Taillefer; R v Duguay*, *supra* note 47 at paras 59-60; Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 348; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 47-48.

[291] *R v O'Connor*, 1995 CanLII 51 (SCC); Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 47; PPSC Deskbook, *supra* note 6, s 5.9.

[292] PPSC Deskbook, *supra* note 6, s 5.9.

The disclosure obligation applies to all relevant materials, no matter if it is helpful to your case or that of the accused.[293] The obligation applies whether or not you intend to introduce the relevant materials at trial.[294] Prosecutors "must err on the side of inclusion" but can exclude "clearly irrelevant" materials from disclosure.[295] Some information may be protected by solicitor-client privilege, but solicitor-client privilege may not always prevent you from being obligated to disclose said information.[296] You should review and discuss all disclosure matters with your lawyer. If there is information that you think should be withheld based on its relevancy or solicitor-client privilege, you should consult with your legal counsel to determine whether that is possible or appropriate. If you are operating without legal counsel, you should get focused advice at this stage, and may want to seek the advice of a lawyer.

Your obligation to disclose is "triggered by a request by or on behalf of the accused," which can occur any time after charges are laid.[297] The accused will likely only be informed of the charges after the process hearing, so this is the likely point at which your obligation to disclose would be triggered. If the request is timely, you should provide the Information such that the accused has enough time to consider the Information before electing the mode of trial or pleading at the first appearance.[298] If the accused does not have legal counsel of their own, you should advise them of their right to disclosure, as the courts indicate that a plea cannot be taken if this has not been done.[299]

After initial disclosure is provided, any new information must also be disclosed when it is received.[300] Creating a disclosure strategy that contemplates what evidence will be disclosed, to whom, and through what means, is highly recommended.[301] The disclosure strategy should ensure that disclosed information is easily navigated and accessible. A strong disclosure strategy could help convince the court that you have in fact disclosed all the relevant information should a dispute arise.[302] The initial disclosure package may take the same form as the prosecution brief, and should include:

- A copy of the Information.
- A summary of the circumstances of the offence.
- A list of all exhibits (information and other evidence being disclosed).
- A copy of the accused's criminal or enforcement record.

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[293] Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 348; *R v Taillefer; R v Duguay*, *supra* note 47 at para 59; *R v Stinchcombe*, *supra* note 47.
[294] *Ibid*.
[295] *R v Taillefer; R v Duguay*, *supra* note 47 at paras 59-60; *R v Stinchcombe*, *supra* note 47.
[296] Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 349; *R v Taillefer; R v Duguay*, *supra* note 47 at para 59; *R v Stinchcombe*, *supra* note 47.
[297] *R v Stinchcombe*, *supra* note 47 at 343.
[298] *R v Stinchcombe*, *supra* note 47.
[299] *Ibid*.
[300] *R v Stinchcombe*, *supra* note 47.
[301] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 506-507.
[302] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 506.

- Statements of the accused.
- The names of, statements from, and anticipated testimonies of witnesses.
- Notes from investigations.
- Copies of photographs, videos, and any other evidence.
- Copies of expert reports; and
- Any information that could reduce the sentence if the accused is convicted, including the contact information of people who may have information useful to the accused.[303]

As with the prosecution brief, the disclosure package should be well-organized and reviewed for completeness.[304] A well-organized disclosure package can help avoid unnecessary accusations of non-disclosure, while a disorganized or "haphazard" approach to disclosure can be found to amount to no disclosure at all.[305] In order to ensure that you are able to prove the completeness of your disclosure, you should keep a master copy of the initial disclosure package in "an unaltered and secure state."[306] The same applies to later disclosure packages necessary for fulfilling the disclosure obligation as new information arises, which can be aided by a running index of information including what was disclosed (and on what date), and what still needs to be disclosed.[307] Limiting the number of disclosure packages to two (one initial package and one closer to the date of trial including any additional information received up to that point) is recommended to maintain well-organized and easily-verified disclosure, but you should work with your legal counsel to ensure a consistent and timely approach to fulfilling this vital legal duty.[308]

2.4 STEP 4: CONDUCTING THE PRIVATE PROSECUTION

After a summons has been issued, the private prosecution will follow largely the same procedural steps as any other prosecution. However, this section provides only basic information about these steps. Less detail is provided about the later stages of a private prosecution beyond the initial appearance due to the high likelihood that the Attorney General will have intervened at this point, and more detail can be found in guides and books on criminal procedure. If the Attorney General has not intervened and you face conducting the prosecution itself, you will need counsel with experience in prosecutions.

As a private prosecutor, you are entitled to conduct the prosecution yourself. The assumption throughout this *Guide* is that you have retained a lawyer for this process, but if not it is

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[303] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 47-48; *R v Stinchcombe*, *supra* note 47; Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 498-501; PPSC Deskbook, *supra* note 6, s 2.5.
[304] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 498-501.
[305] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 500; *R v Rajalingam,* 2004 CanLII 31362 (ON CA).
[306] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 501.
[307] *Ibid*.
[308] Campbell, *The Investigator's Legal Handbook*, *supra* note 50 at 503.

recommended that you seek the advice of a lawyer to navigate the complex rules of procedure and evidence.[309] If you have not used a lawyer up to this point at this stage, you can enlist another party to act as your agent and conduct the prosecution, which is generally a lawyer.[310]

2.4.1 FIRST APPEARANCE

The first appearance in court is where the charges are read to the accused, and they can plead guilty or not guilty to each charge.[311] The accused will generally request an adjournment to allow for more time to plead, prepare a defence, or other reasons. This request is always granted.[312] Other pre-trial motions may be made either by you as the private prosecutor, or the accused, including to amend or quash charges, or make a Charter challenge.[313]

If the accused chooses to plead guilty at the first appearance (or a subsequent appearance), then the judge will either proceed with sentencing or adjourn the hearing and schedule a sentencing hearing. Before the sentencing hearing the prosecution and defence may develop an agreed statement of facts, which will be read in at the sentencing hearing. If not then during sentencing both sides may make submissions on the facts, as well as sentencing caselaw, and a proposed sentence.[314] If the accused accepts the necessary facts to establish the offence and understands the nature of the plea, the judge will register a conviction and may sentence the accused immediately, or adjourn to consider the submissions made and make a decision on sentencing at a later date (see Section 2.4.5).[315]

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[309] *Criminal Code*, *supra* note 1, ss 2, 802; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 95-96.
[310] *Criminal Code*, *supra* note 1, s 785; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 95-96.
[311] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 91; ECEL Private Prosecution Report, *supra* note 6 at 5; On information about the first appearance from the accused's perspective, see BC Supreme Court, "First Appearance & Disclosure" (last reviewed October 2022), online: <https://supremecourtbc.ca/criminal-law/before-trial/first-appearance-disclosure> [https://perma.cc/M3FL-R79K].
[312] *Criminal Code*, *supra* note 1, s 606(7); EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0.
[313] EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 92; ECEL Private Prosecution Report, *supra* note 6 at 5.
[314] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 91; ECEL Private Prosecution Report, *supra* note 6 at 5; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 30; The Law Society of British Columbia, *Professional Legal Training Course 2023 Practice Material Criminal Procedure* (The Law Society of British Columbia: 2023) at 31, online (pdf): <https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/material/CriminalProcedure.pdf>.
[315] *Criminal Code*, *supra* note 1, s 606(1.1); ECEL Private Prosecution Report, *supra* note 6 at 5; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 30.

If the accused pleads not guilty, the judge will set a trial date.[316] For summary conviction offences, the matter can proceed straight to trial, while for indictable offences, a preliminary inquiry may come before the trial.[317] Private prosecutions usually do not proceed beyond this stage. For private prosecutions in BC, the Attorney General or the accused will likely seek an adjournment. In the case of the accused, the adjournment will be to allow for the accused to prepare their defence. In the case of the Attorney General, the adjournment is to allow the Attorney General to assess the charges and determine whether and how to intervene.

2.4.2 ELECTING THE MODE OF TRIAL

Many offences under federal laws can be tried either as a summary conviction offence, or as an indictable offence, at the request of the private prosecutor.[318] When pursuing a private prosecution of federal offences, you may be faced with the choice between the two modes of trial – proceeding by summary conviction offence or as an indictable offence.[319] This is a complicated area of law for which you need legal advice.

The following sections provide a brief outline of the process for summary conviction and indictable offences. Generally speaking, indictable offences allow more severe penalties to be imposed and are not subject to limitation periods (there is no time limit after an offence has been committed to pursue prosecution).[320] However, indictable offences require a more complex procedure and give the private prosecutor no right to an appeal.[321] Further, some sources indicate that it is unclear what role the private prosecutor can play in conducting the prosecution for indictable offences.[322] The *Criminal Code* allows private prosecutions for indictable offences to proceed with the consent of a judge where the relevant Attorney General has not intervened, but given the likelihood of intervention outlined in Section 1.4, it is unlikely that such a prosecution would proceed to trial

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[316] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 91; ECEL Private Prosecution Report, *supra* note 6 at 5.
[317] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 91; Supreme Court BC, "Criminal Law: Arraignment Hearing" (last reviewed October 2022), online: <https://supremecourtbc.ca/criminal-law/before-trial/arraignment-hearing> [https://perma.cc/32KB-MWFH].
[318] *Fisheries Act, supra* note 110, s 78; *SARA*, *supra* note 26, s 97(1.1).
[319] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 66, 102-103; Canada, Department of Justice, "Criminal offences" (last modified 7 July 2021), online: <https://www.justice.gc.ca/eng/cj-jp/victims-victimes/court-tribunaux/offences-infractions.html> [https://perma.cc/B74C-4YUU].
[320] *Criminal Code*, *supra* note 1, s 786; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 99-102, 119; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 21-22; ECEL Private Prosecution Report, *supra* note 6 at 2.
[321] *Criminal Code*, *supra* note 1, ss 675-676; *Amfoubalela v PEI*, *supra* note 259.
[322] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 99-102; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 21-22.

unless Crown takes carriage.[323] While this *Guide* provides some information on the differences between summary conviction and indictable offences, if you do not have counsel it is strongly recommended that you seek the advice of a lawyer if faced with this decision.[324]

2.4.3 SUMMARY CONVICTION OFFENCES

Unless specified as indictable, offences under federal legislation are summary conviction offences.[325] All provincial offences are also summary conviction offences.[326] Summary conviction offences are typically less serious in nature than indictable offences and are subject to less severe penalties.[327]

Where not specified in the relevant laws, the *Criminal Code* sets out maximum penalties of less than two years imprisonment or a $5,000 fine for summary conviction offences.[328] However, federal laws such as the *Fisheries Act* and the *Species at Risk Act* set higher maximum fines.[329]

Summary conviction offences are subject to limitation periods, with the *Criminal Code* setting a default of one year from the alleged offence, after which a prosecution cannot be started, unless specified in other legislation.[330] Other laws set out different limitation periods, with, for example, prosecutions able to start up to five years from the alleged offence for summary conviction under the *Fisheries Act*, and up to two years from the alleged offence for summary conviction of the *Species at Risk Act*.[331]

2.4.3.1 Summary Conviction Trial

Before trial there are likely to be several appearances in court to set dates, monitor disclosure, or address other procedural matters. Summary conviction trials take place in provincial court and are decided by a judge, following a procedure laid out in the *Criminal Code*.[332] The purpose of the trial is to establish whether the accused is guilty of the charges laid against them.[333]

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[323] *Criminal Code*, *supra* note 1, s 574(3).
[324] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 66, 102-103.
[325] *Interpretation Act*, RSC 1985, c I-21, s 34(1).
[326] PPSC, "Understanding Criminal Law in Canada," *supra* note 61.
[327] *Criminal Code*, *supra* note 1, s 787; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 95; *R v Dosangh*, 1977 CarswellBC 521, 35 CCC (2d) 309 ("[T]he long accepted rule of construction that where in criminal matters there be a doubt as to applicability of particular provisions or procedures, that which most favours the accused should be adopted. The penalties provided on summary conviction are much less than those provided on conviction in proceedings by indictment" at para 13).
[328] *Criminal Code*, *supra* note 1, s 787.
[329] *Fisheries Act*, *supra* note 110, s 78; *SARA, supra* note 26, s 97(1.1).
[330] *Criminal Code*, *supra* note 1, s 786.
[331] *Fisheries Act*, *supra* note 110, s 82; *SARA*, *supra* note 26, s 107(1).
[332] *Criminal Code*, *supra* note 1, ss 785, 798, 801.
[333] ECEL Private Prosecution Report, *supra* note 6 at 5.

At trial, the prosecution will have the first opportunity to speak and may present an opening statement summarizing the issues and evidence coming before the court.[334] Note that the opening statements should state what the prosecution hopes to prove during the trial but should not include any arguments or attempts to prove what was summarized.[335] The prosecutor (which could be you, your lawyer, or an "agent" working on your behalf) will then call and examine (question) witnesses, and enter exhibits (evidence), which can only be entered through witness testimony (whether oral or affidavit).[336] Once you have examined your witnesses, the defence (which could be the accused, their lawyer, or an "agent" working on their behalf) will have the opportunity to cross-examine the witnesses.[337] The judge may also ask questions of the witnesses.[338] If new issues are raised during the cross-examination, you may be able to re-examine your witnesses.[339]

The defence will then be able to make their case.[340] This can include applying for acquittal by directed verdict, which requires that the prosecution lacks evidence on an essential element of the offence.[341] If no application is made, the defence can make their case in a similar manner to the prosecution, calling and examining their own witnesses, and entering exhibits as evidence.[342] The prosecution will then be able to cross-examine witnesses, and the judge may ask questions of their own.[343] The defence may further examine witnesses where new issues are raised.[344]

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[334] The Law Society of British Columbia, *Professional Legal Training Course 2023 Practice Material Criminal Procedure* (The Law Society of British Columbia: 2023) at 54-55, online (pdf): <https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/material/CriminalProcedure.pdf> [https://perma.cc/DF4M-HEB4] [PLTC Criminal Procedure]>; ECEL Private Prosecution Report, *supra* note 6 at 5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 96-97.

[335] PLTC Criminal Procedure, *supra* note 334 at 5; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 9.0; *R v Mallory* 2007 ONCA 46 ("It is well established that the opening address is not the appropriate forum for argument, invective, or opinion. The Crown should use the opening address to introduce the parties, explain the process, and provide a general overview of the evidence that the Crown anticipates calling in support of its case" at para 338).

[336] Steve Coughlan, *Criminal Procedure*, 4th ed (Toronto, ON: Irwin Law) at 402, 514 [Coughlan, *Criminal Procedure*, 4th ed]; *Criminal Code*, *supra* note 1, ss 540(1), 785, 801(1), 801(3); Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, "The Law of Evidence in Canada Third Edition" (Markham, ON: LexisNexis Canada Inc, 2009) at 39.

[337] PLTC Criminal Procedure, *supra* note 334 at 57-59; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 96-97; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 30.

[338] ECEL Private Prosecution Report, *supra* note 6 at 5.

[339] Coughlan, *Criminal Procedure*, 4th ed *supra* note 336 at 404.

[340] *Criminal Code*, *supra* note 1, s 801(1)(b); Coughlan, *Criminal Procedure*, 4th ed *supra* note 336 at 399.

[341] Coughlan, *Criminal Procedure*, 4th ed *supra* note 336 at 399.

[342] *Criminal Code*, *supra* note 1, ss 541, 801(1)(b); ECEL Private Prosecution Report, *supra* note 6 at 5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 97; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 30.

[343] ECEL Private Prosecution Report, *supra* note 6 at 5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 97; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 30.

[344] *Ibid*.

After both sides have presented their cases, each will have the opportunity to deliver closing arguments.[345] Each party will be able to summarize their interpretation of the law and evidence presented at trial.[346] If the defence has presented evidence, they will deliver their closing arguments first, and if not, the prosecution will do so.[347]

If the prosecution is able to establish beyond a reasonable doubt that the accused has committed the offence, and the defence has been unable to show why the accused should not be convicted (for example, by raising a defence such as due diligence), the judge may convict.[348] The judge may reserve their decision for a later date, but if they deliver their decision immediately, you may proceed to addressing sentencing right away, or adjourn until a later date (see Section 2.4.5).[349]

If the judge does not convict the accused, you may wish to appeal. For summary conviction offences, the private prosecutor does have the right to appeal, but your ability to exercise this right is limited (see Section 2.4.6.3).

2.4.4 INDICTABLE OFFENCES

It is important to note that only the federal government has the power to create indictable offences, so all indictable offences will be under federal laws.[350] The choice to try an offence as indictable will often be indicated in the statute. For example, releasing a "deleterious substance… in water frequented by fish" is a violation of section 36(1) of the *Fisheries Act* and is an offence that can be tried as either an indictable offence or on summary conviction according to section 40(2) of the same act.[351] The *Criminal Code* allows private prosecutions for indictable offences to proceed with the consent of a judge where the relevant Attorney General has not intervened.[352]

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[345] ECEL Private Prosecution Report, *supra* note 6 at 5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 97-98; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 31.
[346] *Ibid*.
[347] *Ibid*.
[348] Note that the judge may discharge the accused if they decide that it is in the best interest of the accused and consistent with the public interest. The judge could also issue an order, such as an order to pay money, without convicting the accused; *Criminal Code*, *supra* note 1, ss 541, 801(2), 804; ECEL Private Prosecution Report, *supra* note 6 at 5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 97-98; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 31.
[349] ECEL Private Prosecution Report, *supra* note 6 at 5; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 98; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution," *supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 31.
[350] The power to create indictable offences is solely within the jurisdiction of the federal government, arising out of the criminal law power enumerated in the Constitution (*Constitution Act, 1867*, *supra* note 60, s 91(27)).
[351] *Fisheries Act*, *supra* note 110, ss 36(1), 40(2).
[352] *Criminal Code*, *supra* note 1, s 574(3).

Note that if the private prosecution can go ahead, it can only be conducted by you or your lawyer, and not by someone else acting on your behalf (an agent).[353]

Procedure is more complex for indictable offences and this section is a very brief overview. The first step is generally a preliminary inquiry.

2.4.4.1 Preliminary Inquiry[354]

The question to be asked by a preliminary inquiry judge under s. 548(1) of the *Criminal Code* is the same as that asked by a trial judge considering a defence motion for a directed verdict, namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."[355] Under this test, a preliminary inquiry judge must commit the accused to trial "in any case in which there is admissible evidence which could, if it were believed, result in a conviction" [356]

2.4.4.2 Indictable Offence Trial

Indictable offence trials are the most procedurally complex criminal litigation, and you will need experienced legal counsel to undertake this.

2.4.5 SENTENCING

If an accused is found guilty or pleads guilty, the next step is sentencing. Sentencing is where the court determines the sentence. It may be done at the same time as a trial, but generally it is done separately at a later date. Sentence may be agreed upon by the prosecutor and defence, or it may be argued in a hearing similar to a small trial, where both sides present their arguments.

While other previous cases or convictions against the accused, or other bad actions, are generally not admissible at trial, they generally are admissible on sentencing – to show a pattern of behaviour. *R v Syncrude* is helpful to review regarding sentencing. Existing guides include sections on sentencing.[357]

Sentences available are generally based on relevant legislation, which may limit sentences to certain parameters of years or fine-amounts or may allow for more creative options.

