

PRIVATE PROSECUTIONS REVISITED: THE CONTINUING IMPORTANCE OF PRIVATE PROSECUTIONS IN PROTECTING THE ENVIRONMENT

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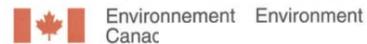
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*While under Canadian law the private prosecutor is granted considerable power to pursue his case, in practice it is a power that is very rarely exercised. The frequency of the use of the power is not in our view an accurate measure of its value ...*¹

*Society as a whole is the beneficiary where formal, positive citizen interaction with the justice system results in some additional control over official discretion.*²

Law Reform Commission of Canada, 1986

In the late 1960s and early 1970s when Canadians awakened to the reality of a growing environmental crisis, lawyers, environmental groups and concerned citizens urgently searched for effective legal remedies. Civil actions and judicial review were largely unavailable because of the absence of substantive environmental rights, the discretion granted by statute to government, the threat of adverse costs awards, *locus standi* requirements, and other barriers to environmental justice. One of the first tools they turned to was the private prosecution. Forty years later, the urgency of the need to protect the environment persists, and private prosecution is sometimes still the most effective legal tool available to individuals and Environmental Non-governmental Organizations (ENGOS) to combat violations of environmental laws. The continuing relevance and importance of environmental private prosecutions is demonstrated by the recent success of private prosecutions in the *Synchrude* and *Cadillac Fairview* cases described below.

REQUESTS FOR INVESTIGATION (PRIOR TO PRIVATE PROSECUTION)

In the best of all worlds, private prosecutions would not be necessary. If a citizen brought concerns about violations of the law to police or a regulatory agency, they would be investigated and, if supported by the evidence, the law would be enforced by trained and

¹ Law Reform Commission of Canada, *Private Prosecutions*, Working Paper 52 (Ottawa: Law Reform Commission of Canada, 1986) at 27, online: Law Reform Commission of Canada <<http://caledoniavictimsproject.files.wordpress.com/2010/04/1986-law-reform-commission-working-paper-privateprosecution.pdf>>. The Commission noted that these powers are greater in summary conviction matters. The Commission recommended that the anomalies restricting the rights of a private prosecutor for indictable offences be removed.

² *Ibid* at 28. The Commission goes on in the same paragraph to say:

... the form of retribution which is exacted by the citizen's resort of legal processes is clearly preferable to other unregulated by the citizen's resort of legal processes is clearly preferable to other unregulated forms of citizen self-help. Further, the burgeoning case-loads which our public prosecutors routinely shoulder are, in some small measure at least, assisted by a system which provides an alternative avenue of redress for those individuals who feel that their cases are not being properly attended to within the public prosecution system. Finally, it is our belief that this form of citizen/victim participation enhances basis democratic values while at the same time ... promotes the general image of an effective system of administering justice within the Canadian state.

objective Crown Attorneys or lawyers employed by regulatory agencies to enforce the law. However, this ideal world does not exist. In the real world, law enforcement agencies are often understaffed, under-resourced, untrained, and reluctant to prosecute or employ other enforcement tools such as orders — particularly where the alleged offender is another government body or even their own department.

In view of the obvious challenges, few people contemplating a private prosecution of a regulatory offence will launch into such a case without first seriously considering or exhausting other options. The first option is always to report an infraction to the relevant government agency, such as the abatement or investigations branch of the Ministry of Environment. Where this is unsuccessful, a more formal request for investigation (pursuant to relatively new citizen engagement tools) can be made. Unfortunately, since the history of such requests is quite discouraging,³ the person involved will want to carefully consider likely delays — and the impact on the evidence or limitation periods — to reach a realistic expectation of government involvement.

Various federal laws also provide *request for investigation* rights. For example, section 17 of the *Canadian Environmental Protection Act* provides for formal requests for investigation by a citizen along with relevant timelines that are to be followed. A similar process exists under section 93 of the *Species at Risk Act*. Under subsection 22(1) of the *Auditor General Act* individuals may file *petitions* with a federal government ministry. The petition can include a formal request that a particular violation be investigated.⁴ In practice, such requests more often lead to frustration instead of action on alleged violations.

As a matter of public policy, a government monopoly on law enforcement is not necessary. Private prosecutions are essential to promoting the societal goals of access to justice, government transparency, and government accountability. Nowhere is this more true than in environmental protection regimes. As noted by the Law Reform Commission of Canada in 1986:

³ Section 74 of Ontario's *Environmental Bill of Rights, 1993*, SO 1993, c 28, for example, allows two citizens to sign a formal request for investigation to prescribed ministries under prescribed acts including the *Environmental Protection Act*, *Ontario Water Resources Act* and other environmental statutes. The Environmental Commissioner of Ontario (ECO) reports that in the first decade of this provision, about 36% of requests for investigation were investigated (Source: ECO, Powerpoint presentation, 17 June 2008, David McRobert, Legal Counsel, at ENGO EBR workshop). However, even where such requests lead to an "investigation" this is often little more than a bureaucrat exercise not involving investigators but rather a decision based on political considerations aimed at forgoing non-compliance charges. Investigations very rarely lead to charges.

⁴ Such petitions are forwarded to the relevant ministries and timelines and responses reviewed by the Commissioner for Sustainable Development and the Environment (CESD) — an office created under the Act. (The CESD, however, has no authority to force a minister to act — and there is little redress where legislated timelines by government actors are ignored.)

Certain kinds of offences may be more likely to inspire a citizen or a group to launch a private prosecution. Offences relating to environmental quality and consumer protection ... are those that most readily spring to mind. ... Large groups of people are committed to the enforcement of the values contained in this type of legislation. It is this type of quasi-crime or regulatory offence that seems most likely to be given a lower priority in the public prosecutor's or Crown attorney's scale of importance.⁵

THE ROLE OF THE PRIVATE PROSECUTOR AT COMMON LAW AND UNDER CANADIAN STATUTES

Historically, a citizen in Britain had a generally unrestricted common law right to prosecute any statutory offence. This ability to prosecute offences has been referred to as a 'basic' right and continues to this day.⁶ Under its *Criminal Code*, Canada has adopted the criminal law of England except as altered or varied by the Code or any other federal statute. As the Code and other federal statutes have not prohibited private prosecutions (except in a few situations where a statute provides, for example that prosecution requires the consent of the Attorney General or a Minister of an enforcement agency), the Canadian citizen has the same right to prosecute criminal and other federal offences as he or she had at common law, at least for summary conviction offences.⁷

The same is true of provincial offences, whether prosecuted under the summary conviction procedures in the *Criminal Code* or under provincial statutes. For example, in Ontario prosecutions for violations of provincial statutes and municipal by-laws are conducted under the *Provincial Offences Act (POA)*, rather than under the summary conviction provisions of the *Criminal Code*. The *POA* explicitly provides for private prosecutions for any proceedings commenced by an Information.⁸

THE ROLE OF THE ATTORNEY GENERAL IN PRIVATE PROSECUTIONS

Although well established, the right to prosecute privately is not entirely unfettered. The Attorneys General of the provinces have the right to intervene in a private prosecution.