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[353] *Criminal Code*, *supra* note 1, s 2.
[354] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 99-103.
[355] *United States of America v Shepard*, CanLII 8 (SCC) at 1080; see also *R v Monteleone*, 1987 CanLII 16 (SCC) at p. 160.
[356] *R v Arcuri*, 2001 SCC 54 at para 21.
[357] Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 107-115; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 9.0; Gaillard, *Guide to Private Prosecution of Animal Welfare Offences*, *supra* note 176 at 31-32; ECEL Private Prosecution Report, *supra* note 6 at 5; *R v Syncrude*, *supra* note 26.

2.4.6 COSTS

Cost awards, or fees levied against the losing party in civil litigation, are generally not a concern in private prosecutions. While courts have discretion to issue costs, this is rarely exercised.[358] The *Criminal Code* and the *Offence Act* recognize that for a summary conviction, a court can award fees to either successful party (the prosecution/ informant or the defendant).[359]

2.4.6.1 Cost awards for the defendant

In addition to specific sections of the *Criminal Code* and the *Offence Act*, superior courts retain inherent jurisdiction to grant a cost award where there was serious misconduct on the part of the prosecution.[360] Further, costs can also be awarded to the defendant if a judge finds that their *Charter* rights have been breached.[361]

For the defendant, the default presumption is that cost awards will not be granted unless there is 'oppressive or improper conduct' by the Crown [prosecution] or where the case is 'remarkable' [a test case]"[362] Such misconduct may be present where a prosecutor has failed to adequately disclose information to the defence, or where the prosecutor pursues "completely meritless" or "hopeless" legal applications and takes an unjustifiably hard line with a defendant.[363]

In practice, the likelihood of costs being awarded against a private prosecutor are low, and even where costs are awarded, the amounts are often nominal.[364] This means that a private prosecutor faces a lower risk of being required to pay an opposing party's legal costs if they are unsuccessful.

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[358] *R v Neustaedter*, 2003 BCSC 39 at para 6 [*R v Neustaedter*]; *R v Melrose*, 2014 BCCA 148 at para 21.
[359] *Offence Act, supra* note 7, ss 79 –81; *Criminal Code*, *supra* note 1, ss 601(5),809(1), 826-827, 834(1)(b), 839(3); *R v Neustaedter*, *supra* note 358 ("section 112 of the *Offence Act*… should be constructed in the same manner as the *Criminal Code* provision on account of their "long parallel history" (*R v Port McNeill (Town)*, 1998, 123 CCC (3d) 392)" at para 4).
[360] *R v Bhatti,* 2006 BCCA 16 at para 11; *USA v Cuppen*, 2023 BCSC 1094 ("what is required is a marked and unacceptable departure from the reasonable standards expected of the prosecution, one that goes beyond 'mere negligence'" at para 27) [*USA v Cuppen*].
[361] *Ontario v 974649 Ontario Inc*, 2001 SCC 81.
[362] *R v Melrose*, 2014 BCCA 148 at para 17; *USA v Cuppen*, *supra* note 360 ("While recovery of an accused's actual legal costs can certainly form part of the remedy in appropriate criminal cases, the focus is not on the accused's out-of-pocket expenses, but on the effect of the Crown's conduct on the integrity of the trial process" at para 40).
[363] *R v Fercan Developments Ltd,* 2016 ONCA 269 at paras 96-113; See *R v Jogendra*, 2012 ONSC 3303 for a case where costs were levied against a private prosecutor.
[364] Swaigen et al, "The Continuing Importance of Private Prosecutions in Protecting the Environment," *supra* note 9 at 244, 249; Elson, "Private Prosecutions of Employment Standards Violations," *supra* note 19 at 350; *Criminal Code*, *supra* note 1, s 840; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 105-106.

2.4.6.2 Cost awards for the prosecution: Investigation

In addition to the general discretion of courts to issue costs, under the *Offence Act*, the prosecution can also be awarded costs of investigation.[365] These awards can only be pursued for prosecutions pursued under the *Environmental Management Act*, the *Pesticide Control Act*, the *Water Sustainability Act*, and the *Wildlife Act*.[366] While courts have held that this does not include lawyer's fees or disbursements relating to those services, courts have been reluctant to issue costs under this section given the lack of clarity on what constitutes "investigative costs." [367]

2.4.6.3 Appeal

There are strict rules regarding when a case can or cannot be appealed, and by whom. Again, you will need legal advice if this is being considered. There are helpful resources on the provincial court website,[368] and other publicly available guides include information on appeals.[369] Only a decision of a court can be potentially appealed, asking a court to review a decision of Crown to enter a stay is a different matter, discussed in Section 3, below.

2.4.6.4 Indictable Offences

Private prosecutors have no right to appeal decisions in indictable offences.[370] As such, the only avenue for appeal is at the discretion of the Attorney General.[371]

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[365] *Offence Act, supra* note 7, s 81.
[366] *R v Morshedian*, 2016 BCPC 80 at para 69 [*R v Morshedian*].
[367] *R v Morshedian*, *supra* note 366; *R v Canadian Forest Products Ltd,* [1997] BCJ No 1397, 24 CELR (NS) 6.
[368] Provincial Court of BC, "Appeals" (last visited 17 August 2022), online: <https://www.provincialcourt.bc.ca/complaints-and-appeals/appeals> [https://perma.cc/F92B-LVGT].
[369] See e.g. Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 117-121; EBI, "Citizens Guide to Environmental Investigation and Private Prosecution*," supra* note 187 at s 9.0.
[370] *Criminal Code*, *supra* note 1, ss 675-676; Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, *supra* note 27 at 102, 119.
[371] *Ibid*.

3. REVIEWABILITY

This section looks at whether a Crown decision to stay your case can be reviewed and overturned or altered by a court. Although it is possible to seek judicial review of an intervention and stay, such attempts have been "spectacularly unsuccessful."[372] Courts have taken a strict approach to such reviews due to reluctance to interfere with the Crown's prosecutorial discretion.

The BC *Crown Counsel Policy Manual* (the "Manual") guides the decisions of prosecutors in the province. The Manual states that "Crown Counsel may direct a stay of proceedings at any time after a private [I]nformation has been sworn." The Manual also guides prosecutors on how to make a decision to stay a proceeding or not. Per the Manual, a prosecution should proceed if there is a "substantial likelihood of conviction" or the "prosecution is required in the public interest." It has been ruled that policies, such as the *Manual*, do not have the force of law.

Although the Manual does not hold the force of law, the BC *Crown Counsel Act (CCA),* which statutorily guides the actions of prosecutors in the province, does hold the force of law. Per the *CCA*, the Attorney General has the responsibility "to approve and conduct, on behalf of the Crown, all prosecutions of offences in British Columbia" (*CCA* s. 2(a)). Implicit in the responsibility to "approve and conduct" is the power to not approve, or not conduct. The *CCA* also lays out the responsibilities of Crown counsel in relation to private prosecutions. It says in this regard:

> 4. Responsibilities of Crown counsel
>
> 4(1) The ADAG may designate as "Crown counsel" any individual or class of individual who is lawfully entitled to practise law in British Columbia.
>
> 4(2) Each Crown counsel is authorized to represent the Crown before all courts in relation to the prosecution of offences.
>
> 4(3) Subject to the directions of the ADAG or another Crown counsel designated by the ADAG, *each Crown counsel is authorized to*
>
> (a) examine all relevant information and documents and, following the examination, to approve for prosecution any offence or offences that he or she considers appropriate,
>
> (b) conduct the prosecutions approved, and
>
> (c*) supervise prosecutions of offences that are being initiated or conducted by individuals who are not Crown counsel and, if the interests of justice require, to intervene and to conduct those prosecutions.*
>
> 4(4) The Attorney General may establish an appeal process under which law enforcement officials may appeal the determination of any Crown counsel or special prosecutor not to approve a prosecution [emphasis added].

[372] Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution," *supra* note 20 at 2.

The *CCA* makes clear at s. 4(3)(c) that Crown counsel holds the authority to intervene in private prosecutions when the interests of justice so require. This is a very broad discretionary power.

The courts have also ruled on the prosecutor's discretion to stay proceedings. The Supreme Court of Canada has held that the ability of the Attorney General's office to intervene and stay a private prosecution is part of the Crown's prosecutorial discretion. As summarized by Vancise J.A. in *Osiowy v. Linn*:[373]

> *It is settled that an individual has the right to initiate a private prosecution. It is also settled that the Attorney General has the right to intervene and take control of a private prosecution. Included in the right to intervene and take control is the power to direct a stay pursuant to s. 508. It follows, then, that a private informant has the right to initiate proceedings, but that right does not give him the liberty to continue the proceedings should the Attorney General decide to intervene and invoke s. 508(1) and direct the entry of a stay of proceedings. Once the Attorney General or counsel on his behalf intervenes and assumes control of the prosecution, that counsel's rights are paramount to the private person's or his counsel's rights. The discretion of the Attorney General to enter a stay is not reviewable in the absence of some flagrant impropriety on the part of the Crown officers. No such impropriety has been suggested here. [emphasis added]*

The Supreme Court further clarified a stay of proceedings as being at the core of prosecutorial discretion in *Krieger v Law Society of Alberta*:

> *Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police: (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether:* R. v. Osborne *(1975), 25 C.C.C. (2d) 405(N.B.C.A.); and (e) the*

[373] *Osiowy v Linn*, 1989 CanLII 4780 (SK CA) at para 6 [*Osiowy v Linn*].

discretion to take control of a private prosecution: R. v. Osiowy *(1989), 50 C.C.C. (3d) 189 (Sask. C.A.).* [374]

Given the Supreme Court's rulings in *Osiowy v Linn* and *Krieger v Law Society of Alberta,* it is clear that directing a stay of proceedings, or withdrawing charges, is within the common law's understanding of the core of prosecutorial discretion.

While it could be argued that the statements above only apply to the *Criminal Code* provisions relating to private prosecutions, and that therefore the law should or could be different regarding the application of the *CCA*, the language in *Krieger v Law Society of Alberta* implies that the power is part of the Crown's common law prosecutorial discretion and has simply been codified in the *Criminal Code*.

Despite that, and the *Manual* not holding the force of law, the *CCA* is legislation that courts must uphold. Furthermore, courts must follow their own case law, which clearly states that a private prosecutor only has the right to initiate proceedings but not to continue them should the Attorney General decide to intervene.[375] Given the clear wording of the *CCA, Krieger v Law Society of Alberta,* and *Osiowy v Linn,* it is well within the prosecutor's discretion to direct a stay of proceedings.

There are a number of bases on which a disappointed Informant may challenge a Crown decision, two of which are listed below. There could certainly be others. None of these are likely to be successful in normal circumstances.

One could argue that:

1) The Crown used the wrong legal test when deciding to intervene in the proceedings, the correct legal test would not lead to a stay in proceedings; and
2) The Crown abused their prosecutorial discretion – due to exercising the wrong legal test, political interference, or bias against a type of offense.[376]

For a more in-depth analysis of the legal issues see "Challenging the Intervention and Stay of an Environmental Private Prosecution" by lawyer Keith Ferguson.[377]

To note, there is a potential for adverse cost awards when attempting to review the Crown's decision to intervene and stay the proceedings.[378]

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[374] *Krieger v Law Society of Alberta*, *supra* note 86 at paras 46-47 [emphasis added].
[375] This continues to be upheld as the law in BC, despite the argument against it, see *R v [Omitted for Publication]*, 2020 BCPC 131; *Holland (Re)*, 2020 BCSC 77.
[376] For an excellent summary of the procedure, see *Holzbauer v British Columbia (Attorney General)*, 2021 BCCA 458 at paras 18-20.
[377] Ferguson, "Challenging the Intervention and Stay of an Environmental Private Prosecution," *supra* note 20.
[378] *Currie v Ontario (Attorney General)*, 2016 ONSC 3884 (CanLII), appeal dismissed 2017 ONCA 266 (CanLII).

4. CASE STUDIES

The following case studies summarize the background facts, offences alleged, outcome, and key takeaways from select environmental private prosecutions in BC. The case studies are ordered chronologically. Primary sources including filed documents, case briefs, and correspondence with Crown counsel can be found in the Appendix.

CASE STUDY #1 - *MORTON V HERITAGE SALMON LTD* (2005)	
Background	In the early 2000s, the collapse of pink salmon populations was a growing issue. Through her scientific research, marine biologist Ms. Alexandra Morton had collected evidence that sea lice outbreaks originating in fish farms were a significant cause of the population decline in pink salmon.[379] Sea lice are a form of ectoparasitic crustacean that commonly occur on farmed salmon due to their dense grouping. When migrating juvenile salmon come in close contact with fish farming pens, sea lice can spread onto the wild salmon and weaken or kill young fish. On June 7, 2005, Ms. Morton swore an Information alleging that Heritage Salmon Limited ("Heritage Salmon"), a fish farming company operating in the Broughton Archipelago, had breached the *Fisheries Act* and *Fishery (General) Regulations* by releasing sea lice into fish habitat. Ms. Morton also charged the Province of BC and the Government of Canada with aiding and abetting the offence.[380]
Offence(s) Alleged	Unlawfully releasing fish into fish habitat, contrary to section 55(1) of the *Fisheries (General) Regulations,* which is an offence under section 78(b) of the *Fisheries Act*.[381]

[379] Jeffrey Jones, "Private Prosecutions in Canada: A Citizen Enforcement Alternative" (Materials prepared for the Renewing Environmental Law Conference, Vancouver, 4 February 2011) [unpublished], online (pdf): <https://www.scribd.com/document/446992434/private-prosecutions-in-Canada-Guide-pdf> [https://perma.cc/6JWN-PSYY] [Jones, "Private Prosecutions in Canada"].
[380] Jones, "Private Prosecutions in Canada," *supra* note 379.
[381] See Appendix A for a copy of the Information sworn by Ms. Morton.

Outcome	The Attorney General of BC intervened in the private prosecution and appointed Mr. William Smart, QC, as a special prosecutor to oversee the Crown's intervention.[382] A special prosecutor is a lawyer who does not typically work on behalf of the government but is granted prosecutorial powers in circumstances where the involvement of government prosecutors could give rise to an appearance of impropriety or lack of fairness.[383] The decision to appoint a special prosecutor was likely made in this case because both the federal and provincial governments were named as defendants. Mr. Smart conducted a twelve-month investigation, which included visiting Heritage Salmon fish farms in the Broughton Archipelago.[384] He also retained a Canadian biologist to assist him with scientific determinations.[385] In August 2006, Mr. Smart released his decision, which addressed the two key criteria for government intervention and the decision to issue a stay: (1) was it in the public interest to proceed with the prosecution; and (2) was there a reasonable likelihood of conviction. Mr. Smart concluded that prosecution was in the public interest, stating: "There is validity to Ms. Morton's assertions that sea lice from fish farms are having a deleterious effect on the pink salmon population in the Broughton Archipelago."[386] However, Mr. Smart concluded that there was not a reasonable likelihood of conviction because sea lice originating from farmed salmon did not meet the definition of "releasing" fish into fish habitat, and there was no "wilful act" of the fish farming company.[387] Relying on Mr. Smart's report, the provincial Crown issued a stay of the private prosecution.
Takeaways	The *Morton v Heritage Salmon Ltd.* private prosecution illustrates that private prosecutions can be used to shed light on environmental issues that are otherwise neglected by private and government actors. Ms. Morton's private prosecution resulted in increased attention to the impact of sea lice on wild fish populations. After all, Mr. Smart's

[382] Jones, "Private Prosecutions in Canada," *supra* note 379.
[383] BC, "About Special Prosecutors," online: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/about/special-prosecutors> [https://perma.cc/X7SN-5EUY].
[384] Jones, "Private Prosecutions in Canada," *supra* note 379 at 19-20.
[385] *Ibid.*
[386] Jones, "Private Prosecutions in Canada," *supra* note 379 at 34.
[387] Jones, "Private Prosecutions in Canada," *supra* note 379 at 20.

	investigation concluded that fish farming had caused deleterious impacts to the pink salmon population in the Broughton Archipelago, and there was a valid public interest in prosecution. In the years following the private prosecution, the federal government introduced stronger enforcement and investigation tools to address sea lice, and new fish farming licence conditions aimed at minimizing the spread of sea lice transfer between wild and farmed fish. The *Morton v. Heritage Salmon Ltd.* private prosecution also demonstrates that determining whether an offence has been committed can be exceedingly complicated. Mr. Smart's report is a rare example of the legal analysis required to determine whether provincial charging standards have been met. An excerpt of the executive summary is included in Appendix C. In most other cases, public prosecution services only disclose their final decision to issue a stay, without elaborating on how they applied provincial charging standards to the facts of the case. Finally, this case also stands for the proposition that a private prosecution can create positive impact even where the charges are novel, and it is not abundantly clear that an offence has been committed. The allegation that releasing sea lice from fish farming operations was an offence under the *Fisheries Act* was untested, but Ms. Morton's decision to bring a private prosecution was the result of considerable research and legal analysis, which made it necessary for the federal and provincial Attorneys General to take the allegations seriously.[388] This also reflects the value of diligent preparation. The private prosecutor does not need to be certain that an offence has been committed, but they should have, at a minimum, credible information that leads to a reasonable belief that an offence has been committed. Another private prosecution brought by Ms. Morton is described in Case Study #3, and which also includes a quote from Ms. Morton on the long-term impact of both prosecutions.

[388] Jones, "Private Prosecutions in Canada," *supra* note 379.

CASE STUDY #2 - GEORGIA STRAIT ALLIANCE (2006)	
Background	Georgia Strait Alliance ("GSA") is an environmental organization whose mission, grounded in environmental justice, is to mobilize and support collective action for the protection of the Salish Sea. In the early 1990s, GSA launched a campaign focussed on inadequate sewage treatment, which, in GSA's opinion, was a serious contributor to pollution in the Georgia Strait that was being overlooked by government decision makers. At the time of GSA's campaign, there were functionally two tiers of sewage treatment available on the coast: primary treatment, and secondary treatment. Primary treatment is a mostly mechanical process that removes approximately 30% of biochemical oxygen demanding substances and 50% of total suspended solids.[389] Secondary treatment uses a biological process to remove the chemicals from synthetic detergents that are the main cause of toxicity to fish and can reduce other pollutants by up to 90%.[390] At the time of GSA's campaign launch, most municipalities in Vancouver had only implemented primary treatment systems.[391] Through the use of freedom of information requests and other research, GSA was able to determine that the GVRD's use of primary treatment failed to prevent the release of a number of harmful pollutants into the Georgia Strait and other critical fish-bearing waters. GSA's sewage campaign included education and community outreach and advocacy components, along with private prosecutions. GSA communicated with officials in all levels of government and hosted conferences and gatherings about the scientific nature of the issue and policy solutions.[392] In 1993, at the outset of the campaign, GSA worked with Sierra Legal Defence (now Ecojustice) to initiate a private

[389] Appendix B - Lions Gate-Synopsis at 1.
[390] *Ibid.*
[391] To note, the Langley Wastewater Treatment Plant was upgraded in 1978 to a secondary treatment system, see MetroVancouver, "Northwest Langley Wastewater Treatment Plant Expansion," online: <https://metrovancouver.org/services/liquid-waste/northwest-langley-wastewater-treatment-plant-expansion> [https://perma.cc/5CPC-UFFV].
[392] Georgia Strait Alliance "GSA Annual Report" (April 2010), at 2, online (pdf): <https://georgiastrait.org/wp-content/uploads/2015/02/Annual_Report2010_WEB.pdf> [GSA Annual Report 2010].

	prosecution against the Greater Vancouver Regional District ("GVRD") under the *Fisheries Act*, and also supported a similar private prosecution brought by T. Buck Suzuki in 1995.[393] Both the 1993 and 1995 private prosecutions were stayed by the provincial Attorney General.[394] In 2006, GSA, United Fishermen and Allied Workers Union – Canadian Auto Workers Union, and the T Buck Suzuki Environmental Foundation resumed its use of private prosecutions by bringing two private prosecutions against the Province of British Columbia and the GVRD, targeting the Lions Gate and Iona sewage treatment plants. The organizations were represented by the Sierra Legal Defence Fund and Ecojustice. These private prosecutions are the focus of this case study. The Lions Gate and Iona water treatment plants operated under provincial permits which allowed the facilities to discharge sewage effluent into receiving waters in the Georgia Strait and Burrard Inlet.[395] Under the provincial permits, the Lions Gate and Iona facilities were required to measure the toxicity of effluents discharged into fish-bearing waters.[396] On numerous occasions between 2000 and 2006, the Iona and Lions Gate facilities discharged sewage effluent that was acutely toxic to fish.[397] These discharges were documented by the Lions Gate and Iona facilities as part of their monitoring requirements. Environment Canada was aware of the toxic discharges and had informed the GVRD, several times, that its discharges were in breach of section 36(3) of the *Fisheries Act*, which prohibits depositing deleterious substances into waters frequented by fish.[398] In response to these warnings, the Province of British Columbia updated the GVRD's Liquid Waste Management Plan (under which operation and discharge permits were issued) to require that the GVRD implement secondary treatment at the Lions Gate treatment facility by 2020, and at the Iona facility by 2030.[399] In GSA's opinion, the long timeframe for updating sewage treatment was unacceptable because it would continue to result in toxic discharges into the marine environment.

[393] GSA Annual Report 2010, *supra* note 392.
[394] *Ibid.*
[395] See Appendix B - Lions Gate – Synopsis at 2.
[396] See Appendix B - Iona – Synopsis of Evidence at 2.
[397] See Appendix B - Lions Gate – Synopsis at 3. See Appendix B - Iona – Synopsis of Evidence at 4.
[398] See Appendix B - Lions Gate – Synopsis at 4.
[399] See Appendix B - Lions Gate – Synopsis at 6. See Appendix B - Iona – Synopsis of Evidence at 7.

	It was in this context that GSA decided to initiate the Iona and Lions Gate private prosecutions. It was clear that despite warnings from Environment Canada, the federal government was not going to take enforcement action to require the GVRD to comply with the *Fisheries Act*. On August 2, 2006, Douglas Chapman swore an information alleging that the GVRD and Province of British Columbia had committed offences under the *Fisheries Act* through the permitting and operation of the Lions Gate Wastewater Treatment Plant. Douglas Chapman was an environmental investigator and former federal prosecutor who worked with GSA and the other clients, and Ecojustice.[400] On December 14, 2006, Douglas Chapman swore an information that alleged the GVRD and Province of British Columbia, through the permitting and operation of the Iona Island Wastewater Treatment Plant, had unlawfully deposited or permitted the deposit of a deleterious substance into waters frequented by fish.[401]
Offence(s) Alleged	Depositing a deleterious substance into waters frequented by fish, contrary to section 36(3) of the *Fisheries Act*, which is an offence under section 40(2) of the *Fisheries Act*.
Outcome	Following the laying of charges, GSA was active in publishing media releases which detailed the private prosecutions and pollution they were directed at addressing.[402] The private prosecutions garnered significant media attention, no doubt due to GSA's frequent and detailed press releases and media interviews. Process hearings for both private prosecutions were held in October 2006 (Lions Gate) and March 2007 (Iona). The Provincial Court found that in both cases, there was sufficient evidence for the cases to proceed.[403] Following the process hearing, several appearances were scheduled in Provincial Court and attended by counsel. At each of these appearances, counsel for the Attorney General of Canada requested an

[400] See Appendix B - Lions Gate Private Prosecution Information.
[401] See Appendix B - Iona Private Prosecution Information.
[402] Georgia Strait Alliance, "Charge laid against BC and Greater Vancouver" (2 August 2006), online: <https://georgiastrait.org/press/charge-laid-against-bc-and-greater-vancouver/> [https://perma.cc/E4QY-UF3M].
[403] Georgia Strait Alliance, "Judge Approves GVRD Sewage Fight" (23 October 2006), online: <https://georgiastrait.org/press/judge-approves-gvrd-sewage-fight/> [https://perma.cc/YEH4-BMU5]; Georgia Strait Alliance, "Sewage prosecutions gaining momentum," (22 March 2007), online: <https://georgiastrait.org/press/sewage-prosecutions-gaining-momentum/> [https://perma.cc/JJ7T-L876].

	adjournment on the basis that the charge assessment process was not complete. In July 2007, a trial date was set for the Lions Gate private prosecution charges.[404] In October 2007, the Attorney General of Canada intervened in the Lions Gate private prosecution and directed a stay.[405] Two days before appearing in court to request the Lions Gate prosecution be stayed, the Attorney General of Canada sent a letter to Ecojustice. In the letter, the author stated that they had reviewed the documents filed with the Information and had considered the two issues relevant to the Attorney General's decision to stay a private prosecution: (1) whether the evidence demonstrates that there is a reasonable prospect of conviction; and (2) whether the public interest requires prosecution to be pursued.[406] The writer concluded that neither criterion was met. No specific reasons were given for this conclusion. In November 2008, the Attorney General of Canada intervened in the Iona private prosecution and directed a stay.[407] Similarly, no specific reasons were given. Following the Attorney General's decision to stay the private prosecutions, GSA continued its strategy of media outreach and participated in outreach and public consultations regarding changes to federal and provincial sewage treatment law and policy. In 2009, Metro Vancouver approved a new Liquid Resource Management Plan, which resulted in requests being made to the higher levels of government for shared funding. The federal and provincial governments eventually agreed to pledge additional funding to update the Iona and Lions Gate wastewater treatment facilities, including plans to develop tertiary treatment capabilities.[408] The GVRD's Waste

[404] Georgia Strait Alliance, "Greater Vancouver, BC, face trial over Lions Gate sewage pollution," (17 July 2007), online: <https://georgiastrait.org/press/greater-vancouver-bc-face-trial-over-lions-gate-sewage-pollution/> [https://perma.cc/WDN4-X7W8].
[405] Georgia Strait Alliance, "Feds denounced for staying pollution charge," (11 November 2007), online: <https://georgiastrait.org/press/feds-denounced-for-staying-pollution-charge/> [https://perma.cc/8CD8-GYDH].
[406] See Appendix B - Public Prosecution Service Letter to Eco Justice.
[407] Georgia Strait Alliance, "Harper Breaks First Election Promise," (18 November 2008), online: <https://georgiastrait.org/press/harper-breaks-first-election-promise/> [https://perma.cc/X3EY-3RLW].
[408] Braela Kwan, "Metro Vancouver's Biggest Sewage Plant Is Getting An Upgrade. Many Are Watching," *The Tyee* (20 August 2020), online: <https://thetyee.ca/News/2020/08/20/Metro-Vancouver-Sewage-Plant-Upgrade/> [https://perma.cc/7LH8-QX3K].

	Management Committee also approved an expedited schedule for upgrading treatment plants and an updated sewage plan which includes resource recovery at several water treatment plants.[409]
Takeaways	GSA's use of private prosecutions demonstrates their effectiveness as a tool to increase the profile of environmental issues and encourage government action. It was understood from the outset that a conviction under the *Fisheries Act* was unlikely – not because the discharges were strictly legal, but because of the culture in BC that private prosecutions are generally stayed. Through the use of private prosecutions in conjunction with media outreach, public education, and advocacy (which included government relations), GSA was able to greatly increase awareness of the sewage pollution issue, which resulted in increased pressure on the government to modify timelines and devote additional funding to upgrade water treatment facilities.
Comments by the private prosecutor	"Private prosecutions are inherently democratic as they provide the opportunity for anyone who has evidence of an alleged legal violation to bring it before the courts. This is particularly powerful, as in our cases, when the charges should have been brought by the government itself. Though we recognized that in BC it was more than likely that our case would be stayed, the light that the case shone on how the government was not enforcing its own laws and was allowing the environment to be damaged and degraded, was powerful unto itself. The media attention these cases received was intense, and embarrassing, placing pressure on governments to act. Though we lost all our cases, the result was big steps forward in bringing advanced wastewater treatment to the region (in Greater Vancouver but even more notably to the Capital Regional District of Victoria)." - Christianne Wilhelmson, Executive Director of Georgia Strait Alliance

[409] GSA Annual Report 2010, *supra* note 393 at 2, 4.

CASE STUDY #3 - *MORTON V. MARINE HARVEST CANADA INC.* (2009)

Background	On June 16, 2009, several individuals reported seeing small pink salmon mixed in with larger salmon in a truck at the Port McNeill government dock. The truck was receiving brood stock salmon from a vessel operated by Marine Harvest Canada, Inc. ("Marine Harvest").[410] The truck operator and crew of the vessel were all employees or contractors of Marine Harvest.[411] The individuals took photographs of dead salmon on the dock and later confronted Marine Harvest with their evidence.[412] The company posted a letter publicly admitting to the incident.[413] Pink salmon are not the subject of fish farming authorizations, and possessing wild fish without a licence is an offence under the *Fisheries Act*.[414] With the assistance of a lawyer, marine biologist Ms. Alexandra Morton wrote two letters to the Department of Fisheries and Oceans setting out what had been observed.[415] After receiving no response, on September 15, 2009, Ms. Morton initiated a private prosecution that alleged Marine Harvest Canada had possessed pink salmon without authorization, contrary to the *Fisheries Act* and *Fishery (General) Regulations*.[416]
Offence(s) Alleged	Unlawfully possessing fish, contrary to section 33 of the *Fishery (General) Regulations,* which is an offence under section 78(b) of the *Fisheries Act*.
Outcome	A process hearing was held on November 26, 2009. One witness was called along with the evidence of Ms. Morton. Following cross examination by a Crown lawyer, the Provincial Court Judge ruled there was sufficient evidence to allow the charge to proceed. On January 5, 2010, the BC Provincial Court issued a summons to compel the appearance of Marine Harvest.[417]

[410] Jones, "Private Prosecutions in Canada," *supra* note 379 at 20.
[411] *Ibid.*
[412] *Ibid.*
[413] *Ibid.*
[414] *Ibid.*
[415] *Ibid*.
[416] *Ibid.* See also Appendix A – Alexandra Morton's Information.
[417] Jones, "Private Prosecutions in Canada," *supra* note 379 at 20.

	After the summons was issued, Ms. Morton and the defendants attended several court appearances while the Attorney General of Canada conducted its investigation.[418] After completing its investigation, the federal Crown stayed Ms. Morton's private prosecution. On April 16, 2010, the federal Crown brought its own charges against Marine Harvest, which included the original offences alleged by Ms. Morton.[419] On January 18, 2012, Marine Harvest pled guilty to one of the charges, and was sentenced to pay a $5,000 fine.[420]
Takeaways	This case is an example of how private prosecutions can be used effectively to address relatively "minor" environmental offences. Whereas several of the other private prosecution case studies in this *Guide* concern systemic issues or environmental catastrophes, the allegations in this case related to a single incident involving several dozen fish. Despite being more minor in nature, similar offences may face a higher risk of going unaddressed due to a lack of enforcement resources or regulatory capture, which can contribute to a culture of non-compliance amongst industry actors. A private prosecutor can counteract this trend by bringing private prosecutions against similar offences, which may also be easier to prosecute, especially for a private prosecutor with limited investigative abilities. Armed with strong evidence and a clear understanding of the applicable law, Ms. Morton was able to secure a conviction despite the government's initial unwillingness to even investigate.
Comments by the private prosecutor	"I think the private prosecutions I did with the late Jeffery Jones were important. I was very surprised to learn that a legal mechanism is built into the *Fisheries Act* for citizens to use the legal system to protect wild fish. The *Act* even offers to share the fines collected by successful prosecutions as incentive. It is as if those who wrote the *Act* knew DFO needed watchdogs. Protecting our natural world is so difficult, it is almost impossible. Clearly this has to change. The process must accelerate. In the meantime, the task requires that we use all tools to build a reality that is visible to lawmakers and the public. It was not enough for me to say salmon farms are killing wild salmon. I had to engage heavily in publishing science,

[418] Jones, "Private Prosecutions in Canada," *supra* note 379 at 20.
[419] Jones, "Private Prosecutions in Canada," *supra* note 379 at 20, 53.
[420] *R v Marine Harvest Canada Inc*, BCPC (sentencing transcript, January 18, 2012) online (pdf): <https://deptwildsalmon.files.wordpress.com/2012/03/transcript-sentencing-jan-2012.pdf> [https://perma.cc/ADS5-BTA6].

	communication, activism and hugely important is that I can say I took the salmon farmers to court 5 times and never lost. While none of the prosecutions on their own led to measurable relief for wild salmon, they were an essential measure of validity that what I was telling the government was rational and significant. One of the most dangerous tools used against those of us trying to protect life is slander. From the start, 30 years ago, the industry accused me of lying and fabricating evidence. I failed to grasp how effective this would be and largely ignored it. Taking a solid private prosecution to a judge is perhaps the most effective antidote to being silenced by slander."[421] – Alexandra Morton

CASE STUDY #4 - LEMON CREEK (2013)

Background	On July 27, 2013, a jet fuel truck operated by Executive Flight Centre Fuel Services ("Executive") drove off the road in Slocan Valley, crashing into Lemon Creek and dumping 33,000 litres of jet fuel into the river.[422] The jet fuel truck was on its way to a staging area where the Ministry of Forests was coordinating a firefighting effort.[423] Following the crash, 2,500 residents in Slocan Valley were ordered to temporarily leave their homes, and a "do not drink" water advisory was issued.[424] The BC Conservation Officer Service investigated the spill, but in early 2014 the investigation was closed, and no charges were brought. On September 29, 2014, a private citizen and resident of Slocan Valley named Marilyn Burgoon swore an Information charging both Executive and the Province with offences under the *Fisheries Act.*
Offence(s) Alleged	Depositing a deleterious substance into waters frequented by fish, contrary to section 36(3) of the *Fisheries Act*, which is an offence under section 78(b) of the *Fisheries Act*.
Outcome	Ms. Burgoon appeared for a process hearing on November 27, 2014. Federal Crown counsel also appeared at the process hearing and cross-examined

[421] Email from Alexandra Morton to Patrick Canning (21 April 2023).
[422] CBC News, "Jet fuel spill evacuation order lifted in B.C.," *CBC News* (27 July 2013), online: <https://www.cbc.ca/news/canada/british-columbia/jet-fuel-spill-evacuation-order-lifted-in-b-c-1.1306998> [https://perma.cc/87MC-WJTK].
[423] *Ibid.*
[424] *Ibid.*

	Ms. Burgoon.[425] Provincial Court Justice McKimm found that there was sufficient evidence to issue a summons for both Executive and the Province.[426] On December 23, 2014, the Provincial Court issued a summons for the defendants to attend court on February 3, 2015.[427] Between February and May 2015, Ms. Burgoon, the Province, and Executive attended several appearances in the Provincial Court.[428] During the first and second appearances, federal Crown counsel advised the Court that the Attorney General of Canada had not completed its investigation and charge assessment.[429] The matter was adjourned to May 19, 2015.[430] At the May 19 appearance, federal Crown counsel again advised the Court that the investigation was not complete.[431] The presiding judge decided that further delays would not be acceptable and adjourned the matter to allow for a trial date to be set.[432] On June 16, 2015, a two-week trial was scheduled to begin April 18, 2016.[433] On January 25, 2016, the federal Crown intervened and stayed the private prosecution, stating that the BC Conservation Officer Service and Environment Canada were still investigating the spill, and the Crown needed additional time to decide whether to proceed with a prosecution.[434] The Crown counsel clarified that the Attorney General of Canada still had the option to resume the charges laid by Ms. Burgoon within one year, or it could issue a new Information and proceed by summary trial within five years.[435] On July 22, 2016, the Attorney General of Canada approved an eight-count Information charging Executive, the driver of the vehicle, the BC Ministry of Transportation, Highways and Infrastructure ("MOTI") and the BC Ministry of Forests, Lands and Natural Resource Operations ("MOF") with offences

[425] *R v Executive Flight Centre Fuel Services Ltd.,* 2019 BCCA 139 at para 5 [*R v Executive Flight Centre Fuel Services Ltd* BCCA].
[426] *Burgoon v Executive Flight Centre Fuel Services Ltd*, BCPC (reasons of Judge D.M. McKimm, December 12, 2014) online (pdf):<https://s3.documentcloud.org/documents/1384674/reasons-for-judgment-dec-12-2014.pdf>.
[427] *R v Executive Flight Centre Fuel Services Ltd* BCCA, *supra* note 425, at para 6.
[428] *Ibid* at para 7.
[429] *Ibid* at para 8.
[430] *Ibid.*
[431] *Ibid* at para 9.
[432] *Ibid*.
[433] *Ibid.*
[434] *R v Executive Flight Centre Fuel Services Ltd* BCCA, *supra* note 425, at para 11; see also CBC News, "New federal charges for 2013 Lemon Cree, B.C. fuel spill" CBC News (28 July 2016), online: <https://www.cbc.ca/news/canada/british-columbia/federal-charges-lemon-creek-1.3699257> [https://perma.cc/89W8-P72H].
[435] *R v Executive Flight Centre Fuel Services Ltd* BCCA, *supra* note 425 at para 11.

	under section 36(3) of the *Fisheries Act* and sections 6(2), 6(3) and 6(4) of the *Environmental Management Act*.[436] The trial was held between September 2017 and February 2018.[437] At the outset of the trial, Executive successfully obtained an order staying the charges against it on the grounds that its section 11(b) *Charter* right to a trial within a reasonable time had been breached.[438] Justice Mrozinski of the BC Provincial Court found the driver guilty of depositing a deleterious substance into both Lemon Creek and Slocan river, in breach of the *Environmental Management Act* and *Fisheries Act*.[439] The MOF and MOTI were found not guilty because there was insufficient evidence to prove that MOF or MOTI caused, permitted, or allowed the spill to occur.[440] In February 2019, the BC Provincial Court sentenced the driver of the truck and ordered him to pay a fine of $20,000, with $10,000 of the fine to be paid into the Habitat Conservation Trust Fund.[441]
Takeaways	The Lemon Creek private prosecution confirms that the best-case scenario for a private prosecutor is for the Attorney General to take over and continue the prosecution. This case also confirms the importance of private prosecutions as check on public prosecutors' exercises of discretion. The BC Conservation Officer Service had initially investigated the spill, but decided charges were not warranted. This was ultimately an incorrect decision that was only remedied by Ms. Burgoon's private prosecution. The mere fact that a potential offence has been investigated and dismissed by a public body does not mean that an offence has not been committed. Private prosecutions serve as a check on government discretion, especially where the government is aware of a potential offence but has decided not to act.