⁵ Law Reform Commission of Canada, *supra* note 1 at 3.

⁶ Richard Jackson, *The Machinery of Justice in England*, 5th ed (Cambridge: Cambridge University Press, 1967) at 129-301.

⁷ Section 504 of the *Criminal Code* provides that "anyone" who has reasonable grounds to believe that another person has committed an indictable offence may lay an Information before a justice of the peace. "Anyone" clearly includes a private prosecutor. *Criminal Code*, RSC 1985, c C-46, s 504.

⁸ *Provincial Offences Act*, RSO 1990, c P.33, s 23 [*POA*]; s 3 of Alberta's *Provincial Offences Procedure Act*, RSA 2000, P-34 [*POPA*], provides that the provisions of the *Criminal Code* dealing with summary conviction offences apply to all matters to which the *POPA* applies; therefore, it does not prevent private prosecutions for violations of Alberta statutes and municipal bylaws.

They may withdraw or stay charges or proceed with the charges. If the Attorney General withdraws or stays a charge, s/he may substitute his or her own Information and proceed or simply prevent the prosecution from proceeding. One of the few restraints placed on this discretion is that once an Information is before a justice, the Attorney General cannot *withdraw* charges until after the justice has decided whether to issue process.⁹ However, this restriction does not prevent the Attorney General from *staying* charges at any time after the Information has been laid.¹⁰ It has been held that the constitutional duty of the Crown to consult First Nations before making decisions affecting their rights does not include a duty on the part of the Attorney General to consult a First Nations informant before staying his or her prosecution.¹¹

THE ROLE OF THE COURTS IN SUPERVISING PRIVATE PROSECUTIONS

While the Attorney General has almost limitless power to stay or take over a private prosecution, the courts have much more limited powers that are largely restricted to preventing abuse of process. Basically, the courts have the same power to control the integrity of their process in private prosecutions as they do in relation to public prosecutions. As one Ontario court stated, "... proceeding with a private prosecution under the *POA* is a statutorily granted right which the courts should be loath to tamper with lightly".¹²

RECOMMENDATIONS FOR REFORM OF PRIVATE PROSECUTION

Where the British or the Canadian system of penal law has been examined, private prosecutions have either been considered so uncontroversial as to merit little or no mention (for example, the Martin Committee Report)¹³ or the commentators have recommended that private prosecutions be retained.¹⁴ When Ontario passed its *POA* in

⁹ *Dowson v The Queen*, [1983] 2 SCR 144. See also, *Buchbinder v The Queen*, [1983] 2 SCR 159.

¹⁰ *R v McHale*, 2010 ONCA 361.

¹¹ *Labrador Metis Nation v Canada (Attorney General)*, 2005 FC 939. The case, incidentally, was an environmental prosecution — a charge against the Province of Newfoundland and Labrador for alleged destruction of fish habitat contrary to s 35 of the *Fisheries Act*. Upheld, 2006 FCA 393.

¹² *Sanford v Ontario Realty Corp* (2003), 2 CELR (3) 288 (ONSC).

¹³ G Arthur Martin, Chair, ed, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993) [Martin Committee Report]; Criminal Justice Review Committee, *Report of the Criminal Justice Review Committee* (Toronto: Queen's Printer for Ontario, 1999); Law Commission of Ontario, *Modernization of the Provincial Offences Act: Final Report* (Toronto: Law Commission of Ontario, August 2011), online: <<http://www.lco-cdo.org>>.

¹⁴ *Supra* note 1; Justice (Society) Criminal Justice Committee, *The Prosecution Process in England and Wales* (London, UK: Justice Educational and Research Trust, 1970); Peter Burns, "Private Prosecutions in

1979, the Legislature provided for the right of any person to commence a private prosecution by laying an Information, on the basis that the obligation of a private prosecutor to satisfy a Justice of the Peace that there are reasonable and probable grounds for believing the offence has been committed and to swear that belief provides an adequate safeguard to prevent abuse of the prosecution process.¹⁵

The key reasons for retaining private prosecutions (apart from the fact that there are very few of them) is that they provide access to justice (recognized as a ‘Charter value’) and that they enhance government accountability. One commentator went so far as to suggest that it was not only the privilege but the duty of the private citizen to preserve the King’s Peace and bring offenders to justice.¹⁶

A related reason for supporting private prosecutions is that they assist the State to enforce its laws when it has insufficient resources for vigorous enforcement. Although seldom recognized today, the need for such assistance was once considered so important that statutes were passed which encouraged private prosecutions by providing that fines levied by the courts be shared with the prosecutor. At least one of these provisions has survived for centuries and remains in our statute books to this day.¹⁷ The view that government officials no longer need private assistance in carrying out their enforcement duties is undermined by the fact of cutbacks to government enforcement staff and department budgets, as recorded in recent Hansard debates and the media.¹⁸

Canada: The Law and a Proposal for Change” (1975) 21 McGill LJ 269; Law Reform Commission of Canada, *supra* note 2.

¹⁵ JD Drinkwalter & JD Ewart, *Ontario Provincial Offences Procedure* (Toronto: Carswell, 1980) at 79. Drinkwalter and Ewart note at 48 that while private prosecution may continue under Part III of the *POA*, which deals with prosecutions commenced by the traditional Information, private prosecutions are not available under Part I which provides for the more streamlined approach of issuing ‘tickets’ because of the default consequences and because the Act ensures ministerial accountability for issuing offence notices or a Part I summons.

¹⁶ See BM Dickens, “Control of Prosecutions in the United Kingdom, (1973) Int’l & Comp LQ 1, 2, cited in Burns, *supra* note 14.

¹⁷ The *Fishery (General) Regulation*, SOR/93-53, s 62, issued pursuant to the *Fisheries Act*, RSC 1985, c F-14, provide that one half of any fine resulting from a private prosecution is paid to the private informant.