[436] *R v Executive Flight Centre Fuel Services Ltd* BCCA, *supra* note 425 at para 14.
[437] *R v Lasante et al,* 2018 BCPC 45 [*R v Lasante*]
[438] *R v Executive Flight Centre Fuel Services Ltd* BCCA, *supra* note 425 at paras 17-19.
[439] *R v Lasante,* 2018 BCPC 45, *supra* note 437.
[440] *Ibid.*
[441] *R v Lasante,* 2019 BCPC 96.

CASE STUDY #5 - MOUNT POLLEY (2016)

Background	The Mount Polley mine is a copper and gold mine located in south-central BC. It is operated by the Mount Polley Mining Corporation ("MPMC"), a company owned by Imperial Metals. In August 2014, a tailings dam at the Mount Polley mine failed, releasing more than 17 million cubic metres of wastewater and 8 million cubic metres of mine tailings into Polley Lake, Hazeltine Creek, and Quesnel Lake.[442] Tailings are the materials left over after separating valuable minerals from ore, and can contain heavy metals, sulfides, and other pollutants. The discharge of wastewater and tailings flattened trees in the flow path from the dam, and the tailing materials settled at the bottom of Quesnel Lake. Immediately following the dam failure, investigations began by Fisheries and Oceans Canada, Environment Canada, the BC Conservation Officer Service, and the BC Ministry of Energy and Mines. Under the applicable provincial laws, regulators had three years to decide whether to bring charges. For federal charges proceeding by summary conviction under the *Fisheries Act*, a five-year limitation period applied. In December of 2015, more than one year after the dam failure, the Ministry of Energy and Mines concluded its investigation. The Chief Inspector of Mines released his report, stating that he would not be recommending charges under provincial mining laws because "[a]lthough there were poor practices, there were no non-compliances we could find."[443] In late 2016, more than two years after the dam failure, federal and provincial investigations were still ongoing, and no charges had been brought.

[442] British Columbia, "Mount Polley Mine Tailings Dam Breach," online: <https://www2.gov.bc.ca/gov/content/environment/air-land-water/spills-environmental-emergencies/spill-incidents/past-spill-incidents/mt-polley>.

[443] Gordon Hoekstra, "No charges under B.C.'s mining laws for failure of Mount Polley mine dam," *Vancouver Sun* (17 December 2015), online: <https://miningwatch.ca/news/2015/12/17/no-charges-under-bc-s-mining-laws-failure-mount-polley-mine-dam> [https://perma.cc/92T7-5L6R].

	On October 18, 2016, MiningWatch Canada initiated a private prosecution against MPMC and the Province of BC, alleging violations of the federal *Fisheries Act*.[444] On August 4, 2017, the same day the limitations period for provincial charges was set to expire, Bev Sellars swore an Information alleging that MPMC had committed offences under the provincial *Environmental Management Act* and *Mines Act*.[445] Bev Sellars is the former chief of the Xatśūll First Nation, whose traditional territory encompasses the Mount Polley mine, as well as a historian, lawyer, prize-winning author, and former Chair of First Nation Women Advocating for Responsible Mining (FNWARM).
Offence(s) Alleged	**MiningWatch Canada Private Prosecution:** Carrying out a work, undertaking or activity that results in the harmful alteration, disruption, or destruction of fish habitat contrary to section 35(1) of the *Fisheries Act*, which is an offence under section 40(1). Depositing a deleterious substance into waters frequented by fish, contrary to section 36(3) of the *Fisheries Act*, which is an offence under section 40(2). **Bev Sellars Private Prosecution:**[446] Introducing waste into the environment without having complied with the requirements of a permit issued under the *Environmental Management Act,* which is an offence under section 120(6).[447] Introducing, causing, or allowing waste to be introduced into the environment in the course of conducting an industry, trade or business prescribed in the *Waste Discharge Regulation,*[448] contrary to section 6(2) of the *Environmental Management Act,* which is an offence under section 120(3). Introducing, causing, or allowing waste to be introduced into the environment from an industry, trade or business prescribed in the *Waste Discharge Regulation*, contrary to section 6(3) of the *Environmental Management Act*, which is an offence under section 120(3).

[444] West Coast Environmental Law, "MiningWatch Canada files charges against BC government and Mount Polley Mine for 2014 tailings pond disaster" (17 October 2016), online: <https://www.wcel.org/media-release/miningwatch-canada-files-charges-against-bc-government-and-mount-polley-mine-2014> [https://perma.cc/UVW2-SKJK].
[445] See Appendix A for the Information sworn by Bev Sellars.
[446] See Appendix A for the Information sworn by Bev Sellars.
[447] Several separate charges were filed under this provision in the *Environmental Management Act*, *supra* note 126 citing specific permit requirements, that Bev Sellars alleged had been breached.
[448] *Waste Discharge Regulation,* BC Reg 320/2004.

	Introducing, causing, or allowing waste to be introduced into the environment in such a manner or quantity as so to cause pollution, contrary to sections 6(4) of the *Environmental Management Act*, which is an offence under section 120(3). Failing to retain a qualified manager in respect of a tailings storage facility and water balance, contrary to sections 21, 22, 24, 26 of the *Mines Act,* which is an offence under section 37(2). Failing to take reasonable measures to ensure compliance with the *Mines Act,* mine permit, or order issued under the *Mines Act,* contrary to section 24 of the *Mines Act*, which is an offence under section 37(2). Contravening a condition of a mining permit, which is an offence under section 37(2) of the *Mines Act*.[449]
Outcome	The MiningWatch Canada private prosecution was scheduled for a process hearing on January 13, 2017. However, before the process hearing could occur, the Attorney General of Canada intervened and issued a stay.[450] Crown counsel stated that the Canada Prosecution Service had concluded there was not a reasonable prospect of conviction or a public interest in pursuing the charges, given that a joint investigation was still ongoing and federal charges could be brought in the future. The private prosecution initiated by Bev Sellars was also stayed before a process hearing, but by the provincial Attorney General. In a media release dated January 30, 2018, the BC Prosecution Service stated that it had decided to stay the prosecution after concluding that the material provided did not meet the provincial charge assessment standard.[451] The joint investigation by Environment and Climate Change Canada, Fisheries and Oceans Canada, and the BC Conservation Officer Service concluded in April 2019, and recommendations for charges were sent to the Public Prosecution Service of Canada.[452] The deadline for bringing summary conviction charges under the *Fisheries Act* passed in August 2019, and as of

[449] Several separate charges were filed under this provision in the *Mines Act*, RSBC 1996, c 293, citing specific permit conditions that Bev Sellars alleged had been breached.

[450] Monica Lamb-Yorski, "MiningWatch Canada's private prosecution of Mount Polley disaster stayed," *The Williams Lake Tribune* (28 March 2017), online:<https://www.wltribune.com/news/miningwatch-canadas-private-prosecution-of-mount-polley-disaster-stayed/> [https://perma.cc/BMM9-6RVK].

[451] BC Prosecution Service, "Media Statement: BC Prosecution Service Directs Stay of Proceedings of Mt. Polley Mines Private Prosecution" (30 January 2018), online:<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2018/18-02-sop-mt-polley-mines.pdf>.

[452] Justine Hunter, "With deadline looming, charges recommended in Mount Polley mines disaster," *The Globe and Mai*l (28 June 2019), online: <https://www.theglobeandmail.com/canada/british-columbia/article-mount-polley-disaster-five-years-later-no-charges-no-jobs-no-trust/> [https://perma.cc/7H2E-YNS3].

	March 2023, no charges against the MPMC have been brought by either branch of government. Indictable charges under the *Fisheries Act* are not subject to a limitations period and could still be brought, but the Attorney General of Canada has not explicitly indicated that it intends to file charges. At this point, nearing 10 years after the Mount Polley disaster, commentators suggest that it is highly unlikely charges against MPMC will ever be brought.[453] In addition to the joint investigation, the Mount Polley disaster was the subject of an independent technical inquiry, and a report by the Office of the Auditor General of BC. The independent inquiry concluded that the disaster was caused by flaws in the dam's design, which failed to sufficiently consider soil irregularities in the wall of the dam and the impacts of drainage and erosion.[454] In 2018, Imperial Metals received a $108 million settlement stemming from a lawsuit it had brought against two engineering firms that contributed to the design of the tailings dam.[455] In the report released by the Office of the Auditor General of BC, the Auditor General concluded that "almost every one of our expectations for a robust compliance and enforcement program within the Ministry of Energy and Mines and Ministry of Environment were not met."[456] In 2022, three engineers that were involved in the design of the tailings dam received sanctions from Engineers and Geoscientists BC, which is the regulatory body for those professions under the *Professional Governance Act.*[457] The Mount Polley dam failure is regarded as one of the worst environmental disasters in Canadian history and remains a focal point in discussions about

[453] Gordon Hoekstra, "No environmental charges as 6th anniversary of Mt. Polley mine dam collapse looms," *Prince George Citizen* (4 August 2020), online: <https://www.princegeorgecitizen.com/local-news/no-environmental-charges-as-6th-anniversary-of-mt-polley-mine-dam-collapse-looms-3741058> [https://perma.cc/D79A-6YEK].

[454] Paula Lombardi, "Mount Polley Subject to Private Prosecution Due to Province's Failure to Act" (8 August 2017), online: <https://www.siskinds.com/mount-polley-subject-private-prosecution-due-provinces-failure-act/#:~:text=On%20August%204%2C%202017%2C%20three%20years%20after%20the,part%20of%20a%20private%20prosecution%20against%20Mount%20Polley> [https://perma.cc/U5DV-XWDP].

[455] Francesca Fionda, "Explainer: Eight years after the Mount Polley disaster, soaring prices mean Imperial Metals is gearing up to reopen … again," *The Narwhal* (4 August 2022), online: <https://thenarwhal.ca/mount-polley-mine-reopens/> [https://perma.cc/T6WK-2JW4].

[456] Office of the Auditor General of British Columbia, *An Audit of Compliance and Enforcement of the Mining Sector* (3 May 2016), online: <https://www.bcauditor.com/pubs/2016/audit-compliance-and-enforcement-mining-sector> [https://perma.cc/6U54-K6HL].

[457] Chad Pawson, "Regulatory body wraps up investigation into engineers involved in B.C.s Mt. Polley mine disaster," *CBC News* (12 March 2022), online:< https://www.cbc.ca/news/canada/british-columbia/mount-polley-mine-disaster-engineers-and-geoscientists-bc-investigation-1.6383200> [https://perma.cc/7KRR-KXQH].

	mining law reform. The disaster itself, and the private prosecutions brought by Bev Sellars and MiningWatch Canada, have been the subject of numerous media stories. Partially in response to the disaster and significant criticism of the government's response, Canada introduced amendments to the *Metal and Diamond Mining Effluent Regulations* in 2021. These amendments include additional restrictions on discharges of arsenic, cyanide, lead, zinc, nickel, and copper for mining operations commencing after June 1, 2021. The Government of BC also introduced legislative changes. In 2016, new limits to the steepness of dam slopes were introduced.[458] In 2017, administrative penalties were added to the *Mines Act* to allow for certain types of sanctions to be applied without a judicial process.[459] In 2020, the *Mines Act* was amended to extend the limitations period for *Mines Act* offences to five years, to provide for the creation of a chief permitting officer position and Mine Audits and Effectiveness Unit, and to increase investigative powers under the *Act*.[460]
Takeaways	This case demonstrates how private prosecutions can be used as a powerful tool to illuminate the inadequacy of environmental laws and enforcement policies. After the private prosecutions began, the federal and provincial Attorneys General had several options. They could have continued the private prosecutions themselves, declined to intervene and allowed the private prosecutors to conduct the prosecutions, or stayed the prosecutions outright. By electing to stay the private prosecutions, the Attorneys General demonstrated that either they were unwilling or lacked capacity to perform their duty to enforce the law, or that the applicable environmental laws suffered from such critical shortcomings that securing a conviction was impossible. Whichever is true, the result is a troubling lack of accountability that has been the rallying cry for mining reform advocates in the years following the disaster.

[458] Gordon Hoekstra, "More regulatory changes introduced in wake of Mount Polley mine disaster," *Vancouver Sun* (22 June 2020), online: <https://vancouversun.com/news/local-news/more-regulatory-changes-introduced-in-wake-of-mount-polley-mine-disaster> [https://perma.cc/7FKR-E75R].
[459] *Ibid.*
[460] British Columbia, Energy Mines and Low Carbon Innovation, "Mines Act updates to improve permitting, regulation in B.C." (22 June 2020), online:<https://news.gov.bc.ca/22452>.

CASE STUDY #6 - K'OMOKS FIRST NATION (2018)

Background	In this case the K'omoks First Nation (K'omoks) filed a private prosecution to enforce their *Land Code* when other law enforcement entities refused to act.[461] In 2016 K'omoks adopted a *Land Code*[462] in accordance with federal legislation (*The Framework Agreement on First Nations Land Management*). Under the *Land Code* adopted by K'omoks, a Certificate of Possession gave a Band member the right to lease the property to non-Band members. The Band member rented a house to two individuals who did not belong to the K'omoks First Nation, on K'omoks First Nation reserve land. They failed to pay their rent for months and refused to leave pursuant to eviction. They were also hostile, and one had an extensive criminal record.[463] The *Land Code* makes it an offence for any person who "resides on, enters or remains on KFN lands other than in accordance with a residence or access right under this Land Code or under a Law."[464] The K'omoks First Nation sought enforcement by the RCMP, but they refused because the law at issue was unfamiliar. Provincial and federal Crown prosecutors also refused to take enforcement action. The *First Nation Land Management Act*,[465] contemplates prosecution by a number of means. Ultimately K'omoks proceeded by a Criminal Code information, by private prosecution.[466]
Offence(s) Alleged	Trespassing, under the *K'omoks First Nation Land Code*, s. 31.1 and the *First Nation Land Management Act*, s. 22(3)(a).

[461] Bethany Lindsay, October 8, 2018, CBC, They did it 'their own damn selves': First Nation wins unusual bid to evict bad tenants, online: < https://www.cbc.ca/news/canada/british-columbia/they-did-it-their-own-damn-selves-first-nation-wins-unusual-bid-to-evict-bad-tenants-1.4852788 >.
[462] *K'omoks First Nation Land Code*, June, 2016, online: <https://komoks.ca/wp-content/uploads/2019/09/Land-Code_Final_2016.pdf>.
[463] *K'omoks First Nation v. Thordarson and Sorbie*, 2018 BCPC 114 (CanLII), <https://canlii.ca/t/hs04d>, para. 25.
[464] *K'omoks First Nation Land Code*, June, 2016, online: <https://komoks.ca/wp-content/uploads/2019/09/Land-Code_Final_2016.pdf>, s. 31.1.
[465] *First Nation Land Management Act*, S.C. 1999, c. 24, s. 22.
[466] *K'omoks First Nation v. Thordarson and Sorbie*, 2018 BCPC 114 (CanLII), <https://canlii.ca/t/hs04d>, paras. 14 – 17.

Outcome	The case discussed here was the process hearing, and the private prosecution was allowed to proceed by the British Columbia Provincial Court.[467] Ultimately the accused were found guilty and each sentenced to a $1,000 fine and six months of probation. They were removed from the house in the presence of RCMP officers.[468]
Takeaways	This successful private prosecution shows that First Nations can bring private prosecutions for the enforcement of their laws, and what can happen when Indigenous communities bring forward private prosecutions. This is an intriguing new opportunity for private prosecutions with considerable implications for land use, law enforcement by First Nations, and potentially for Guardians or other First Nations land monitoring programs.

[467] *K'omoks First Nation v. Thordarson and Sorbie*, 2018 BCPC 114 (CanLII), <https://canlii.ca/t/hs04d>.
[468] Bethany Lindsay, October 8, 2018, CBC, They did it 'their own damn selves': First Nation wins unusual bid to evict bad tenants, online: <https://www.cbc.ca/news/canada/british-columbia/they-did-it-their-own-damn-selves-first-nation-wins-unusual-bid-to-evict-bad-tenants-1.4852788>.

5. ADDITIONAL RESOURCES

Other Private Prosecution Guides

- Animal Justice Canada, "Guide to Private Prosecution of Animal Welfare Offences under the Federal *Health of Animals Act,*" by Sophie Gaillard (May 2013), online (pdf): <https://www.animaljustice.ca/wp-content/uploads/2013/06/Animal-Justice-Guide-002-Private-Prosecution-of-Animal-Welfare-Offences-under-the-Health-of-Animals-Act-13.05.29.pdf> [https://perma.cc/CC9F-SPV7]
- East Coast Environmental Law, "Bringing a Private Prosecution," (2009), online (PDF): <www.ecelaw.ca/media/k2/attachments/Summary_Series_3.pdf> [https://perma.cc/W62Z-BNLS].
- Environmental Bureau of Investigation, "The Citizens Guide to Environmental Investigation and Private Prosecution," online: <https://ebi.probeinternational.org/citizens-guide/> [https://perma.cc/6PQ4-VWXK].
- James S Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution*, 2nd ed (Edmonton: Environmental Law Centre, 2004), online (pdf): <https://elc.ab.ca/wp-content/uploads/2022/12/Enforcing-Environmental-Law.pdf>
- Jeffrey Jones, "Private Prosecutions in Canada: A Citizen Enforcement Alternative" (Materials prepared for the Renewing Environmental Law Conference, Vancouver, 4 February 2011) [unpublished], online (pdf): <https://www.scribd.com/document/446992434/private-prosecutions-in-Canada-Guide-pdf>.
- John Swaigen, Albert Koehl & Charles Hatt, "Private Prosecutions Revisited: The Continuing Importance of Private Prosecutions in Protecting the Environment," in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary: University of Calgary Press, 2019) 240, online (pdf): <prism.ucalgary.ca/bitstream/handle/1880/109483/9781552389867_chapter19.pdf?sequence=21&isAllowed=y> [https://perma.cc/9MZP-UCG7]

Sources of Funding

- West Coast Environmental Law, "Apply to the Environmental Dispute Resolution Fund," online: <https://www.wcel.org/apply-edrf> [https://perma.cc/UGQ3-2VVL].

Other Sources of Information

- Canada, Department of Fisheries and Oceans Canada, "Report a Fisheries Violation," online: <https://www.pac.dfo-mpo.gc.ca/fm-gp/rec/ORR-ONS-eng.html#contact> [https://perma.cc/HA6C-H7WG].
- Christopher Nowlin & Joan Brockman, *An Introduction to Canadian Criminal Procedure and Evidence*, 6th ed (Simon Fraser University: Nelson Education, 2015).
- Law Reform Commission of Canada, *Private Prosecutions* (Working Paper 52) (Ottawa: Law Reform Commission of Canada, 1986), online (PDF): <sealegacy.com/pdf%20files/04%20-%20WorkingPaper-PrivateProsecution.pdf> [https://perma.cc/UZE8-9ELS].

- The Law Society of British Columbia, *Professional Legal Training Course 2023 Practice Material Criminal Procedure* (The Law Society of British Columbia: 2023), online (pdf): <https://www.lawsociety.bc.ca/Website/media/Shared/docs/becoming/material/CriminalProcedure.pdf> [https://perma.cc/C23T-ZRQS].