¹⁸ See for example, Paul McLeod, “Ottawa axes fisheries staff, offices” *The Chronicle Herald* (27 June 2012) online: <<http://thechronicleherald.ca/canada/111543-ottawa-axes-fisheries-staff-offices>>; Fisheries and Oceans Canada, “Quarterly Financial Report for the quarter ended June 30, 2012”, online: <<http://www.dfo-mpo.gc.ca/qfr-rft/2012-13/Q1-eng.htm>>; Mark Hume, “Austerity Measures threaten to sink salmon biologist jobs” *The Globe and Mail* (26 October 2012), online: <<http://www.theglobeandmail.com/news/british-columbia/austerity-measures-threaten-to-sink-salmon-biologist-jobs/article4677593/>>; Rob Ferguson, “Ministry of Natural Resources job cuts, office closures coming, province says” *The Toronto Star* (28 June 2012), online: <http://www.thestar.com/news/canada/2012/06/28/ministry_of_natural_resources_job_cuts_office_closures_coming_province_says.html>.

ADVANTAGES OF PRIVATE PROSECUTION AS A TOOL FOR CITIZENS: COSTS AND STANDING ISSUES

As indicated earlier, prosecutions have a number of advantages over civil actions and applications for judicial review as a method of enforcing environmental laws. Most importantly there is no ‘standing’ barrier since the prosecutor need suffer no harm or loss from the offence to have the right to prosecute. Secondly, although the prosecutor cannot recover costs from the defendant if successful, no costs may be awarded against the prosecutor who fails to secure a conviction, except in the most exceptional circumstances.¹⁹ Moreover, this immunity from costs largely also applies to an appeal of an acquittal.

DISADVANTAGES OF PRIVATE PROSECUTIONS: THE DIFFICULTY OF SECURING EVIDENCE (AND DISCLOSURE)

Success in a prosecution, whether by a public or a private prosecutor, is challenging because the prosecutor must meet the criminal onus of proving the offence beyond a reasonable doubt rather than the civil burden of proof on the balance of probabilities. One reason there will never be an ‘open floodgate’ problem with private prosecutions is the difficulty of securing sufficient evidence to meet this onus or to rebut a due diligence defence. Although it is not necessary for the prosecutor to prove a lack of due diligence to the criminal standard, it can be difficult for any prosecutor to obtain even enough evidence of lack of due diligence to rebut the evidence of reasonable care adduced by a defendant. It is particularly difficult for a private prosecutor to obtain evidence of lack of due diligence. Although the prosecutor has no legal onus to prove lack of due diligence, as a practical matter it is difficult to succeed without at least some such evidence. As Dickson CJC pointed out in *Sault Ste. Marie*, it is fair to put the onus on the defendant to establish due diligence because the defendant will usually have whatever information exists about the steps taken to prevent the offence.²⁰ Despite the onus on the defendant, prudence usually dictates that a public enforcement body or a private prosecutor have at least some evidence of lack of due diligence, rather than relying solely on the defendant’s onus.

¹⁹ In one of Ontario’s earliest private prosecutions, the Court convicted the defendant of operating a charcoal plant without the required approval under the *Environmental Protection Act*. But the judge, feeling that the prosecution was unnecessary since he considered the Ministry of the Environment to have matters well in hand, awarded costs against the successful prosecutor. The costs award was overturned on appeal. See, *R v Adventure Charcoal Enterprises Ltd* (1972), 9 CCC (2d) 81; see also, “Charcoal plant fined \$500 in first private prosecution under Ontario *Environmental Protection Act*” Canadian Environmental Law News (April 1972) at 1.

²⁰ *R v Sault Ste Marie*, [1978] 2 SCR 1299 per Dickson CJC, “In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence.”

The most serious practical problems facing the private prosecutor, especially in relation to environmental statutes, relate to obtaining the evidence necessary to prove the charge.²¹ The government enforcement agency has inspectors and investigators. The inspectors have authority to enter business premises to carry out inspections while the legislation often contains a requirement that a regulated business cooperate with the inspector. The private prosecutor has no such tool available. Once the focus of an inspection turns to investigation and the collection of evidence for possible prosecution, a search warrant may be needed.²² The *Criminal Code* and provincial offences legislation do not appear to prevent a Justice issuing a search warrant to a private individual, but the authors are not aware of a private prosecutor ever successfully applying for a search warrant — and the request for a warrant by a private party is very likely to be met with significant skepticism. Freedom of information statutes provide for access to certain government information on request, but are subject to broad exceptions and involve lengthy delays that may exceed prescribed time limits for the laying of charges.

Government officials may choose to voluntarily share evidence with a private prosecutor without the need for a formal request under freedom of information laws, but as noted by S.H. Berner in a study on private prosecutions,²³ “the government may, in effect, be indifferent, in the sense that it would neither assist the private prosecutor nor actively hinder him in his efforts; or the government may be quite antipathetic and prepared to bar the private prosecutor’s way entirely if it can”.

In addition, a private prosecutor may persuade a justice to issue a subpoena to government officials to attend court and bring with them the relevant evidence. This is a gamble, however, as the government official has no duty to speak to or to produce the documents to the prosecutor until called to the witness stand. Moreover, a subpoena can be issued only after process has been issued, and the prosecutor must obtain sufficient evidence to be able to swear that he or she has reasonable grounds for laying charges (and in the case of prosecutions for federal offences, to satisfy a *pre-enquete* justice) *before* the court issues process.

In addition, since disclosure obligations almost certainly apply equally to a private prosecutor as they do to a public prosecutor, a private prosecutor must both anticipate this obligation in terms of gathering documentary and other evidence and also be diligent in terms of its disclosure.

²¹ See, for example, SH Berner, *Private Prosecution & Environmental Control Legislation: A Study Commissioned by the Department of the Environment* (Vancouver: Faculty of Law, University of British Columbia, September 1972) at 22-26.

²² An inspection becomes an investigation, necessitating a warrant, where the predominant purpose of an inquiry is the determination of a person’s penal liability, see *R v Jarvis*, 2002 SCC 73; *R v Ling*, 2002 SCC 74.

²³ *Supra* note 16 at 23.

PRACTICES OF DIFFERENCE JURISDICTIONS ON WHETHER TO ALLOW PRIVATE PROSECUTIONS TO PROCEED

Whether you will be allowed to pursue a prosecution depends on where you live. BC and Alberta have traditionally stayed private prosecutions. Alberta had a “blanket policy that the Attorney General takes conduct of all criminal prosecutions in Alberta (other than those conducted by the federal Attorney General) and that such prosecutions are based on an investigation conducted by the appropriate government agency”.²⁴ However, in recent years Alberta has at least once laid its own charges and pursued the case to trial. After a private prosecutor laid charges against Syncrude under Alberta’s *Environmental Protection and Enhancement Act* for the April 2008 deaths of 1600 ducks that landed on a Syncrude tailings pond, Alberta substituted its own charges and proceeded to trial on those charges. The company was found guilty in June 2010 and fined \$800,000 as well as agreeing to donate over \$2,200,000 to various environmental projects.

The Federal Government has also stayed environmental private prosecutions. For example, in 2004, the Attorney General of Canada stayed private prosecutions against the Province of Newfoundland and Labrador for allowing the destruction of fish habitat contrary to the federal *Fisheries Act*. However, the federal government does not have a policy of staying all prosecutions. The Department of Justice Federal Prosecution Service Deskbook, which guides the exercise of prosecutorial discretion by federal prosecutors, has a chapter on private prosecutions which “endorses the important role that members of the public play in enforcement of the law”. The federal government’s policy on whether to intervene in private prosecutions requires Crown counsel to consider, *inter alia*,

- The need to strike an appropriate balance between the right of the private citizen to conduct a prosecution as a safeguard in the justice system and the responsibility of the Attorney General for the proper administration of justice
- The seriousness of the offence
- Whether there is a reasonable prospect of conviction
- Whether the public interest would not be served by continuing the proceedings
- Whether the decision to prosecute was made for improper motives

²⁴ Shaun Fluker, “Remembering Martha Kostuch: The Private Prosecution and the Oldman River Dam” (29 September 2008) ABlawg.ca, online: <<http://ablawg.ca/2008/09/29/remembering-martha-kostuch-the-private-prosecution-and-the-oldman-river-dam/>>.

- Whether it is in the interests of the proper administration of justice for the prosecution to remain in private hands.²⁵

On at least two occasions the federal government has laid its own charges following initiation of a private prosecution. In the *Syncrude* case above, in addition to the charges laid by the Alberta government under the provincial environmental statute, the federal government laid charges of harming the ducks contrary to the *Migratory Birds Convention Act*. In British Columbia, the private prosecution of Alexandra Morton against a salmon farm company for killing wild salmon was stayed but the federal Public Prosecutions Service then laid four of its own charges on the same facts (the case is ongoing).²⁶

In contrast, Ontario allows private prosecutions to proceed or takes them over but may proceed to trial rather than staying or withdrawing them. Ontario has obtained convictions on cases in which it intervened, such as the *Snow* case referred to below. In 2001, The Attorney General of Ontario took over a private prosecution against the Ontario Ministry of the Environment for alleged violations of the *Ontario Water Resources Act* alleging continuous discharges of heavy metals into the Moira River from the former Deloro mine site. The trial became the longest environmental trial in Canadian history. At its end, the Court ruled that the Ministry had committed the *actus reus* of the offence but acquitted on the basis that the Ministry had exercised due diligence.²⁷

Whether it is healthy for the integrity of the administration of justice to have some provinces in which meritorious private prosecutions are allowed to proceed while other provinces have a blanket policy of staying all or most private prosecutions is a matter that deserves serious consideration.

CROWN CONSENT, NOTICE TO CROWN, AND THE *PRE-ENQUETE*

In a number of jurisdictions around the world, the prior consent of the Crown is required for a private prosecution. This requirement has generally not been adopted in Canada given the continuing acceptance of the importance of such prosecutions. There are, however, particular provisions of acts such as the *Criminal Code* that specifically require the Attorney General's consent. Various federal and provincial laws in Canada require some form of notice of the private prosecution to the Crown. Where federal criminal procedure applies, then the notice also serves to allow the federal Crown to participate in the *pre-enquete* hearing.

²⁵ Public Prosecution Service of Canada, "The Federal Prosecution Service Deskbook — Chapter 26 Private Prosecutions", online: <<http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch26.html>>.

²⁶ Mark Hume, "Ottawa takes over prosecution of salmon farm" *The Globe and Mail* (21 April 2010), online: <<http://www.theglobeandmail.com/news/british-columbia/ottawa-takes-over-prosecution-of-salmon-farm/article1541338/>>.

²⁷ *R v Ontario (Ministry of the Environment)* (27 June 2001) (OCJ) Dorval J.

The *pre-enquete* is an additional screening measure to prevent improper private prosecutions under the *Criminal Code* and other federal regulatory statutes such as the *Fisheries Act* or the *Species at Risk Act*. A justice who receives an Information laid by a private prosecutor and determines that it complies with the requirements for a valid Information must select a date upon which a hearing (the *pre-enquete*) will be conducted to determine whether to issue a summons or warrant to the person accused in the Information. The justice is required to hear and consider “the allegations of the informant and the evidence of the witnesses”. Section 507.1 (*Referral When Private Prosecution*) of the *Criminal Code* requires that the Attorney General receive a copy of the Information, notice of the hearing, and an opportunity to attend and participate in the hearing by calling or cross-examining witnesses. In doing so, the Attorney General is not considered to have intervened in the case — and the private prosecutor can therefore retain carriage of the case.

The purpose of the *pre-enquete* is also to prevent frivolous or vexatious prosecutions from reaching the courts.²⁸ In *R. v. Vasarhelyi*, the Ontario Court of Appeal emphasized the gatekeeping function of the *pre-enquete*, holding that it “serves as an important control over invocation of the criminal process to further the fevered imaginings of a private informant”.²⁹

The accused need not be notified and has no right to participate in the *pre-enquete*, which is usually conducted *ex parte* and *in camera*.

The current regime for private prosecutions, including the procedure for the *pre-enquete*, came into force on July 23, 2002. However, the taking of evidence at a *pre-enquete* is governed by provisions for evidence at preliminary inquiries which were added by amendment in 2004.³⁰ Unlike a pre-hearing on an Information laid by a law enforcement officer, where evidence must only be presented if required by the presiding Justice, subsection 507.1(3)(a) of the *Criminal Code* requires a private informant to provide evidence of witnesses at the *pre-enquete*.³¹ This evidence must show or tend to show the commission of the offence.³² By contrast, evidence which amounts to an “amalgam of unshakeable beliefs, unbridled speculation and patent animus”, and which leaves

²⁸ *McHale v Ontario (Attorney General)*, 2010 ONCA 361 at para 65, per Watt JA.

²⁹ *Vasarhelyi*, *infra* note 30 at para 39.

³⁰ The ss 540(7)-(9) of the *Criminal Code* govern what evidence must be adduced at a *pre-enquete*. These provisions have been in force since 1955. One must connect a series of related provisions to reach this result: s 507.1(8) incorporates by reference ss 507(2)-(8), which includes s 507(3)(b). This section requires “evidence to be taken in accordance with s 540 in so far as that section is capable of being applied”. Subsections 540(7)-(9) therefore set the standard for *what* the justice may receive as evidence at a *pre-enquete*. For a full discussion, see *R v Vasarhelyi*, 2011 ONCA 397 at paras 39-48 [*Vasarhelyi*], per Watt JA.