APPENDICES

APPENDIX A: SUPPORTING DOCUMENTATION FOR CASE STUDY #1 – *MORTON V HERITAGE SALMON LTD.* (2005)

Court File Number 13381
Numero de dossier de la Court
PORT HARDY REGISTRY

CANADA: Province of British Columbia
Province de la Colombie-Britannique

Information/Denonciation

This is the information of/Les presentes constituent la denonciations de **Alexandra Morton** (the "informant"/le "denonciateur") of/de Simoom Sound, British Columbia, Biologist,

The informant says that she has reasonable and probable grounds to believe and does believe that/Le denonciateur declare qu'il a des motifs raisonnables et probables de croire effectivement que:

Count 1. Heritage Salmon Limited, between the 1st day of March, 2004, and the 30th day of May, 2004, at or near the Burdwood Islands, in the Broughton Archipelago, in the Province of British Columbia, in Canadian Fisheries Waters, did unlawfully release fish into fish habitat, to wit: parasitic shellfish (sea lice), contrary to section 55(1) of the *Fisheries (General) Regulations*, thereby committing an offence under s. 78(b) of the *Fisheries Act*, R.S.C.

Count 2. Her Majesty the Queen in Right of the Province of British Columbia, between the 1st day of March, 2004, and the 30th day of May, 2004, at or near the Burdwood Islands, in the Broughton Archipelago, in the Province of British Columbia, in Canadian Fisheries Waters, did unlawfully release fish into fish habitat, to wit: parasitic shellfish (sea lice), contrary to section 55(1) of the *Fisheries (General) Regulations*, thereby committing an offence under s. 78(b) of the *Fisheries Act*, R.S.C.

Count 3. Her Majesty the Queen in Right of Canada, between the 1st day of March, 2004, and the 30th day of May, 2004, at or near the Burdwood Islands, in the Broughton Archipelago, in the Province of British Columbia, in Canadian Fisheries Waters, did unlawfully release fish into fish habitat, to wit: parasitic shellfish (sea lice), contrary to section 55(1) of the *Fisheries (General) Regulations*, thereby committing an offence under s. 78(b) of the *Fisheries Act*, R.S.C.

Count 4. Heritage Salmon Limited, Her Majesty the Queen in Right of the Province of British Columba, and Her Majesty the Queen in Right of Canada, between the 1st day of March, 2004, and the 30th day of May, 2004, at or near the Burdwood Islands, in the Broughton Archipelago, in the Province of British Columbia, in Canadian Fisheries Waters, did unlawfully release fish into fish habitat, to wit: parasitic shellfish (sea lice), contrary to section 55(1) of the *Fisheries (General) Regulations*, thereby committing an offence under s. 78(b) of the *Fisheries Act*, R.S.C.

SWORN BEFORE ME/ASSERMENTE)
DEVANT MOI on/le June 7, 2005)
At Port Hardy, British Columbia/)
Colombie-Britannique)
)
)
A Justice of the Peace in and for the)
Province of British Columbia)
Juge de paix dans et pour la province)
de la Colombie-Britannique)

Signature of Informant/Signature du denonciateur

MINISTRY OF ATTORNEY GENERAL
CRIMINAL JUSTICE BRANCH

SUMMARY OF SPECIAL PROSECUTOR'S REPORT CONCERNING HERITAGE SALMON LIMITED ET AL.

Special Prosecutor William B. Smart, Q.C. has approved the release of the following summary of his charge assessment opinion. The opinion dated July 21, 2006, concerns a private prosecution initiated by Alexandra Morton. The following summary is an attachment to Media Statement 06-11 issued by the Criminal Justice Branch on August 9, 2006:

On June 7, 2005, Ms. Alexandra Morton swore an Information in BC Provincial Court charging Heritage Salmon Limited, the Province of British Columbia and the federal government, individually and collectively, with unlawfully releasing sea lice into a fish habitat contrary to s. 55(1) of the *Fishery (General) Regulations*, and thereby committing an offence under s. 78(b) of the *Fisheries Act*.

As the provincial government was named as a defendant, the Criminal Justice Branch of the Ministry of Attorney General appointed Mr. Smart as an independent Special Prosecutor, pursuant to the *Crown Counsel Act*. His mandate included assessing whether the proposed charge, or some other charge, should be approved, and if so, to carry out the prosecution.

The Information alleges that the Burdwood fish farm (and other fish farms in the Broughton Archipelago) produced sea lice which infected pink salmon smolts in the Broughton. The Burdwood farm was owned and operated by Heritage Salmon Limited at the time. Given the importance of the alleged biological impact of sea lice on the wild pink salmon, Mr. Smart retained an independent expert, Dr. Fred Whoriskey of the Atlantic Salmon Federation, in St. Andrews, New Brunswick, to assist him in examining the scientific issues raised by this prosecution.

"Farm fish" are transferred from hatcheries to fish farms, such as the Burdwood farm, after they have reached a certain stage of development. They arrive at the "farm" free of any sea lice and continue their maturation at the farm until they are ready for harvest.

Sea lice are parasitic crustaceans and fall under the definition of "fish" in the *Fisheries Act*. During certain stages of development, sea lice will, if able, attach themselves to a "host" upon which they will feed. Salmon provide ideal "hosts". On larger fish, small numbers of sea lice may have little effect. On smaller fish, sea lice can have severe consequences.

Sea lice enter the fish farms through the open nets or pens which contain the fish in the farms. With thousands of salmon confined in a small area, the farms provide an ideal environment for the sea lice to survive and reproduce in very large numbers despite lice control programs employed by the farms.

It was alleged that millions of sea lice are being produced every month at the Burdwood farm and other fish farms in the Broughton. Large numbers of these sea lice are moving, through the open nets, out of the farms and into the adjacent waters where they come into contact with the wild salmon smolts passing through on their migration to the sea. Given the small size and immaturity of the pink smolts, they are much more vulnerable to the parasitic effects of the sea lice than the larger, more mature Atlantic farm salmon. Moreover, it was alleged that sea lice from the Burdwood fish farm, and other fish farms in the Broughton, have had and will continue to have a significant adverse effect on the pink salmon population in this area.

While these allegations formed the basis upon which the Information charging Heritage Salmon and the provincial and federal governments was sworn, the actual offence charged is much more narrow and technical in nature. The charge is that sea lice leaving the Burdwood fish farm are being "released" into a fish habitat without a licence as required by s. 55 of the *Fishery (General) Regulations*. It is this offence to which the Crown charge approval standard must be applied.

Crown Counsel's charge assessment standard has two components. First, is there a substantial likelihood of conviction, taking into account the admissible evidence that is available, and any viable defences? Second, does the public interest require a prosecution?

Substantial Likelihood of Conviction

In a *Fisheries Act* prosecution, the Crown must be able to establish guilt to the highest standard of proof known to law — proof beyond a reasonable doubt. This is the standard of proof that is used in criminal trials, and is a much higher standard than the civil standard of proof, which requires proof "on a balance of probabilities".

An offence under s. 55 of the *Fishery (General) Regulations* occurs when a person "release[s] a live fish into any fish habitat", without a licence to do so. A licence may be granted by the Minister pursuant to s. 56 of the *Regulations* if the "release" meets three criteria. It must (1) "be in keeping with the proper management and control of fisheries", (2) not involve the introduction of disease harmful to fish, and (3) "not have an adverse effect on the stock size of fish or the genetic characteristics of fish or fish stocks". These criteria for the issuance of a licence speak to the harm that the "release" offence targets.

There is no dispute that sea lice live naturally in the waters of the Broughton Archipelago; that the farm fish are brought to the farms free of sea lice; and that they are infected by sea lice that enter the farms from the adjacent open waters.

Mr. Smart has interpreted this offence under s. 55, taking into account:

- the legislative context of the provision;
- principles of statutory interpretation;
- the parallel offence of transferring a fish into a fish-rearing facility;
- the meaning of the term "release"; and
- the remedial nature of legislation, and the harm it was meant to address (described in s. 56).

He has analyzed the specific offence in the context of the surrounding sections and determined that the offence is aimed at circumstances where live fish are introduced into a new, foreign habitat. It is when fish are "released" or "transferred" from one habitat to another, that there is a risk of introducing disease, genetically altering fish, or harming fisheries. This is why a licence is required pursuant to s. 56 and may only be granted when the risk of such consequences can be avoided.

Mr. Smart has reasoned that the "release" offence is not focused on the circulation or movement of live fish within their ordinary habitat but rather, their introduction into a foreign environment. As such, the movement of sea lice from fish-farm pens into adjacent waters would likely not qualify as a "release". For sea lice existing in their natural environment, it is not apparent that crossing the open-pen nets amounts to introducing a fish into a new, foreign environment. The offence cannot be said to occur every time a fish moves from one theoretical or conceptual "fish habitat" to another, in the course of swimming along its ordinary course of travel. If this were a proper interpretation of the offence, then there would be a "release" not only when sea lice leave a fish farm, but also when they enter one.

Mr. Smart has also considered the dictionary definitions of the word "release" and noted that they generally imply control — one can only "release" something if one has control of it in the first place. On the evidence available, it is not apparent that the fish farms are in control of the sea lice that enter and leave their pens.

Mr. Smart has concluded that sea lice are not "being released" from the Burdwood fish farm, contrary to s. 55(1), and that to interpret the word "release" in the manner suggested by Ms. Morton was inconsistent with a common sense and purposive interpretation of these provisions of the *Fishery (General) Regulations*, inconsistent with the dictionary definitions of the word "release", and would create the nonsensical result that every fish flowing in and out of a fish farm was a violation of s. 55(1)(a).

Mr. Smart has also considered whether there was some other *Fisheries Act* offence capturing the conduct at issue. He has concluded there is not, as Heritage Salmon Limited had complied with all government requirements and obtained the necessary permits for its operations.

In addition, Mr. Smart has noted that even if there were a substantial likelihood of establishing that sea lice were being "released" contrary to s. 55(1), the defendant may be able to successfully advance a defence of "due diligence" as it had cooperated with the government and obtained advance approval for its operations.

Mr. Smart observed that the onerous standard of proof he must apply — proof beyond a reasonable doubt — is not a standard that one would expect governments to apply when addressing the potential environmental consequences of fish farms and formulating policy with respect to their operation.

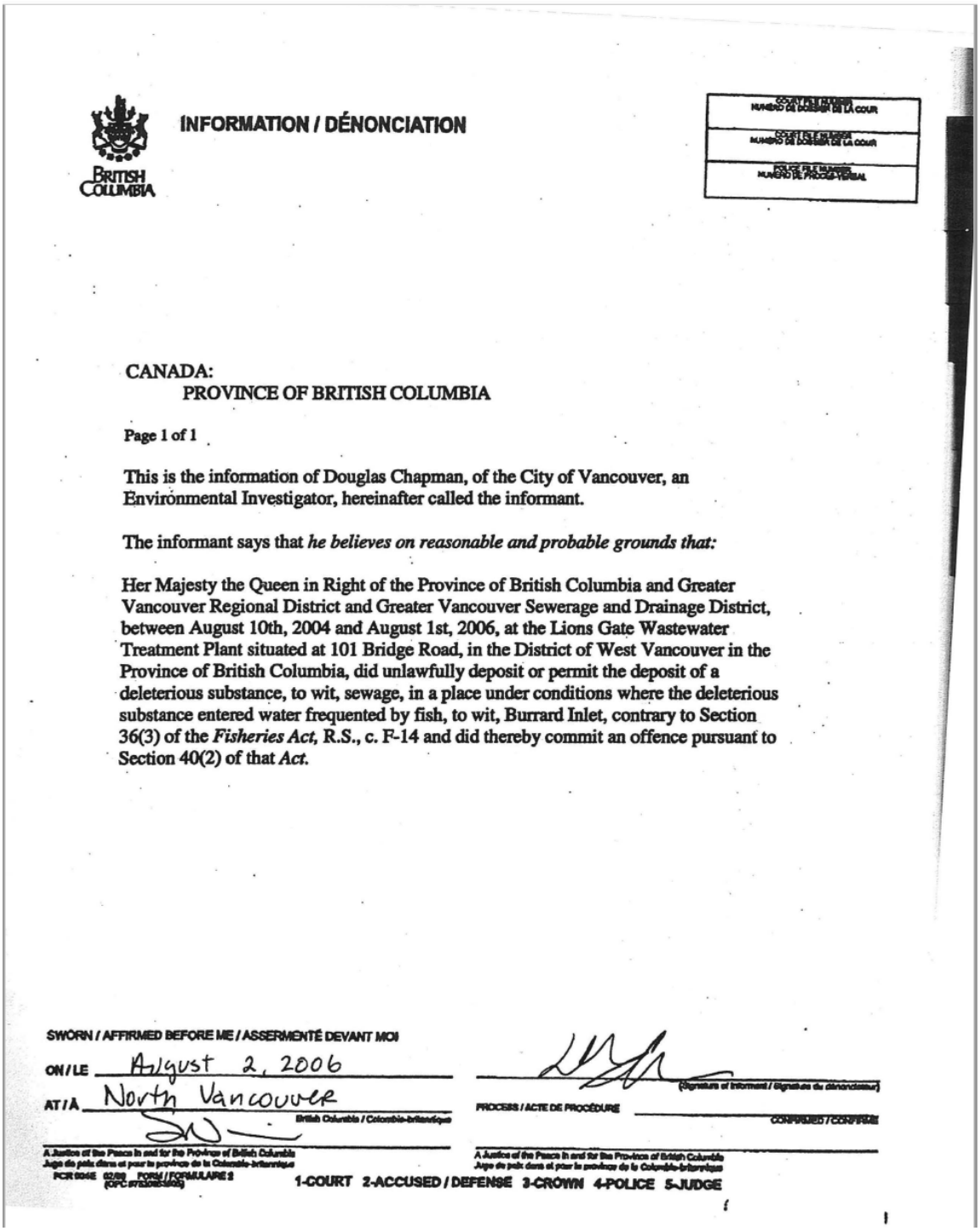
The Public Interest

Mr. Smart has also considered the second component of the charge approval standard, the public interest, and has concluded that in the circumstances of this case, had there been a substantial likelihood of conviction, the public interest would support a prosecution. Critical to his decision was the issue of whether sea lice are causing serious harm to pink salmon stocks in the Broughton. Mr. Smart reviewed the submissions made to him by Ms. Morton and her counsel, counsel for Heritage Salmon Limited, counsel for the Province of British Columbia and the many scientific articles and publications provided. He also reviewed the report provided to him by Dr. Whoriskey, the independent expert who was retained to assist the Special Prosecutor.

In his report to the Special Prosecutor, Dr. Whoriskey wrote:

> *Having reviewed the evidence specific to the Broughton Archipelago, additional studies available in the scientific literature on the impacts of sea lice upon salmonids worldwide, having visited the Broughton Archipelago, and based on my past work experience, I am of the opinion that the evidence shows that sea lice in the Broughton Archipelago are infecting and killing pink salmon.*
>
> *Ms. Morton and her colleagues have carefully and diligently executed their scientific work. They have used credible experimental and data analysis methods, regularly subjected their results to peer review, and have presented their results for scientific scrutiny through publication in established scientific periodicals. This is the globally accepted procedure for the conduct of good science. …*

APPENDIX B: SUPPORTING DOCUMENTATION FOR CASE STUDY #2 – GEORGIA STRAIT ALLIANCE (2006)



BRITISH COLUMBIA

INFORMATION / DÉNONCIATION

COURT FILE NUMBER / NUMÉRO DE DOSSIER DE LA COUR

COURT FILE NUMBER / NUMÉRO DE DOSSIER DE LA COUR

POLICE FILE NUMBER / NUMÉRO DE PROCÈS-VERBAL

CANADA:
PROVINCE OF BRITISH COLUMBIA

Page 1 of 1

This is the information of Douglas Chapman, of the City of Vancouver, an Environmental Investigator, hereinafter called the informant.

The informant says that *he believes on reasonable and probable grounds that:*

Her Majesty the Queen in Right of the Province of British Columbia and Greater Vancouver Regional District and Greater Vancouver Sewerage and Drainage District, between August 10th, 2004 and August 1st, 2006, at the Lions Gate Wastewater Treatment Plant situated at 101 Bridge Road, in the District of West Vancouver in the Province of British Columbia, did unlawfully deposit or permit the deposit of a deleterious substance, to wit, sewage, in a place under conditions where the deleterious substance entered water frequented by fish, to wit, Burrard Inlet, contrary to Section 36(3) of the *Fisheries Act,* R.S., c. F-14 and did thereby commit an offence pursuant to Section 40(2) of that *Act.*

SWORN / AFFIRMED BEFORE ME / ASSERMENTÉ DEVANT MOI

ON / LE August 2, 2006

AT / À North Vancouver

British Columbia / Colombie-Britannique

(Signature of Informant / Signature du dénonciateur)

PROCESS / ACTE DE PROCÉDURE

CONFIRMED / CONFIRMÉ

A Justice of the Peace in and for the Province of British Columbia
Juge de paix dans et pour la province de la Colombie-Britannique

A Justice of the Peace in and for the Province of British Columbia
Juge de paix dans et pour la province de la Colombie-Britannique

PCR 6046 02/08 FORM / FORMULAIRE 2 (OPC 6046 02/08)

1-COURT 2-ACCUSED / DEFENSE 3-CROWN 4-POLICE 5-JUDGE

LIONS GATE- SYNOPSIS

The documents and the testimony of the witnesses listed in this private prosecution brief will establish the following:

The Greater Vancouver Regional District (GVRD) is a federation of municipalities and electoral areas in Greater Vancouver, British Columbia. Originally it was known as The Regional District of Fraser-Burrard and was incorporated by Letters Patent issued on June 29, 1967 pursuant to the then-*Municipal Act* (now the *Local Government Act*, R.S.B.C. 1996, c. 323). Subsequently, its name was changed to The Greater Vancouver Regional District on June 27, 1968 by further Letters Patent.

The Greater Vancouver Sewerage and Drainage District (GVS&DD) is a body corporate and politic constituted by the *Greater Vancouver Sewerage and Drainage District Act,* R.S.B.C. 1956, c.59 to provide for the construction, maintenance, operation and administration of sewerage and drainage facilities in the Greater Vancouver area. While strictly speaking a separate legal entity from the GVRD, GVS&DD shares the same Board of Directors and is functionally part of the GVRD.

GVRD and GVS&DD operate five wastewater treatment plants in the Greater Vancouver area: Annacis Island, Iona, Lions Gate, Lulu Island and North West Langley. Three GVRD treatment plants discharge effluent to the Fraser River: Annacis; Lulu; and, North-west Langley. Each of these three plants provides full secondary treatment.

Secondary treatment refers to a treatment system that includes a biological process to remove organic matter from, and reduce the toxicity of, the wastewater effluent. The biological process employed by secondary treatment removes up to 90 percent of biochemical oxygen demanding substances (BOD) and of total suspended solids (TSS).

As will be discussed below, secondary treatment also removes the chemicals in synthetic detergents that are the main cause of the toxicity to fish of the Lions Gate sewage discharges into Burrard Inlet. Secondary treatment also removes over 90 percent of the toxic, bio-hazardous substances like heavy metals and persistent organic pollutants (PCBs, PAHs, pesticide residues, etc.) from sewage effluent.

By contrast, primary treatment is a mainly mechanical process that removes only between 30 and 40 per cent of BOD and approximately 50 percent of TSS.

The Lions Gate Wastewater Treatment Plant (hereinafter referred to as Lions Gate or Lions Gate WWTP) provides mere primary treatment of domestic and industrial sewage waste originating from the District of West Vancouver, the City of North Vancouver, and the District of North Vancouver. The Lions Gate WWTP is located immediately to the west of the Lions Gate Bridge in West Vancouver. Its municipal address is 101 Bridge Road, West Vancouver. Lions Gate discharges sewage effluent through an outfall and diffuser into the First Narrows area of Burrard Inlet, located just west of the Lions Gate Bridge at a depth of about 22 meters.

Prior to April 23, 2004, each of GVRD's wastewater treatment plants held a provincially-issued permit that allowed each facility to operate and discharge treated effluent to the receiving waters. The permits have since been replaced with "Operational Certificates", which continue to operate in law as permits. Operational Certificates were first issued in April 2002 by the Provincial Ministry of Water, Land and Air Protection (now the Ministry of Environment) under the provisions of the then *Waste Management Act,* (now the *Environmental Management Act,* S.B.C., c.53).

On April 4, 2002, the Provincial Ministry of Water Land and Air Protection approved GVRD's Liquid Waste Management Plan (LWMP). Following this, on April 23, 2004, the Ministry issued Operational Certificate ME-00030 to GVS&DD for the operation of the Lions Gate WWTP.

The Lions Gate Operational Certificate (hereinafter referred to as the "Lions Gate OC") regulates the daily rate of the sewage discharge into Burrard Inlet, and the concentration and loadings (tonnes/day) of TSS and BOD. The Lions Gate OC requires GVS&DD to monitor for certain substances and to conduct a monthly fish bioassay test to determine whether the sewage effluent that is being discharged into Burrard Inlet is acutely toxic to fish. This bioassay test follows a scientifically accepted Environment Canada standard test protocol and is known as the 96 hour LC50 Acute Lethality Test ("the Acute Lethality Test").

Municipal, provincial and federal governmental regulatory authorities across Canada rely on the Acute Lethality Test as a measure of the toxicity of effluents being discharged to fish-bearing waters. The Acute Lethality Test is used by the Province of British Columbia and is directly referred to in the Province's *Municipal Sewage Regulation,* B.C. Reg. 129/99.

The Lions Gate OC also requires GVS&DD to report the results of its monthly Acute Lethality Tests to the British Columbia Ministry of Environment, its provincial regulator. The Lions Gate OC does not specifically prohibit the discharge of effluent that is acutely toxic to fish; it only requires the operator to determine, once a month, *if* the discharge is acutely toxic to fish. If the monthly tested sewage discharge is toxic to fish, GVRD is required to conduct testing to determine the cause of the toxicity.

The purpose of the *Fisheries Act,* R.S.C. 1985, c. F-14 is to protect Canada's fisheries waters. Subsections 36(3) and 40(2) of the federal *Fisheries Act* make it an offence to deposit or to permit the deposit of a deleterious substance into water frequented by fish. Subsection 36(3) states:

> 36(3) Subject to subsection 4, no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

John Werring, a Registered Professional Biologist, will give the following evidence concerning the receiving waters into which Lions Gate sewage effluent is continually being discharged: *"The Burrard Inlet ecosystem includes diverse marine, estuarine and terrestrial environments that provide habitat to a wide range of species. The inlets' shorelines, inter-tidal areas, mudflats and salt marshes are home to an estimated 200 varieties of marine organisms, including 70 different species of fish and over a hundred species of invertebrates. Juvenile salmon entering Burrard Inlet from local streams such as Noons, Mossom, and Schoolhouse Creeks produce high numbers annually: Adult pink salmon return each year to spawn in Indian River at the head of Indian Arm. In addition, both the Seymour and Capilano Rivers support significant populations of salmonids, including Coho, Chinook and Chum salmon and steelhead trout. The inlet also provides habitat for birds, with over 10,000 diving and dabbling ducks using the inlet on a seasonal basis.*

The waters of Georgia Straight and Burrard Inlet are known to be fish-bearing waters. In fact, the mouth of the Capilano River, which is situated due west of the Lion's Gate WWTP and is within 500 metres of the WWTP's point of discharge, is one of the most important and easily accessible salmon sport fisheries in North America. During salmon season hundreds of boats ply these waters carrying people eager to catch salmon. At any one time during salmon season as many as 50 sport-fishers can also be seen fishing from shore at, or near, the mouth of the river. In addition, the Squamish First Nation conducts an annual food fishery from the spit of land on to the east of the river mouth."

The tidal waters of the First Narrows area of Burrard Inlet into which the sewage is discharged carries the sewage plume east into the inner harbour on a flooding tidal current and west, along the shore of West Vancouver and into Georgia Strait on an ebbing tidal current. During all slack tide periods, usually 4 times each day, there is no current flow and often the sewage plume reaches the surface immediately adjacent to the Lions Gate Bridge.

The plain dictionary meaning of "deleterious" is "harmful. The Acute Lethality Test determines whether or not the discharge is "acutely lethal" to fish within the 96 hour test period. In other words, it measures the rate of the *mortality of the fish* that have been put into the effluent for a 96 hour period.

On seventeen monthly testing days between June, 2001 and April, 2006 the GVRD discharged primary treated sewage effluent that was acutely toxic to fish from the Lions Gate WWTP into Burrard Inlet. As required by the OC, GVRD reported these test failures in writing to the Province.

(See the list of seven alleged offence days between August 12, 2004 and May 9, 2006 relating to the acute toxicity of the Lions Gate effluent, at the end of this Synopsis.)

Section 78.1 of the *Fisheries Act* stipulates that each day a contravention of the *Act* is committed constitutes a separate offence.

In a May 1999 GVRD document entitled "Caring for Our Waterways'", the GVRD acknowledged the following: *"The Fisheries Act prohibits the discharge of deleterious substances into fish-bearing waters and protects fish habitat. Over the years the courts have determined that discharges that are acutely toxic to fish, based on the 96 hour fish bioassay test, are deemed to be deleterious."* (See EX. 54, p. 3-1)

Furthermore, in "Caring For our Waterways", the GVRD acknowledges that discharges from GVRD CSO's (combined sewer overflows), stormwater and the Lions Gate WWTP wastewater treatment plant have contributed a substantial amount of trace metals to the sediments of Burrard Inlet. In particular, copper, a metal that is highly toxic to aquatic life, is found in concentrations that frequently exceed provincial water and sediment quality objectives for this metal in the marine environment. GVRD acknowledges that "*The most important sources of copper in Burrard Inlet include stormwater, CSOs and the Lions Gate WWTP and industrial discharges.*" (Ex. 54, page 5-15).

From no later than 1995 until May 2006, the sewage discharged from Lions Gate WWTP into Burrard Inlet has often been acutely toxic to fish. (See EX. 28, p. 31 and EX. 39)

In 2000, GVRD commissioned a consultant to conduct an assessment of the acute toxicity in the effluents from five of its WWTPs, including Lions Gate. The study concluded that the most frequent cause of toxicity of the Lions Gate effluent was anionic surfactants found in synthetic detergents. These chemicals are also known as MBAS.

A subsequent GVRD study attempted to find methods to remove MBAs; several alternatives were suggested but the study made it clear that the best method of removal was biological treatment also known as secondary treatment. This latter study states that biological treatment has shown, *"proven removal of MBAS in biological treatment plants around the world,"* and that it is, *"well-established process with good track record,"* and that it is, "*safe and environmentally sound.*" (See EX. 3, Table 6-1)

Environment Canada has consistently informed GVRD that its discharges of sewage effluent were subject to section 36(3) of the *Fisheries Act.* By letter dated May 15, 2001 from Environment Canada, the City of Vancouver, a GVRD member municipality, was advised "*that the GVRD must also achieve compliance with the Fisheries Act at all of its wastewater discharge points.*" The May 2001 letter further stated that recent Environment Canada inspections had determined that Lions Gate WWTP discharges were not in compliance with the *Fisheries Act.* This letter also stated that Environment Canada was not satisfied that the LWMP which GVRD had proposed to the Province for provincial approval would meet the requirements of the *Fisheries Act.* (EX. 57)

In the months of April, June, August, October and December of 2001, and in February 2002, Environment Canada inspectors attended at the Lions Gate WWTP and took samples of the sewage being discharged into Burrard Inlet, for testing. All six samples subsequently failed the 96 hour LC50 Acute Lethality Tests. These toxicity test failures and others were acknowledged by GVRD and GVRD recognized the fact that they were not in compliance with the *Fisheries Act.* ((EX.43)

Environment Canada had also warned GVRD about violations at Iona by issuing a legal warning document on March 20, 2001 to George Puil, Chairman of the Board of GVRD and to Johnny Carline, Chief Administrator of GVRD. This document was entitled **"Warning Respecting An Alleged Violation,"** and it advised the recipients that the Iona effluent was found to be acutely toxic to fish after being subjected to the Acute lethality Test ("the Iona Warning") (EX.56).

The Iona Warning further advised the GVRD officials of GVRD obligations under the *Fisheries Act,* and of penalties thereunder. This warning also advised that," *further steps will be considered by Environment Canada if you do not take the necessary action to prevent the release of a deleterious substance."*

Since 1992, the Province has conducted extensive monitoring studies of the water quality in Burrard Inlet and the Province determined that, *"dissolved oxygen concentrations in Burrard Inlet remain a widespread problem for the protection of aquatic life in both surface and deeper waters."* (Ex. 53, p.12). The Lions Gate facility discharges about 8 tonnes of oxygen depleting substances into Burrard Inlet every day. Secondary treatment would reduce the oxygen depleting substances in the sewage effluent by 90 per cent.

On June 14, 2001, Mr. J. Brian Wilson, Director of the Pacific and Yukon region of the Environmental Protection Branch of Environment Canada wrote both GVRD and the Province. Mr. Wilson advised that the proposed GVRD Liquid Waste Management Plan being discussed by the Province and the GVRD would not satisfy the requirements of the federal *Fisheries Act.* In particular, Environment Canada stated that the plan only required GVRD to *"evaluate options"* for improving bioassay test results "*within the limitations of the existing liquid waste management treatment process and infrastructure."* The letter stated that "*this suggests that compliance with the Fisheries Act may not be achieved."* Further, in this letter Environment Canada advised GVRD and the Province that Environment Canada inspections had "*confirmed that discharges from the Iona and Lions Gate facilities were acutely lethal to fish, and thus in contravention of the Fisheries Act."* This letter acknowledged that GVRD was taking steps to address the toxicants in the Iona and Lions Gate effluents but the letter further states, "*However, these actions by themselves may not bring the effluent discharges from the Iona and Lions Gate facilities into compliance with the Fisheries Act. Consequently, Environment Canada intends to conduct further inspections at the facilities to verify compliance with the Fisheries Act and to take appropriate enforcement action should violations continue."* (EX.58)

Since Environment Canada wrote this letter to GVRD and the Province there have been 16 acute toxicity test failures of the Lions Gate sewage effluent. There has been no enforcement action taken by Environment Canada or by the Province.

Ten months after receiving the above letter from Mr. Wilson of Environment Canada, with the knowledge that secondary sewage treatment at Lions Gate would eliminate the major cause of the toxicity of its effluent and also with the knowledge that there was a

widespread problem in Burrard Inlet with low dissolved oxygen concentrations, the Province officially approved GVRD's Liquid Waste Management Plan on April 4, 2002. By approving the GVRD LWMP, the Province gave GVRD 28 more years, until the year 2030, to upgrade to secondary treatment.

Further, Provincial approval of the LWMP permits GVRD to violate section 36(3) of the *Fisheries Act*. The Provincially-approved LWMP permits GVRD to violate the *Fisheries Act* by acknowledging that there are toxicity violations at Iona and Lions Gate, and yet does not require these violations to cease. Rather the LWMP merely requires GVRD to determine the cause of the failed bioassay toxicity tests, and to submit an action plan "***to significantly reduce*** *non-ammonia-related acute toxicity at the point of discharge.*" (emphasis added) (EX.32)

This Provincial Government's approval of the LWMP was followed by the Provincial issuance of the Lions Gate Operating Certificate on April 23, 2004. On April 28, 2004, Environment Canada thanked the Province for being offered an opportunity to comment on the draft Operational Certificate and advised the Provincial government official that even though there was an Operational Certificate, section 36(3) of the *Fisheries Act* still was applicable. (Ex.1)

Alleged Offense Dates

If this private prosecution proceeds by way of summary conviction under the Criminal Code, there are 7 alleged offence days relating to the acute toxicity of the Lions Gate sewage effluent. The *Fisheries Act* provides a maximum fine of $300,000 upon conviction for each day. The Province of British Columbia, GVRD and GVS&DD all have prior convictions for *Fisheries Act* offences.

Alleged offence days relating to the acute toxicity of the Lions Gate sewage effluent discharged to Burrard Inlet:

1. August 12, 2004
2. May 3, 2005
3. June 1, 2005
4. July 7, 2005
5. August 8, 2005
6. September 13, 2005
7. May 9, 2006

Public Prosecution Service of Canada
British Columbia Regional Office
900 - 840 Howe Street
Vancouver, B.C.
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Service des poursuites pénales du Canada
Bureau régional de Colombie Britannique
840, rue Howe, pièce 900
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Telephone: (604) 666-2991
Facsimile: (604) 666-1599
Internet Address:
john.cliffe@ppsc-sppc.gc.ca
Our File No. : 1-249394
Notre dossier:

October 9, 2007

VIA FACSIMILE

Coristine Woodall
Barristers and Solicitors
660 – 220 Cambie Street
Vancouver, B.C. V6B 2M9

Attention: Mr. Kevin M. Woodall,

Ministry of Attorney General
Legal Services Branch – Civil Litigation
1001 Douglas Street
Victoria, B.C. V8W 9J7

Attention: Ms. Angela Davies,

Dear Sirs/Mesdames:

Re: Douglas Chapman v. Her Majesty the Queen in Right of the Province of British Columbia, the Greater Vancouver Regional District and the Greater Vancouver Sewerage and Drainage District *(Lions Gate Wastewater Treatment Plant)*
Information # 47239
Charge: Violation of section 36(3), Fisheries Act
Next Appearance: October 11, 2007, 9:30 am, Provincial Court of British Columbia at North Vancouver

Please be advised that as a result of a comprehensive review and analysis of the aforementioned matter guided by the relevant policy statements contained in the **Federal Prosecution Service Deskbook** the writer will attend the Provincial Court of British Columbia at North Vancouver on October 11, 2007 and will advise the presiding Judge of that Court that the Attorney General of Canada will be intervening in this case and also will direct the Clerk of the Court to enter a Stay of Proceedings with respect to all of the aforementioned accused charged in the sole count contained in Information #47239.

If you have any inquiries with respect to the status of this matter, please do not hesitate to contact the writer.

Yours truly,

John D. Cliffe
Counsel
British Columbia Regional Office

JDC:sl

Canada

Public Prosecution Service
of Canada
British Columbia Regional Office
900 - 840 Howe Street
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Internet Address:
john.cliffe@justice.gc.ca
Our File No. : 1-249394
Notre dossier:
Recipient File No. :
Votre dossier:

October 9, 2007

VIA FACSIMILE

Eco Justice Canada
(Formerly Sierra Legal Defence Fund)
214 – 131 Water Street
Vancouver, B.C.
V6B 4M3

Attention: Ms. Lara Tessaro,
Staff Lawyer

Dear Sirs/Mesdames:

Re: Douglas Chapman v. Her Majesty the Queen in Right of the Province of British Columbia, the Greater Vancouver Regional District and the Greater Vancouver Sewerage and Drainage District *(Lions Gate Wastewater Treatment Plant)*
Information # 47239
Charge: Violation of section 36(3), Fisheries Act
Next Appearance: October 11, 2007 2007, 9:30 am, Provincial Court of British Columbia at North Vancouver

As you are aware the writer is Crown counsel assigned by this office to consider whether the Attorney General of Canada should intervene in the aforementioned matter pursuant to section 579.1 of the **Criminal Code of Canada** ("the **Criminal Code**")

In this regard the writer has conducted a comprehensive review and analysis of the evidence and information provided by your office with respect to the aforementioned matter (collectively "the private Informant's Brief"), namely

1. A binder of documents which was received on August 10, 2006 that contained a copy of Information #47239, a synopsis of the case, a statement of Mr. Douglas Chapman, the private Informant herein ("Mr. Chapman"), a statement and resume of a Mr. John Werring, RP.Bio.; two documents entitled "Anticipated Evidence" with respect to a Mr. Bob Jones of the Greater Vancouver Regional District ("the GVRD") and a Mr. Sisto Bosa of the British Columbia Ministry of Environment and copies of 58 documents of various kinds (including laboratory reports, letters, e-mail, extracts from reports, etc.);

Canada

2. A letter to the writer dated February 13, 2007, the subject matter of which was "Charge Assessment Considerations in Lions Gate Private Prosecution" (22 pgs.) with a binder of documents;

3. A copy of letter dated May 29, 2007 to Ms. Angela Davies and Ms. Susan Corristine and Mr. Kevin Woodall (5 pgs) with a number of documents; and

4. An e-mail dated June 5, 2007 with a copy of the Summary Report of the Final Report prepared for the GVRD by Stantec Consulting Ltd. and Dayton & Knight Ltd. entitled "GVRD Iona Island and Lions Gate WWTP Project No. RFP 03-005".

In addition the writer has considered representations made by you and Mr. Chapman at our meeting on September 27, 2006 and the representations made by Mr. Chapman and other representatives of the Sierra Legal Defence Fund at a meeting with the writer on December 18, 2006.

The writer met separately and on one occasion with counsel for each of the accused herein. Counsel advised that each had received copies of the binder referred to in item # 1 above. Counsel for the accused made representations and provided information and documents to the writer on a confidential and without prejudice basis.

The thrust of counsel's representations was that the Attorney General of Canada should intervene in this case and direct a Stay of Proceedings because the evidence provided by the private Informant herein did not in their respective opinions demonstrate a reasonable prospect of conviction and it was not in the public interest to continue these proceedings.

You were made aware that the writer met with counsel for the accused.

It should be noted that the writer requested and received the assistance of staff at Environment Canada ("EC") and Fisheries & Oceans Canada ("the DFO") in Vancouver. The staff of EC and the DFO provided information and documents that permitted the writer to, inter alia, understand technical evidence such as laboratory results, and appreciate the relevant regulatory background and context.

You were made aware that the writer received the aforementioned assistance.

The relevant provisions of the **Fisheries Act,** judicial precedent interpreting same and the relevant provisions of the **Criminal Code** were considered during the writer's review.

The writer's review and analysis herein was guided by the policy statements contained in the **Federal Prosecution Service Deskbook** ("the **FPS Deskbook**").

In this regard it should be noted that in Part V, Chapter 15, the **FPS Deskbook** it states that Crown counsel must consider two issues when deciding whether to prosecute. First, counsel must consider whether the evidence demonstrates that there is a *reasonable prospect of conviction*. Second, counsel must consider whether the *public interest* requires a prosecution to be pursued.