³¹ *Ibid.*

³² *Ibid* at para 56.

“untouched many, if not most essential elements of the offences alleged in the Information” will not meet the standard in section 507.1.³³

Under subsection 579(1) of the *Criminal Code* the Attorney General may at any point after proceedings are commenced and prior to the conclusion of the case intervene to stay the charges or take over carriage of the prosecution. Under section 579.01 the Attorney General is allowed to call evidence in the trial itself and to cross-examine witnesses without actually intervening in the case.

Provincial Charges

The Ontario *POA* does not require that the Crown be notified of a private prosecution. However, since the *Crown Attorneys Act* gives the Crown the right to oversee private prosecutions and to intervene,³⁴ there are obvious advantages to notifying the Crown early to avoid an intervention at a later stage in the trial. The same is true of comparable British Columbia legislation, namely the *Offence Act* and the *Crown Counsel Act*.

Under Ontario’s *POA*, the requirements that an informant swear an Information based on reasonable and probable grounds together with the ability of a justice of the peace to refuse to issue process and the power of the Attorney General to intervene have been considered sufficient safeguards against abusive private prosecutions.

THE POWER TO APPEAL

The private prosecutor has a common law right to bring a prosecution. However, there is no common law right carried over from British law for any prosecutor, public or private, to appeal an acquittal. Accordingly, the private prosecutor, like the public prosecutor, can appeal an acquittal only where given this power by statute. Appeals from *Criminal Code* summary trial acquittals can be taken by a private prosecutor because subsection 748(b) of the *Criminal Code* provides for this. There is no similar statutory power to appeal in relation to indictable proceedings, so no such power exists. In practice, this is of little consequence, since environmental prosecutions will almost always proceed by way of summary conviction.

Under Ontario’s *POA*, the ‘prosecutor’, defined as the person who lays the Information or his or her agent, has the same right to appeal an acquittal as the Attorney General.³⁵

³³ *Ibid* at para 63.

³⁴ RSO 1990, c C.49, s 11(1).

³⁵ *POA*, *supra* note 8, ss 1 and 116(1).

COSTS

As noted earlier, unlike civil litigation, a private or public prosecutor need not fear an adverse costs award if the case results in an acquittal. By the same token, the private prosecutor will not benefit monetarily if a conviction results. If a fine is imposed in the case of a successful private prosecution, then the fine will simply be paid into government coffers. One notable exception is the *Fisheries Act*, which stipulates that the private prosecutor will receive half of any penalty imposed.³⁶ This ‘fine-splitting’ provision enables a private prosecutor to recover some of the significant costs that may have been incurred in mounting a case.³⁷ In this way, private prosecutions may actually be encouraged.³⁸

In both provincial offences and criminal cases the underlying philosophy is that costs are neither sought nor paid by the Crown because, unlike the situation in civil proceedings, the Crown is bringing its cases in the public interest. This applies to private prosecutions as well. The fact that costs are not awarded to a winning party might also be seen as a deterrent to private prosecutions given the significant expense involved. This is particularly true in regulatory, public welfare law cases — and more so where the prosecution is brought merely as a “test case”.³⁹

At the trial stage, while there is no statutory right to costs on acquittal under the *POA*,⁴⁰ a defendant may have a Charter-based right to costs if the prosecutor demonstrated “a

³⁶ *Fishery (General) Regulation*, *supra* note 17, states in s 62(1) that:

Where an information is laid by a person in circumstances other than those referred to in section 60 [federal prosecutor] or 61 [provincial prosecutor] relating to an offence under the Act, the payment of the proceeds of any penalty imposed arising from a conviction for the offence shall be made

(a) one half to the person; and

(b) one half to the Minister or, where all of the expenses incurred in the prosecution of the offence are paid by a provincial government, to that provincial government.

³⁷ The ‘fine-splitting’ provision in the *Fisheries Act* was challenged by the defendants in a private prosecution for the escape of landfill leachate involving the City of Kingston on the basis that it violated the common law relating to maintenance and champerty. The case was ultimately decided on other grounds. *Fletcher v Kingston (City)* (2004), 70 OR (3d) 577 (ONCA) varying in part *Fletcher v Kingston (City)* (7 June 2012) (ON SCJ); overturning convictions of the private informant *Fletcher v Kingston (City)* (1998), 28 CELR (NS) 229 (OCJ – Prov Div).

³⁸ In his forward to Linda Duncan, *Enforcing Environmental Law: A Guide to Private Prosecution* (Edmonton: Environmental Law Centre, 1990), John Swaigen notes that:

Perhaps it is because of the potential of private prosecutions to reveal so dramatically government ineptitude, that governments are so hostile towards private prosecutions, and attempt to establish a monopoly over prosecution of environmental statutes. This was not always the case. There was a time when government welcomed the assistance of the private prosecutor. During the eighteen hundreds, government agencies and the courts explicitly recognized the need for such assistance from the public and encouraged private prosecutions by providing that half of any fine imposed by the court was payable to the person laying the charge. Ontario’s Municipal Act contained such a provision until the 1960s

³⁹ *R v Garcia* (2005), 194 CCC (3d) 361 (ONCA).

⁴⁰ *R v Roberts*, [2001] OJ No 4645 (OCJ).

marked and unacceptable departure from the standards customarily expected of the Crown” during the trial.⁴¹ This standard is a high one and is rarely met.

Beyond this Charter right, section 809 of the *Criminal Code* allows for the making of a costs award in summary conviction matters, but these costs are restricted to nominal amounts set out in the Schedule (s. 840) to the Act for such things as the attendance of a witness (\$4).

A costs award⁴² at the appeal stage is only slightly more likely but still rare — whether in the case of a public or private prosecutor. The case law reveals only the rarest of cases where costs are actually awarded, and the standard used is the same as that for a Charter-based right to costs upon acquittal — namely, “a marked and unacceptable departure” from the proper standard of conduct.⁴³

In *R. v. Goodfellow* (2009), costs were awarded on appeal because at trial the prosecutor demonstrated a “basic misunderstanding of the law”, did not provide disclosure of essential witness statements, and failed to correct the presiding Justice of the Peace when it was objectively clear his “lack of patience and ... biting sarcasm” created an unfair trial process.⁴⁴

The biggest hurdle for a private prosecutor will simply be the cost of mounting a prosecution. The cost of sampling, analysis, and experts — if they have to be paid in full — will present a significant impediment. In addition, time and resources that have to be dedicated to meeting disclosure obligations are equally, if not more, onerous.