With respect to the first issue, namely, and in other words sufficiency of the evidence the **FPS Deskbook** states at section 15.3.1 in part:

> "In the assessment of the evidence, a bare *prima facie* case is not enough; the evidence must demonstrate that there is a *reasonable prospect of conviction*. This decision requires an evaluation of how strong the case is likely to be when presented at trial.....
>
> A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown counsel should also consider any defences that are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction....."

After assessment of the private Informant's Brief it is the writer's opinion that there is no reasonable prospect of conviction in this case. In other words sufficient evidence to establish a case against the accused herein for violation of section 36(3) of the **Fisheries Act** is lacking.

The writer separately assessed available and indicated defences and is of the same opinion namely that there is no reasonable prospect of conviction in this case.

With respect to the second issue, namely, the public interest criterion, the **FPS Deskbook** states at section 15.3.2 in part:

> "If satisfied that there is sufficient evidence to justify the institution or continuation of a prosecution, Crown counsel must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued.
>
> It is not the rule that all offences for which there is sufficient evidence must be prosecuted.
>
> .....
>
> The factors which may properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued. The resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases. The corollary is that the available resources should be employed to pursue with due vigour those cases worthy of prosecution.

> In some cases it will be appropriate for Crown counsel to obtain the views of the investigative agency or client department when determining whether the public interest requires a prosecution to be commenced or continued...Ultimately, however, Crown counsel must decide independently whether the public interest warrants a prosecution."

The writer assessed this criterion and is of the opinion that the public interest as that term is considered in the **FPS Deskbook** does not warrant this prosecution to be pursued.

Please be advised that the writer's review, analysis and opinion of this case has been approved by the Regional Director of the British Columbia Regional Office of the Public Prosecution Service of Canada and the office of the Deputy Director of the Public Prosecution Service of Canada. As a result of the creation of the Public Prosecution Service of Canada and for the purposes of section 26.6 of the **FPS Deskbook** the aforementioned positions would be the equivalent respectively to the Senior Regional Director and the Assistant Deputy Attorney General (Criminal Law) in the Department of Justice.

Please also be advised it is the writer's opinion that all of the statutory preconditions for intervention by the Attorney General of Canada pursuant to section 579.1(1) of the **Criminal Code** are met in this case, namely the prosecution proceedings involve a violation of section 36(3) of the **Fisheries Act** which is an Act of Parliament; the proceedings were instituted by a private Informant and not by an Attorney General; judgment has not been rendered; and the Attorney General of British Columbia will not be intervening in this case.

Accordingly, the writer will be attending the Provincial Court of British Columbia at North Vancouver on October 11, 2007 and will advise the presiding Judge of that Court that the Attorney General of Canada will be intervening in this case pursuant to section 579.1 of the **Criminal Code** and pursuant to section 579 of the **Criminal Code** will be directing the Clerk of the Court to enter a Stay of Proceedings with respect to all of the accused charged in the sole count contained in Information # 47239

Yours truly,

John D. Cliffe
Counsel
British Columbia Regional Office

JDC:sl

BRITISH COLUMBIA

INFORMATION / DÉNONCIATION

COURT FILE NUMBER / NUMÉRO DE DOSSIER DE LA COUR: 50766

COURT FILE NUMBER / NUMÉRO DE DOSSIER DE LA COUR:

POLICE FILE NUMBER / NUMÉRO DE PROCÈS-VERBAL:

CANADA:
PROVINCE OF BRITISH COLUMBIA

Page 1 of 1

This is the information of Douglas Chapman, of the City of Vancouver, an Environmental Investigator, hereinafter called the informant.

The informant says that *he believes on reasonable and probable grounds that:*

Her Majesty the Queen in Right of the Province of British Columbia and Greater Vancouver Regional District and Greater Vancouver Sewerage and Drainage District, between January 1, 2005 and November 30, 2006, at the Iona Island Wastewater Treatment Plant situated at 1000 Ferguson Road in the City of Richmond in the Province of British Columbia did unlawfully deposit or permit the deposit of a deleterious substance, to wit, sewage, in a place under conditions where the deleterious substance entered water frequented by fish, to wit, the Strait of Georgia, contrary to Section 36(3) of the *Fisheries Act* (R.S.,c. F-14) and did thereby commit an offence contrary to Section 40(2) of that *Act*.

SWORN / AFFIRMED BEFORE ME / ASSERMENTÉ DEVANT MOI

ON / LE 14 December 2006

AT / À Richmond, British Columbia / Colombie-britannique

(Signature of Informant / Signature du dénonciateur)

PROCESS / ACTE DE PROCÉDURE

CONFIRMED / CONFIRMÉ

A Justice of the Peace in and for the Province of British Columbia
Juge de paix dans et pour la province de la Colombie-britannique

A Justice of the Peace in and for the Province of British Columbia
Juge de paix dans et pour la province de la Colombie-britannique

PCR 004E 02/09 FORM / FORMULAIRE 2 (OPC 87320853405)

1-COURT 2-ACCUSED / DEFENSE 3-CROWN 4-POLICE 5-JUDGE

IONA- SYNOPSIS OF EVIDENCE

The documents and the testimony of the witnesses listed in this private prosecution brief will establish the following:

The Greater Vancouver Regional District (GVRD) is a federation of municipalities and electoral areas in Greater Vancouver, British Columbia. Originally it was known as The Regional District of Fraser-Burrard and was incorporated by Letters Patent issued on June 29, 1967 pursuant to the then-*Municipal Act* (now the *Local Government Act*, R.S.B.C. 1996, c. 323). Subsequently, its name was changed to The Greater Vancouver Regional District on June 27, 1968 by further Letters Patent.

The Greater Vancouver Sewerage and Drainage District (GVS&DD) is a body corporate and politic constituted by the *Greater Vancouver Sewerage and Drainage District Act*, R.S.B.C. 1956, c.59 to provide for the construction, maintenance, operation and administration of sewerage and drainage facilities in the Greater Vancouver area. While strictly speaking a separate legal entity from the GVRD, GVS&DD shares the same Board of Directors and is functionally part of the GVRD.

GVRD and GVS&DD Wastewater Treatment Plants: Secondary v. Primary Treatment

GVRD and GVS&DD operate five wastewater treatment plants in the Greater Vancouver area: Annacis Island, Iona, Lions Gate, Lulu Island and North West Langley. Three GVRD treatment plants discharge effluent to the Fraser River: Annacis, Lulu, and, North-west Langley. Each of these three plants provides full secondary treatment.

Secondary treatment refers to a treatment system that includes a biological process to remove organic matter from, and reduce the toxicity of, the wastewater effluent. The biological process employed by secondary treatment removes up to 90 percent of biochemical oxygen demanding substances (BOD) and of total suspended solids (TSS). Secondary treatment also removes over 90 percent of the toxic, bio-hazardous substances like heavy metals and persistent organic pollutants (PCBs, PAHs, pesticide residues, etc.) from sewage effluent.

By contrast, primary treatment is a mainly mechanical process that removes only 30 per cent of BOD and approximately 50 percent of TSS.

The Iona Island Wastewater Treatment Plant (hereinafter referred to as Iona or Iona WWTP) is situated in Richmond B.C. just north of the Vancouver International Airport and it discharges sewage, which has received only primary treatment, into the Strait of Georgia through an outfall located approximately 7 kilometers west of the Iona Island shoreline at an average depth of 90 meters

The source of Iona's wastewater includes industrial and commercial operations and the domestic sewage from approximately 600,000 people in Vancouver, the University Endowment Lands and areas within Burnaby and Richmond.

The industrial and commercial sources of the sewage includes, dental offices, printing facilities, laboratories, photofinishers, recreation facilities, automotive businesses, dry cleaners, carwash facilities, U-Brew/Wine premises, carpet cleaning services and funeral homes. Further, the Iona facility receives trucked industrial wastes from the Greater Vancouver Regional District and from other areas. Iona also receives storm water from combined sewage areas.

The GVRD Liquid Waste Management Plan and the Iona Operational Certificate

Prior to April 23, 2004, each of GVRD's wastewater treatment plants held a provincially-issued permit that allowed each facility to operate and discharge treated effluent to the receiving waters. The permits have since been replaced with "Operational Certificates", which continue to operate in law as permits. Operational Certificates were first issued in April 2002 by the Provincial Ministry of Water, Land and Air Protection (now the Ministry of Environment) under the provisions of the then *Waste Management Act,* (now the *Environmental Management Act,* S.B.C., c.53).

On April 4, 2002, the Provincial Ministry of Water Land and Air Protection approved GVRD's Liquid Waste Management Plan (LWMP). Following this, on April 23, 2004, the Ministry issued Operational Certificate ME-00023 to GVS&DD for the operation of the Iona Island WWTP.

The Iona Island Operational Certificate (hereinafter referred to as the "Iona OC") regulates the daily rate of the sewage discharge into Georgia Strait, and the concentration and loadings (tonnes/day) of TSS and BOD. The Iona OC requires GVS&DD to monitor for certain substances and to conduct a monthly fish bioassay test to determine whether the sewage effluent that is being discharged into Burrard Inlet is acutely toxic to fish. This bioassay test follows a scientifically accepted Environment Canada standard test protocol and is known as the 96 hour LC_{50} Acute Lethality Test ("the Acute Lethality Test").

GVRD in its Quality Control Annual Report for 2003 describes the toxicity test as follows: "Under present permit requirements the GVRD is required to monitor effluent toxicity at each of the wastewater treatment plants using a standardized test for acute toxicity.[1] The standard procedure exposes test organisms (rainbow trout) to a series of effluent dilutions and determines the survival rate at the end of 96 hours. The final result is reported as the 96-Hr LC_{50} which is reported as the % by volume (of the original sample) at which 50% of the test fish survive. A "pass" or satisfactory result for all sewage effluents requires that the LC_{50} value must be equal to or greater than 100%. This means that 50% or more of the test fish must survive to 96 hours in the original undiluted sample. The short-term acute toxicity test relates only to the immediate characteristics of the undiluted effluent and cannot be used to provide information on long term or chronic effects on aquatic or marine organisms. (Ex. 37, p. 4)

[1] Environment Canada Biological Test Method, Reference Method for Determining Acute Lethality of Effluents to Rainbow Trout, Reference methods, EPS 1/RM/13 July 1990, latest amendment, December 2000.

Municipal, provincial and federal governmental regulatory authorities across Canada rely on the Acute Lethality Test as a measure of the toxicity of effluents being discharged to fish-bearing waters. The Acute Lethality Test is used by the Province of British Columbia and is directly referred to in the Province's *Municipal Sewage Regulation*, B.C. Reg. 129/99.

The Iona OC also requires GVS&DD to report the results of its monthly Acute Lethality Tests to the British Columbia Ministry of Environment, its provincial regulator. The Iona OC does not specifically prohibit the discharge of effluent that is acutely toxic to fish; it only requires the operator to determine, once a month, *if* the discharge is acutely toxic to fish. If the monthly tested sewage discharge is toxic to fish, GVRD is required to conduct a Toxicity Identification Evaluation (TIE) to determine the cause of the toxicity.

Subsection 36(3) of the federal Fisheries Act

The purpose of the *Fisheries Act*, R.S.C. 1985, c. F-14 is to protect Canada's fisheries waters. Subsections 36(3) and 40(2) of the federal *Fisheries Act* make it an offence to deposit or to permit the deposit of a deleterious substance into water frequented by fish. Subsection 36(3) states:

> 36(3) Subject to subsection 4, no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

"Water frequented by fish"

The Iona discharge outfall is located in the tidal waters of Georgia Strait immediately adjacent to the mouths of the Fraser River through which annually pass millions of salmonids. In fact, the Iona facility discharges into the Fraser River estuary. The Fraser River is one of the world's most productive salmon rivers and the Strait of Georgia is well known as both commercial and sport fisheries waters.

John Werring, a fishery biologist will testify as follows: *"The Strait of Georgia ecosystem includes diverse marine, estuarine and terrestrial environments that provide habitat to a wide range of species. This ecosystem includes the Sturgeon Banks and the Fraser River estuary which encompasses the estuarine zones of the North Arm, Main Arm and Main Stem of the Fraser River. These areas are extremely important migration routes for juvenile and returning adult salmon. To leave or reach the river, the fish must cross the Sturgeon Banks and pass by the area where the Iona discharge takes place. The Fraser River estuary is also a rearing area for various salmon and trout. There are 14 fish species using the lower Fraser River that are migratory, six species having periodic migration and 18 species that are not known to migrate regularly. The Fraser River is*

home to one of the largest wild salmon runs in the entire world. The waters of Georgia Strait are fish-bearing waters. The three channels of the Fraser River also are used for irrigation, secondary-contact recreation (fishing, boating) and by industry for transportation."

"Deleterious Substance"

The plain dictionary meaning of "deleterious" is "harmful. The Acute Lethality Test determines whether or not the discharge is "acutely lethal" to fish within the 96 hour test period. In other words, it measures the rate of the *mortality of the fish* that have been put into the effluent for a 96 hour period.

On seventeen monthly testing days between the year 2000 and October 2006, the GVRD discharged primary treated sewage effluent that was acutely toxic to fish from the Iona WWTP into Georgia Strait. In the years 2005 and 2006, as required by the OC, GVRD reported these test failures in writing to the Province. The GVRD has also for some time posted these monthly toxicity test results on its web site: www.gvrd.bc.ca

(See the list of eight alleged offence days between May 3, 2005 and October 11, 2006 relating to the acute toxicity of the Iona effluent, at the end of this Synopsis.)

Section 78.1 of the *Fisheries Act* stipulates that each day a contravention of the *Act* is committed constitutes a separate offence.

In a May 1999 GVRD document entitled "Caring for Our Waterways"", the GVRD acknowledged the following: *"The **Fisheries Act** prohibits the discharge of deleterious substances into fish-bearing waters and protects fish habitat. Over the years the courts have determined that discharges that are acutely toxic to fish, based on the 96 hour fish bioassay test, are deemed to be deleterious."* (See EX. 35, p. 3-1)

GVRD and Province aware that Iona WWTP discharges are acutely toxic to fish

From 2000 until October 2006, the sewage discharged from Iona Island WWTP into Georgia Strait has regularly been acutely toxic to fish. (See 2001 GVRD Quality Control Annual Report- Ex.34)

In 2000, GVRD commissioned a consultant to conduct an assessment of the acute toxicity in the effluents from five of its WWTPs, including Iona. The study concluded that the main cause of toxicity of the primary treated Iona sewage effluent was because of the high dissolved oxygen (DO) demand. A study was again conducted in 2002 and it confirmed that the Iona effluent samples failed to meet acceptable toxicity levels mainly because of the high DO demand of the effluent.

GVRD acknowledges that primary treatment only reduces oxygen demanding substances (BOD) by 30% while secondary treatment will reduce BOD by 90%.

Environment Canada has consistently informed GVRD that its discharges of sewage effluent were subject to section 36(3) of the *Fisheries Act*. By letter dated May 15, 2001 from Environment Canada, the City of Vancouver, a GVRD member municipality, was advised "*that the GVRD must also achieve compliance with the Fisheries Act at all of its wastewater discharge points*." The May 2001 letter further stated that recent Environment Canada inspections had determined that the Iona WWTP discharges were not in compliance with the *Fisheries Act*. This letter also stated that Environment Canada was not satisfied that the LWMP which GVRD had proposed to the Province for provincial approval would meet the requirements of the *Fisheries Act*. (EX. 60)

In the months of April, June, August, October and December of 2001, and in February 2002, Environment Canada inspectors attended at the Iona Island WWTP and took samples of the sewage being discharged into Georgia Strait, for testing. Three of the six samples subsequently failed the 96 hour LC50 Acute Lethality Tests. These toxicity test failures and others were acknowledged by GVRD and GVRD recognized the fact that they were not in compliance with the *Fisheries Act*.

Environment Canada had also warned GVRD about violations at Iona by issuing a legal warning document on March 20, 2001 to George Puil, Chairman of the Board of GVRD and to Johnny Carline, Chief Administrator of GVRD. This document was entitled **"Warning Respecting An Alleged Violation,"** and it advised the recipients that the Iona effluent was found to be acutely toxic to fish after being subjected to the Acute lethality Test (EX.59)

The Iona Warning further advised the GVRD officials of GVRD obligations under the *Fisheries Act,* and of penalties thereunder. This warning also advised that," *further steps will be considered by Environment Canada if you do not take the necessary action to prevent the release of a deleterious substance."*

In GVRD's 2001 Quality Control Annual Report there is a discussion of the contaminants that were sampled in the sediments near the Iona outfall. At page 59 of this report the following appears: *"Concentrations of cadmium, silver, chlorbenzenes, p,p'-DDE, coplanar PCB #77, several PCB cogeners, nonylphenol and its ethoxlates and certain sterols showed trends in concentrations that indicated that their distribution in sedimentsd was related to the Iona outfall. A comparison of measured concentrations to relative marine sediment quality values indicated that arsenic, chromium, copper, nickel, aldrin, total DDT, lindane, acenaphthene, anthracene, flouranthene, flourene, naphthalene, phenanthrene, and bis-(2-ethylhexyl) phthalate (DEHP) exceeded sediment quality values in one or more stations."* (Sediment quality values are guidelines to protect the benthic community upon which fish depend for food.)

During the years 2000-2002, GVRD conducted a sediment quality assessment of the Iona outfall area. Albert van Roodselaar, GVRD's Senior Engineer and Regional Utility Planning Division Manager participated in the study and is a co-author of the resulting report. Sampling locations were spread in a north-south orientation, with one site located

close to the outfall (Station 9), eight sites located eight sites located north of the diffusers, (Stations 1-8) and seven sites located south of the diffusers, (Stations 10-16).

The study determined that the largest number of PCB cogeners was located at the outfall and the lowest number was located at a Station furthest south of the outfall. Further, trace organics, including PCBs, PAHs and Coprostanol were found at their highest level near the outfall. The samples were also compared to sediment quality guidelines designed to protect benthic life and the following contaminants were found to exceed the guidelines at at least one station: arsenic, chromium, copper, nickel, chrysene, flouranthene, naphthalene and Bis-(2-ethylhexyl) Phthalate. Significantly, the metals, copper and nickel exceeded the sediment quality guidelines at all 16 stations.

The 2003 GVRD Quality Control Annual Report acknowledges that, *"to date, the monitoring program has detected minor effects of the Iona outfall discharge on sediment quality and on the composition of invertebrate organisms that dwell in or on the sediments."*

A provincial government document has stated that, *"based on the 2002 data, dissolved oxygen concentrations in Burrard Inlet remain a widespread problem for the protection of aquatic life in both surface and deeper waters."* (Ex. 57, page 12)

The Burrard Inlet Environmental Action Program (BIEAP) was established in 1991 and is an inter-governmental partnership that coordinates a joint action program to improve and protect the environmental quality of the inlet. A January 2006 BIEAP report states that currents and mixing disperse the Iona effluent north on the Strait of Georgia causing it to flow into Burrard Inlet. This report indicates that both Iona and Lions Gate are a high priority in terms of influences on the inlet and the actions required to mitigate the residual risk are WWTP upgrades. (Ex.52)

On a daily basis, the Iona facility discharges over 40 tonnes of oxygen demanding substances into the Strait of Georgia.