A prosecutor (whether private or public) may also face a civil suit for malicious prosecution. The burden on a plaintiff for proving this tort is, however, so high that the prospect of such a suit need never worry a prosecutor proceeding in good faith.

EXAMPLES OF SUCCESSFUL OR INFLUENTIAL PRIVATE PROSECUTIONS

Private prosecutions are usually brought as a last resort, after repeated requests to government officials to enforce the law have been rebuffed. One environmental private

⁴¹ *Ontario v 974649 Ontario Inc*, [2001] SCJ No 79, 159 CCC (3d) 321 [*Dunedin Construction*].

⁴² Subsection 129(1) of Ontario’s *POA* reads: “Where an appeal is heard and determined ... the court may make any order with respect to costs that it considers just and reasonable.”

⁴³ *R v Hallstone Products Ltd* (1999), 140 CCC (3d) 145. Furthermore, there is no jurisdiction at the Ontario Court of Appeal to award costs on a leave application: *R v Laundry* (1996), 93 OAC 100 (ONCA); *R v Rankin*, 2007 ONCA 426. There is a “reluctance” to order costs on prerogative writ matters, as well as their appeals: *R v 1353837 Ont Inc* (2005), 74 OR (3d) 401 (ONCA); *R v Felderhoff* (2004), 180 CCC (3d) 498 (ONCA).

⁴⁴ 2009 ONCJ 543 at paras 24-34 per Bishop J.

prosecutor has noted that typically she launched a private prosecution only after government bodies had been trying unsuccessfully to negotiate compliance for a prolonged period of time but remained unwilling to turn to prosecution.⁴⁵ As one of the authors of this paper has noted elsewhere, prosecution often succeeds in quickly getting offenders to spend money on corrective actions where prolonged efforts to persuade or to negotiate compliance have had no results.⁴⁶ This is true of both government and private prosecutions.

Private environmental prosecutions have historically been very successful in setting positive legal precedents, influencing government policy, publicizing serious environmental concerns, and spurring industries (and government offenders) to greater action to prevent the continuation of breaches of statutory duties. They continue to be effective in achieving those goals even today.

Private prosecutions have been successful in achieving some of these goals even when unsuccessful in court. For example, private charges against a noisy bedspring factory in Toronto in 1976 were quashed because of a drafting error in the Information. The charges, however, led to the Ministry of Environment issuing a control order. Ultimately, the company was prompted by the charges and the control order to move to a more isolated location. In addition, the publicity generated by the prosecution resulted in the Ministry announcing that it was reversing its policy of not prosecuting noise violations under the *Environmental Protection Act (EPA)*. The Ministry had drafted a regulation but later abandoned this approach in favour of drafting a model municipal noise control bylaw to be enforced by municipalities. During both these periods, which together lasted several years, the Ministry refused to enforce section 14 of the *EPA*, which made it an offence to emit noise likely to interfere with the enjoyment of property.⁴⁷

Other cases with successful or influential results include:

⁴⁵ Marilyn Kansky, "Private Prosecutions from the Public's Perspective" in Linda Duncan, ed, *Environmental Enforcement: Proceedings of the National Conference on the Enforcement of Environmental Law* (Edmonton: Environmental Law Centre, 1985).

⁴⁶ John Swaigen, "A Case for Strict Enforcement of Environmental Statutes" in Duncan, *supra* note 18.

⁴⁷ In February of 1973, the Ministry stated that it expected to announce noise regulations "in the near future". See "Noise regulations expected soon" *Canadian Environmental Law News* (April 1974) at 47. These regulations still had not been released, and the Ministry still continued to refuse to prosecute noise violations under section 14 of the *EPA* when a private prosecutor obtained such a conviction in February of 1974. (See "Noisy neighbour's air conditioner", *infra* note 61). In early 1976, CELA initiated a private prosecution against a noisy bedspring factory after negotiating unsuccessfully for about two years. See, "CELA action leads to second Ontario Noise Control Order" (April 1976) *CELA Newsletter*. These charges led to the Ministry issuing its second control order in relation to noise. As stated in the article, at the time CELA's charges were laid the *EPA* had been in effect for four years with no noise prosecutions by the Ministry and only one control order being issued against noise polluters in early 1976.

Podolsky v. Cadillac Fairview Corporation Limited (2013 ONCJ)⁴⁸

The City of Toronto lies in the path of an important migratory bird flyway. On their migratory journeys birds will be drawn into cities by bright lights or to replenish their stores of energy. Daytime images of the sky or trees reflected in windows routinely delude birds into fatal collisions. A Toronto-based non-profit group routinely collects birds that have been killed or injured in window strikes — and for over a decade had unsuccessfully tried to get building owners and managers to take action.⁴⁹ It is estimated that upwards of one million birds die in Toronto each year in such collisions despite the existence of known solutions involving the application of visual markers on the windows of a building's lower floors.

In a February 2013 judgment, Ontario Judge Melvyn Green found that the prosecutor had proved beyond a reasonable doubt that Cadillac Fairview killed or injured hundreds of birds, including several birds of 'threatened' species, as a result of window collisions at its Toronto office complex. In coming to this conclusion, Judge Green interpreted section 14 of Ontario's *Environmental Protection Act* and section 32 of the federal *Species at Risk Act* to cover the unintentional killing or injuring of birds from window strikes.

The company was ultimately acquitted of the charges, having satisfied the judge that it acted reasonably in pursuing innovative measures to prevent the window strikes. The ruling, however, will now require all building owners and managers (as well as corporate directors and officers) to implement remedial measures where birds are being killed or injured in window strikes.

Schultz v. Menkes Developments et al. (2012 ONCJ)

This case preceded the *Cadillac Fairview* case noted above and was based on a similar fact scenario. The Justice of the Peace dismissed charges against the accused companies for the death or injury of hundreds of migratory birds in window strikes at defendants' office complex. The court concluded that reflected light could not have been contemplated as a pollutant under the *EPA*. In the subsequent *Cadillac Fairview* decision, Judge Green noted that the JP's legal analysis in coming to his decision was "unencumbered by any reference to the governing jurisprudence." The acquittal is currently under appeal. Subsequent to the commencement of the trial, the entire complex

⁴⁸ 2013 ONCJ 65, online: <<http://canlii.org/en/on/oncj/doc/2013/2013oncj65/2013oncj65.html>>. For a brief analysis of the case, see Dianne Saxe, "Canada: It Is Now An Environmental Offence To Kill Birds With Buildings", *Mondaq* (4 March 2013) online: <<http://www.mondaq.com/canada/x/224868/Environmental+Law/It+Is+Now+An+Environmental+Offence+To+Kill+Birds+With+Buildings>>.

⁴⁹ Fatal Light Awareness Program (FLAP), online: <<http://www.flap.org/>>.

was retrofitted with window films to deter strikes, making it the first commercial structure of its kind.⁵⁰

R. v. Syncrude Canada Ltd. (2010) (Alta Prov Ct)⁵¹

In January 2009, after both the federal and Alberta governments ignored requests to prosecute Syncrude for the killing of more than 1,600 ducks that landed on the company's tar sands tailings pond, Ecojustice laid a charge against Syncrude under the *Migratory Birds Convention Act (MBCA)*. Before the *pre-enquete*, the federal and provincial Crown committed to laying charges under Alberta's *Environmental Protection and Enhancement Act* and the *MBCA* in exchange for withdrawal of the privately laid charge. The government prosecutions resulted in convictions and \$800 000 in fines plus additional penalties amounting to \$3 million, among the highest amounts ever levied for an environmental offence.

Lukasik v. City of Hamilton (1999) (OCJ – Prov Div)⁵²

In 1999, Sierra Legal Defence Fund brought a private prosecution against the City of Hamilton, Ontario for violating the *Fisheries Act* by discharging toxic leachate into Red Hill Creek. The Ontario Ministry of the Environment brought separate charges for the same matter under the Ontario Water Resources Act. Hamilton pleaded guilty to both charges and was fined \$480,000. The fine was subject to the *Fisheries Act* fine-splitting provision. \$150 000 of this money was then used to establish Environment Hamilton, an ENGO.⁵³

⁵⁰ CBC Metro Morning, audio interview with new building owner (13 February 2013), online: <<http://www.cbc.ca/metromorning/episodes/2013/02/13/bird-safe-buildings/>>.

⁵¹ *R v Syncrude Canada Ltd*, 2010 ABPC 229, Tjosvold J; CBC News, "Syncrude to pay \$3M penalty for duck deaths" (22 October 2010), online: <<http://www.cbc.ca/news/canada/edmonton/story/2010/10/22/edmonton-syncrude-dead-ducks-sentencing.html>>.

⁵² Environmental Bureau of Investigation, "Hamilton Environmentalist Succeeds in Private Prosecution – City of Hamilton fined \$450,000 for toxic waste dump" (18 September 2000), online: <<http://ebi.probeinternational.org/prosecutions/city-of-hamilton/news-releases/september-18-2000/>>; Also, see "Hamilton bleeding PCBs" (December 1999) Sierra Legal Defence Fund Newsletter at 4; "City of Hamilton fined a record \$450,000 for toxic dumping" (October 2000) Sierra Legal Defence Fund Newsletter at 1.

⁵³ Environment Hamilton, online: <<http://environmenthamilton.org/view/page/about>>.

Fletcher v. Kingston (City) (1998) (OCJ – Prov Div)⁵⁴

In 1999, a private prosecutor represented by lawyers from Sierra Legal Defence Fund (now Ecojustice) obtained a conviction against the City of Kingston under the *Fisheries Act* and a fine of \$120,000, one of the highest fines ever levied against a municipality for environmental offences, for discharges of toxic effluent from a former waste dump into the Cataraqui River. As soon as the charges were laid, the City installed pumps and a collection system to prevent the leachate from polluting the river. The case was, however, appealed and the conviction on the private Information charges was overturned.

R. v. Suncor Inc. (1982), R. v. Suncor Inc. (1983); R. v. Suncor Inc. (1985)⁵⁵

In 1982 five Informations were laid by the Chief of the Fort McKay Indian Band under the *Fisheries Act* for discharges of effluent from the accused's upstream oil sands operation along the Athabasca River. Subsequently, the Alberta Attorney General's office laid additional charges under the *Fisheries Act* and the provincial *Clean Water Act* and assumed carriage of the prosecutions. The multitude of charges proceeded via separate trials. In the first trial Suncor was acquitted of all but one charge (failure to notify) but the subsequent trials resulted in convictions and fines totaling \$38,000. The prosecutions were Alberta's first environmental prosecutions and, at an estimated cost of several million dollars, they provided the impetus for significant reforms to the province's environmental enforcement regime.⁵⁶

R. v. Snow (1981) (ON Prov Ct)⁵⁷

In 1981, a private prosecution for violation of the *Environmental Assessment Act (EAA)* was taken over by the Attorney General. An Ontario Cabinet Minister and deputy minister pleaded guilty to violating the *EAA* and given substantial fines. They had approved the construction of a road without preparation of the environmental assessment

⁵⁴ At trial, defendant was convicted on one Ministry charge, acquitted on one Ministry charge, and convicted on all privately laid charges, *Fletcher v Kingston (City)* (1998), 28 CELR (NS) 229 (OCJ – Prov Div); Appeal to ONSC allowed in part (new trial ordered on both Ministry charges, new trial ordered for all privately laid charges), (7 June 2012) (ON SCJ) McWilliam J; Leave to appeal to ONCA granted for Ministry charges; Appeal allowed in part (original conviction and acquittal for Ministry charges restored), 70 OR (3d) 577 (ONCA); Leave to appeal to SCC denied, [2004] SCCA No 347. Also see, "Prosecutions prompt quick clean-ups" (December 1999) Sierra Legal Defence Fund Newsletter at 5.

⁵⁵ *R v Suncor Inc* (1983), 3 FPR 264 (Alta Prov Ct); *R v Suncor Inc*, [1983] AWLD 881, 3 FPR 270 (Alta Prov Ct); *R v Suncor Inc* (1985), 4 FPR 409 (Alta Prov Ct).

⁵⁶ For a detailed summary of the *R v Suncor Inc* cases see, Kernaghan Webb, "Taking Matters Into Their Own Hands: The role of Citizens in Canadian Pollution Control Enforcement" (1991) 36 McGill LJ 770 at 809-814, online: <<http://lawjournal.mcgill.ca/documents/36/3/03.pdf>>.

⁵⁷ *R v Snow* (1981), 11 CELR 13 (ON Prov Ct).

required by the *EAA*. The court stated that it was imposing a substantial penalty because of the need to ensure respect for the law.

R. v. Cherokee Disposals and Construction Ltd. (1973) (ON Prov Ct – Crim Div); R. v. Sault Ste. Marie (1978) (SCC)⁵⁸

Informations in both cases were laid by Mark Caswell, a landowner along watercourses polluted by a waste disposal company under contract to the City of Sault Ste. Marie. The Crown eventually took carriage of both prosecutions and, in the latter case, pursued the matter to the Supreme Court of Canada. The result was the landmark decision establishing strict liability offences in Canadian law.