GVRD reported to Environment Canada's National Pollution Release Inventory that in the year 2005 it had discharged from the Iona facility the following contaminants into the Strait of Georgia:

- 14 tonnes of copper;
- 332 kilograms of arsenic;
- 95 kilograms of Polycyclic Aromatic Hydrocarbons;
- 63 kilograms of Cadmium;
- 587 kilograms of lead;
- 21 kilograms of mercury; and,
- 12 tonnes of zinc.

On June 14, 2001, Mr. J. Brian Wilson, Director of the Pacific and Yukon region of the Environmental Protection Branch of Environment Canada wrote both GVRD and the Province. Mr. Wilson advised that the proposed GVRD Liquid Waste Management Plan being discussed by the Province and the GVRD would not satisfy the requirements of the federal *Fisheries Act*. In particular, Environment Canada stated that the plan only required GVRD to *"evaluate options"* for improving bioassay test results *"within the limitations of the existing liquid waste management treatment process and infrastructure."* The letter stated that *"this suggests that compliance with the Fisheries Act may not be achieved."* Further, in this letter Environment Canada advised GVRD and the Province that Environment Canada inspections had *"confirmed that discharges from the Iona and Lions Gate facilities were acutely lethal to fish, and thus in contravention of the Fisheries Act."* This letter acknowledged that GVRD was taking steps to address the toxicants in the Iona and Lions Gate effluents but the letter further states, *"However, these actions by themselves may not bring the effluent discharges from the Iona and Lions Gate facilities into compliance with the Fisheries Act. Consequently, Environment Canada intends to conduct further inspections at the facilities to verify compliance with the Fisheries Act and to take appropriate enforcement action should violations continue."* (EX.61)

Since Environment Canada wrote this letter to GVRD and the Province there have been 15 monthly acute toxicity test failures of the Iona sewage effluent. There has been no enforcement action taken by Environment Canada or by the Province.

Ten months after receiving the above letter from Mr. Wilson of Environment Canada, with the knowledge that secondary sewage treatment at Iona would eliminate the major cause of the toxicity of its effluent, the Province officially approved GVRD's Liquid Waste Management Plan on April 4, 2002. By approving the GVRD LWMP, the Province gave GVRD 18 more years, until the year 2020, to upgrade to secondary treatment.

Further, Provincial approval of the LWMP permits GVRD to violate section 36(3) of the *Fisheries Act*. The Provincially-approved LWMP permits GVRD to violate the *Fisheries Act* by acknowledging that there are toxicity violations at Iona and Lions Gate, and yet does not require these violations to cease. Rather the LWMP merely requires GVRD to determine the cause of the failed bioassay toxicity tests, and to submit an action plan *"**to significantly reduce** non-ammonia-related acute toxicity at the point of discharge."* (emphasis added) (EX.3)

This Provincial Government's approval of the LWMP was followed by the Provincial issuance of the Iona Operating Certificate on April 23, 2004. On April 28, 2004, Environment Canada thanked the Province for being offered an opportunity to comment on the draft Operational Certificate and advised the Provincial government official that even though there was an Operational Certificate, section 36(3) of the *Fisheries Act* still was applicable.

Alleged Offense Dates

If this private prosecution proceeds by way of summary conviction under the Criminal Code, there are 8 alleged offence days relating to the acute toxicity of the Iona sewage effluent. The *Fisheries Act* provides a maximum fine of $300,000 upon conviction for each day. The Province of British Columbia, GVRD and GVS&DD all have prior convictions for *Fisheries Act* offences.

Alleged offence days relating to the acute toxicity of the Iona sewage effluent discharged to the Strait of Georgia:

May 3, 2005; June 1, 2005; July 7, 2005; September 13, 2005; July 20, 2006; August 14, 2006; September 12, 2006; October 11, 2006.

APPENDIX C: SUPPORTING DOCUMENTATION FOR CASE STUDY # 3 – *MORTON V MARINE HARVEST CANADA INC.* (2009)

Court File Number 14790
Numero de dossier de la Court

CANADA: Province of British Columbia
Province de la Colombie-Britannique

Information/Denonciation

This is the information of/Les presentes constituent la denonciations de **Alexandra Morton** (the "informant"/le "denonciateur") of/de Simoom Sound, British Columbia, Biologist,

The informant says that she has reasonable and probable grounds to believe and does believe that/Le denonciateur declare qu'il a des motifs raisonnables et probables de croire effectivement que:

Count 1. Marine Harvest Canada Inc., on or about June 16, 2009, at or near Port McNeill, near the Broughton Archipelago, in the Province of British Columbia, in Canadian Fisheries Waters, did unlawfully possess fish to wit: pink salmon, contrary to section 33 of the *Fishery (General) Regulations*, thereby committing an offence under s. 78(b) of the *Fisheries Act*, R.S.C.

Count 2. M.V. Orca Warrior, on or about June 16, 2009, at or near Port McNeill, near the Broughton Archipelago, in the Province of British Columbia, in Canadian Fisheries Waters, did unlawfully possess fish, to wit: pink salmon, contrary to section 33 of the *Fishery (General) Regulations*, thereby committing an offence under s. 78(b) of the *Fisheries Act*, R.S.C.

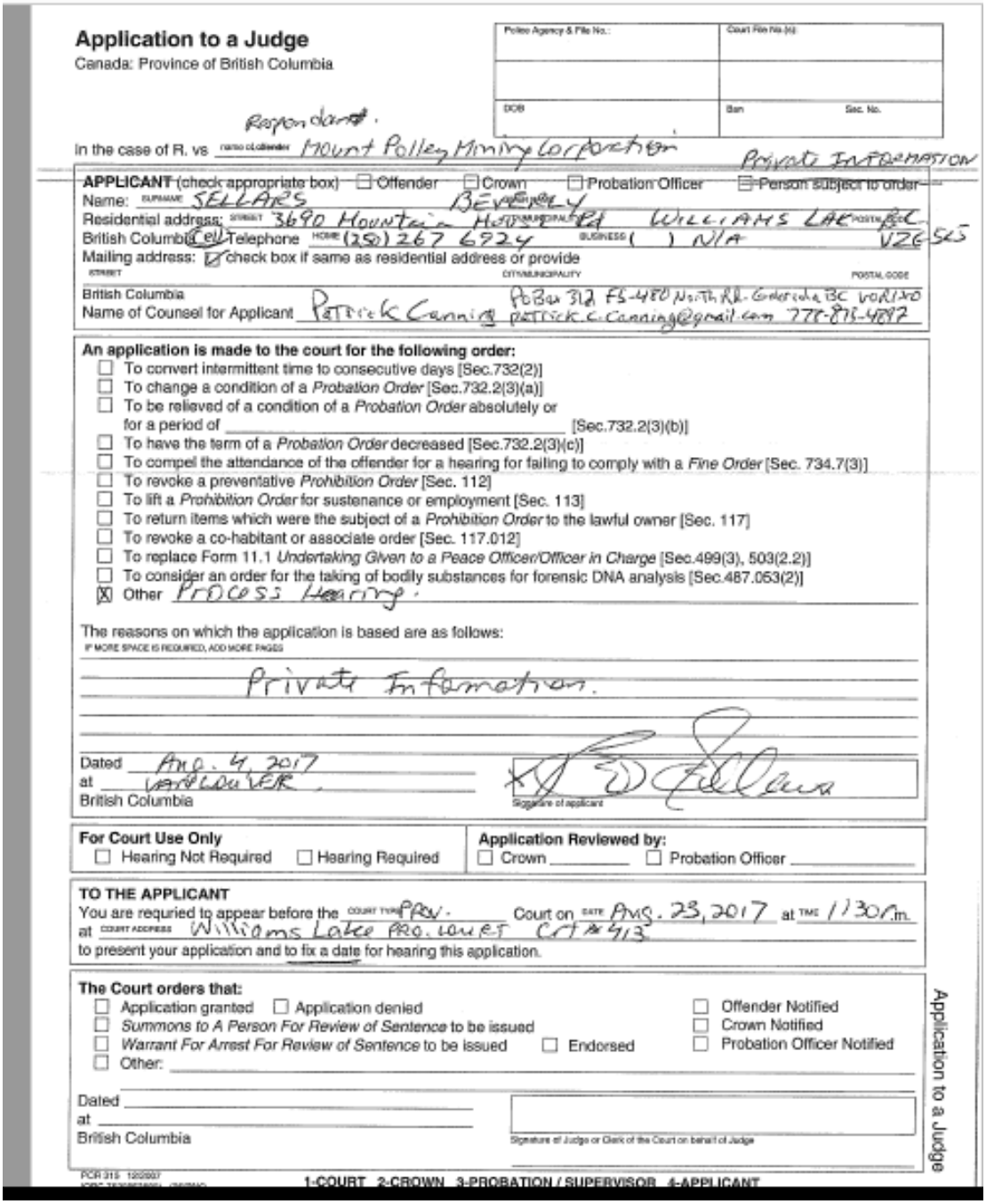
SWORN BEFORE ME/ASSERMENTE)
DEVANT MOI on/le September 15,)
2009 at Port Hardy, British Columbia/)
Colombie-Britannique)
)
_____)
A Justice of the Peace in and for the)
Province of British Columbia)
Juge de paix dans et pour la province)
de la Colombie-Britannique)

_____
Signature of Informant/Signature du denonciateur

APPENDIX D: SUPPORTING DOCUMENTATION FOR CASE STUDY #4 – LEMON CREEK (2013)

Documentation currently unavailable

APPENDIX E: SUPPORTING DOCUMENTATION FOR CASE STUDY #5 – MOUNT POLLEY (2016)



Application to a Judge
Canada: Province of British Columbia

Police Agency & File No.:	Court File No.(s):
DOB	Ban / Sec. No.

Respondent.

In the case of R. vs Name of Offender Mount Polley Mining Corporation

Private Information

APPLICANT (check appropriate box) ☐ Offender ☐ Crown ☐ Probation Officer ☒ Person subject to order

Name: SURNAME SELLARS GIVEN NAME BEVERLY

Residential address: STREET 3690 Mountain Horizon Rd CITY/MUNICIPALITY Williams Lake PROVINCE B.C. POSTAL CODE V2G 5K5

British Columbia ☒ Cell Telephone HOME (250) 267 6924 BUSINESS ( ) N/A

Mailing address: ☒ check box if same as residential address or provide

STREET CITY/MUNICIPALITY POSTAL CODE

British Columbia

Name of Counsel for Applicant Patrick Canning PoBox 312 FS-480 North Rd. Gabriola BC V0R1X0 patrick.c.canning@gmail.com 778-878-4892

An application is made to the court for the following order:

- ☐ To convert intermittent time to consecutive days [Sec.732(2)]
- ☐ To change a condition of a *Probation Order* [Sec.732.2(3)(a)]
- ☐ To be relieved of a condition of a *Probation Order* absolutely or for a period of _____ [Sec.732.2(3)(b)]
- ☐ To have the term of a *Probation Order* decreased [Sec.732.2(3)(c)]
- ☐ To compel the attendance of the offender for a hearing for failing to comply with a *Fine Order* [Sec. 734.7(3)]
- ☐ To revoke a preventative *Prohibition Order* [Sec. 112]
- ☐ To lift a *Prohibition Order* for sustenance or employment [Sec. 113]
- ☐ To return items which were the subject of a *Prohibition Order* to the lawful owner [Sec. 117]
- ☐ To revoke a co-habitant or associate order [Sec. 117.012]
- ☐ To replace Form 11.1 *Undertaking Given to a Peace Officer/Officer in Charge* [Sec.499(3), 503(2.2)]
- ☐ To consider an order for the taking of bodily substances for forensic DNA analysis [Sec.487.053(2)]
- ☒ Other Process Hearing.

The reasons on which the application is based are as follows:

IF MORE SPACE IS REQUIRED, ADD MORE PAGES

Private Information.

Dated Aug. 4, 2017
at Vancouver
British Columbia

Signature of applicant

For Court Use Only
☐ Hearing Not Required ☐ Hearing Required

Application Reviewed by:
☐ Crown _____ ☐ Probation Officer _____

TO THE APPLICANT
You are required to appear before the COURT TYPE PRov. Court on DATE Aug. 23, 2017 at TIME 1130 p.m.
at COURT ADDRESS Williams Lake Prov. Court Crt # 4/3
to present your application and to fix a date for hearing this application.

The Court orders that:
☐ Application granted ☐ Application denied
☐ *Summons to A Person For Review of Sentence* to be issued
☐ *Warrant For Arrest For Review of Sentence* to be issued ☐ Endorsed
☐ Other: _____

☐ Offender Notified
☐ Crown Notified
☐ Probation Officer Notified

Dated _____
at _____
British Columbia

Signature of Judge or Clerk of the Court on behalf of Judge

PCR 315 12/2007

1-COURT 2-CROWN 3-PROBATION / SUPERVISOR 4-APPLICANT

Application to a Judge

INFORMATION

~~Court File Number:~~

~~Vancouver~~ **Registry**

Williams Lake

Form 2

(Offence Act)

Information

Canada:
Province of British Columbia:
County of Vancouver

This is the information of Beverley Ann Sellars, Xat'sull (Soda Creek) First Nation community member, former Chief, and grandmother, called the "informant".

The informant says that she has reasonable and probable grounds to believe and does believe and state:

1. That Mount Polley Mining Corporation, being the holder of a permit, #11678, issued to it under the *Environmental Management Act*, did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce waste, including mine and other waste, into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, without having complied with the requirements of the permit, specifically, section 2.2, by discharging mine waste effluent which **bypassed designated treatment works**, contrary to Section 120(6) of the *Environmental Management Act*.
2. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce mine and other waste into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, without having complied with the requirements of Environmental Management Act Permit # 11678, section 1.2.1, which limits **annual discharge** volume to Hazeltine Creek, contrary to Section 120(6) of the *Environmental Management Act*.
3. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce mine and other waste into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, without having complied with the requirements of Environmental Management Act Permit # 11678, section 1.2.2, which limits **daily discharge** volume to Hazeltine Creek, contrary to Section 120(6) of the *Environmental Management Act*.

4. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce mine and other waste into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, without having complied with the requirements of Environmental Management Act Permit # 11678, section 1.2.4, which limits **effluent quality** to Hazeltine Creek, contrary to Section 120(6) of the *Environmental Management Act*.

5. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce mine and other waste into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, without having complied with the requirements of Environmental Management Act Permit # 11678, section 1.2.5, which mandates that Mount Polley Mining Corporation **stop discharging immediately** if the effluent exceeds limits in set 1.2.4, which they failed to do, contrary to Section 120(6) of the *Environmental Management Act*.

6. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce mine and other waste into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, without having complied with the requirements of Environmental Management Act Permit # 11678, section 2.5, which mandates having an adequate and up to date **Environmental Emergency Response Plan**, contrary to Section 120(6) of the *Environmental Management Act*.

7. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, **failed to provide 1.0 meter of freeboard plus storage for the Probable Maximum Precipitation (PMP)** in their tailings impoundment, contrary to the requirements of Environmental Management Act Permit # 11678, section 2.4.4, contrary to Section 120(6) of the *Environmental Management Act*.

8. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce or cause or allow waste, including mine and other waste produced by mining activity, to be introduced into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, in the course of conducting a prescribed industry, trade or business, namely Mining, within Item 23, Table, section 2, Schedule 1, Waste Discharge Regulation, BC Reg 320/2004, contrary to **Sections 6(2) and 120(3)** of the *Environmental Management Act*.

9. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce or cause or allow to be introduced into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, waste produced by a prescribed activity or operation, namely Mining,

within Item 23, Table, section 2, Schedule 1, Waste Discharge Regulation, BC Reg 320/2004, contrary to **Sections 6(3) and 120(3)** of the *Environmental Management Act*.

10. That Mount Polley Mining Corporation did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce or cause or allow to be introduced waste, namely mine and other waste produced by mining activity, into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, in such a manner or quality as to cause pollution, contrary to **Sections 6(4) and 120(3)** of the *Environmental Management Act*.

11. That Mount Polley Mining Corporation, being the holder of a permit, M-200, issued to it under the *Mines Act*, did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce waste, including mine and other waste, into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, having **failed to retain a qualified manager** in respect of the tailings storage facility and water balance, contrary to sections 21, 22, 24, 26, and 37(2) of the *Mines Act*.

12. That Mount Polley Mining Corporation, being the holder of a permit, M-200, issued to it under the *Mines Act*, did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce waste, including mine and other waste, into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, having **failed to reasonably respond to dam safety concerns raised by employees**, contrary to section 24 of the *Mines Act*, which requires that all reasonable measures be taken to ensure compliance with the *Mines Act*, the regulations and the **Health, Safety and Reclamation Code** for Mines in British Columbia, contrary to section 37(2) of the *Mines Act*.

13. That Mount Polley Mining Corporation, being the holder of a permit, M-200, issued to it under the *Mines Act*, did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce waste, including mine and other waste, into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, having **failed to construct the tailings storage facility in general conformance with the design** contrary to permit M-200 (August 9, 2013 amendment), and contrary to section 1.1.2 of the **Health, Safety and Reclamation Code** for Mines in British Columbia, which requires that all work be carried out without undue risk to the health or safety of any person; section 6.1.1 of the Code, which requires that the mine manager ensure that the mine works met acceptable standards of practice; and section 10.1.11 of the **Health, Safety and Reclamation Code** for Mines in British Columbia, which requires the preparation of an adequate breach and inundation study on the tailings storage facility prior to commencing operation, contrary to section 37(2) of the *Mines Act*.

14. That Mount Polley Mining Corporation, being the holder of a permit, M-200, issued to it under the *Mines Act*, did, on or about August 4th, 2014, at or near Hazeltine Creek, in

Likely, in the Province of British Columbia, introduce waste, including mine and other waste, into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, having **failed to maintain an adequate site-wide water quality model, a water management plan, and to remedy the chronic water balance issues and surplus** on the site, contrary to permit M-200 (amendments dated August 15, 2011, June 29, 2012, and June 25, 2013) and contrary to section 1.1.2 of the **Health, Safety and Reclamation Code** for Mines in British Columbia, which requires that all work be carried out without undue risk to the health or safety of any person, contrary to section 37(2) of the *Mines Act*.

15. That Mount Polley Mining Corporation, being the holder of a permit, M-200, issued to it under the *Mines Act*, did, on or about August 4th, 2014, at or near Hazeltine Creek, in Likely, in the Province of British Columbia, introduce waste, including mine and other waste, into the environment, namely Polley Lake, Hazeltine Creek and Quesnel Lake, having **failed to maintain adequate tailings beaches as required by the initial design**, contrary to the **order of an inspector** and section 1.1.2 of the **Health, Safety and Reclamation Code** for Mines in British Columbia, which requires that all work be carried out without undue risk to the health or safety of any person, contrary to section 37(2) of the *Mines Act*.

THIS INFORMATION SWORN ON AUGUST 4, 2017, CONTAINS A TOTAL OF 15 COUNTS ON 4 PAGES.

Affirmed,
~~Sworn~~ before me this 4th of August, 2017,
at Vancouver, British Columbia

(Signature of Informant)

A Justice of the Peace in
and for the Province of British Columbia.

Silvia Wendland,
S. Wendland
A Justice of the Peace in and for the Province of British Columbia

PROVINCIAL COURT OF BRITISH COLUMBIA
VANCOUVER DISTRICT
222 MAIN STREET
VANCOUVER, B.C. V6A 2S3