R. ex rel. Tyson v. Hale (1976) (ON Prov Ct – Crim Div)⁵⁹

In 1976, the Canadian Environmental Law Association (CELA) conducted the first successful prosecution for the violation of waste disposal standards under the *Environmental Protection Act*. The prosecution was launched after two years of unsuccessful efforts to persuade the Ministry to enforce these standards.

R. ex rel. Strathy v. Konvey Construction Company Limited (1975) (ON Prov Ct – Crim Div)⁶⁰

In 1975, a construction company was convicted of injuring a maple tree during construction activities at an elementary school under the little-used *Trees Act* of Ontario. The conviction resulted in front-page coverage in both the *Toronto Star* and *Globe and Mail*, as well as worldwide in *Reader's Digest*, giving widespread publicity to the plight of urban trees. The informant, Shirley Strathy, was later given an award by the Ontario Association of Landscape Architects for her action.

⁵⁸ *R v Cherokee Disposals and Construction Ltd*, [1973] 3 OR 599, Greco J; *R v Sault Ste Marie*, [1978] 2 SCR 1299. See also Jamie Benidickson, *Water Supply and Sewage Infrastructure in Ontario, 1880–1990s: Legal and Institutional Aspects of Public Health and Environmental History*, Issue Paper for the Walkerton Inquiry (Toronto: 2002) at 109-112, online: <<https://ospace.scholarsportal.info/bitstream/1873/7663/1/10294043.pdf>>; Also, see “Private prosecutions can succeed” *Canadian Environmental Law News* (December 1973) at 158-161.

⁵⁹ *R ex rel Tyson v Hale* (30 November 1976) (ON Prov Ct – Crim Div) Baxter J; Also, see “CELA wins first case under EPA garbage regulations” (December 1976) *CELA Newsletter*. The Ministry relied on this conviction several years later in support of its own application for an injunction to prevent the continued operation of this waste disposal site.

⁶⁰ *R ex rel Strathy v Konvey Construction Company Limited* (27 February 1975) (ON Prov Ct – Crim Div) Newall J; Also, see “CELA obtains conviction for damage to maple tree” *Canadian Environmental Law News* (April-May 1975) at 36; “CELA plaintiff honoured” *Canadian Environmental Law News* (June 1975) at 105.

R. ex rel. Johnston v. Lieberman (1974) (ON Prov Ct – Crim Div)⁶¹

After Ontario's *Environmental Protection Act* was passed in 1971, the first prosecutions for violating the Act were taken not by the Ministry of the Environment, but by the CELA. The cases included a prosecution of a home owner, Ms. Lieberman, who was convicted of operating an excessively noisy air conditioner, as well as a prosecution of the Adventure Charcoal company, referred to earlier, for operating a source of air pollution without the required permit.

R. ex rel. Mackinnon v. International Nickel Company of Canada (1974) (ON Prov Ct – Crim Div)⁶²

In the 1970s, the International Nickel Company of Canada Ltd. (INCO) had a reputation as one of Canada's worst polluters. The first prosecution of INCO for air pollution was brought in July 1973, not by the Ministry of the Environment, but by a group of students, the Sudbury Environmental Law Association. INCO was charged with two counts of emitting black smoke contrary to the 'smoke density' regulation under the *EPA* and one count of failing to notify the Ministry of the smoke emission. INCO was convicted of one count of emitting black smoke and acquitted on the second black smoke account and the charge of failing to notify the Ministry.

**IN WHOSE NAME IS A PRIVATE PROSECUTION BROUGHT —
THE INFORMANT OR THE CROWN?**

The previous section makes clear the lack of consistency in the citation of case names. In the past, it mattered little whether a prosecution proceeded in the name of the Crown or in the prosecutor's name. There was some disagreement about this among commentators, but perhaps the only thing that turned on this was whether the court's decision was reported as '*R. v. Defendant*', '*X v. Defendant*', '*R. on the relation of (ex rel) X v. Defendant*' or '*R. on the Information of X v. Defendant*', where 'X' is the informant/private prosecutor. After the passage of the *Charter of Rights and Freedoms*, however, whether a private prosecution proceeds in the name of the Crown or the informant's name may have implications for matters such as whether disclosure is

⁶¹ *R ex rel Johnston v Lieberman* (28 February 1984), (ON Prov Ct – Crim Div) Pearce J; See "Noisy neighbour's air conditioner leads to first noise conviction under Ontario *Environmental Protection Act*" Canadian Environmental Law News (April 1974) at 47 ["Noisy neighbour's air conditioner"].

⁶² *R ex rel Mackinnon v International Nickel Company of Canada* (4 May 1974, sentencing 11 June 1974) (ON Prov Ct – Crim Div) Michel J; Also, see "Private citizens succeed in first air pollution charge in northern Ontario as INCO fined for polluting Sudbury Air" Canadian Environmental Law News (June 1974) at 75; Brian Chang, "The Canadian Environmental Law Association: Selected highlights from the first decades of CELA's work" (2010) at 27-28, online: <<http://www.cela.ca/sites/cela.ca/files/789CELA40years.pdf>>.

required or whether the prosecutor or persons assisting the prosecutor who obtain evidence are conducting a search or seizure that is subject to the requirements of section 8 of the Charter.

This is now a potential issue because the Charter applies only to governmental action; that is, action by government officials and their agents. For example, if a prosecutor is not considered the Crown or an agent for the Crown, theoretically, he or she may not be subject to disclosure duties required by the Charter. The simplest solution to this dilemma may be to recognize that while an Information is sworn in the prosecutor's own name, process issues in the name of the Crown, and therefore Charter requirements for disclosure and reasonable search and seizure apply, just as they apply to the Crown.

We have been unable to find case law that discusses whether private prosecutors have a duty of disclosure. However, there is little reason to doubt that the disclosure obligation of the Crown also applies to private prosecutors, as a decision to the contrary would result in manifest and unacceptable unfairness to the defendant. In the Cadillac Fairview case noted above, Ecojustice gave extensive disclosure, a matter upon which the trial judge commented favourably.

CONCLUSIONS

Private prosecutions remain an important legal tool available to individuals and community groups that might otherwise become frustrated with the lack of action by public officials for an ongoing or serious environmental violation. The challenges in launching a private prosecution, including evidentiary issues, disclosure obligations, the *pre-enquete*, and the risk of a government intervention to stay charges mean that private prosecutions will continue to be used sparingly. Nonetheless, the history of success and influence of private prosecutions over the last decades mean that this tool ought to continue to be both protected and respected.