

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

UGO LAPOINTE

AND:

MOUNT POLLEY MINING CORPORATION  
HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

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SUBMISSIONS ON CROWN'S JURISDICTION TO STAY PROCEEDINGS

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WRITTEN SUBMISSIONS OF THE PRIVATE INFORMANT

Prepared by:

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**Date & Time of Hearing:** 2:00 p.m.  
Monday, March 27, 2017  
**Location:** Williams Lake, B.C.

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**Issues**

- a. Does the Crown have the authority to enter a Stay of Proceedings in a private prosecution prior to a pre-enquete hearing?
- b. If the Crown can enter a Stay of Proceedings, prior to the pre-enquete, are there any limits to the scope of its discretion to do so?
- c. Is the private informant entitled to have all or a portion of its legal costs paid by the Crown?

## **Facts**

1. On August 4, 2014, the tailings dam owned and operated by Mount Polley Mining Corporation (“MPMC”) collapsed, sending approximately 24 million cubic metres of untreated wastewater and solid mine waste into the environment, including Hazeltine Creek, Polley Lake, and Quesnel Lake.
2. Multiple media, government, MPMC, and independent reports about the spill were published in the following days, months and years.
3. Environment Canada, Fisheries and Oceans Canada, and the B.C. Conservation Officer Service launched a joint investigation shortly after the Mount Polley mine spill in 2014. The results of this investigation are unknown to this date.
4. On May 27, 2016 and then again on September 19, 2016, MiningWatch Canada sent letters to Environment Canada and Fisheries and Oceans Canada advising them that it intended to lay a private information with respect to the Mount Polley mine waste spill of August 2014 if it appeared that the Crown was unwilling to lay charges of its own.
5. On October 18, 2016, MiningWatch Canada, through its Canada Program Coordinator, Ugo Lapointe, attended before a Justice of the Peace at the Williams Lake Court Registry and swore a private information against Mount Polley Mining Corporation and Her Majesty the Queen in Right of British Columbia for violations of the Fisheries Act in connection with the 2014 mine waste spill. A letter was sent on the same day to the Attorney General of British Columbia and the Public Prosecution Service of Canada (the “Crown”) advising of this fact, and advising that a process hearing was scheduled for November 9, 2016.
6. The Attorney General of British Columbia subsequently advised that the province would not be participating in this private prosecution. During a telephone conversation on October 31, 2016, counsel for the private informant and the Crown agreed that the matter should be set down for a full day and the process hearing was scheduled for January 13, 2017 by consent. Counsel for the private informant provided the Crown with the some of the main documents on which they would be relying

on December 14, 2016, many of which documents were also referenced in the May and September, 2016, letters.

7. From October 18, 2016 until January 11, 2017 Crown was aware of the private prosecution and agreed to set the matter for a full day hearing. All of the documentation relied on by the private informant was obtained from public sources, which included lengthy investigative reports prepared by the Province of British Columbia, independent sources, and consulting firms hired by MPMC. These materials were completed well before October, 2016. Crown had the information it needed to reach a decision of whether or not to enter a stay on or shortly after October 18, 2016, when the information was sworn.
8. In addition, the private informant continued its work and investigations from October until January in preparation for the hearing, and incurred significant legal fees and costs. It then incurred more costs in arranging for counsel and witnesses to attend Williams Lake for the hearing, where it intended to present a fulsome account of its evidence against Mount Polley Mining Corporation and Her Majesty the Queen in Right of British Columbia.
9. On January 11, 2017 at approximately 11:30am, less than 48 hours before the process hearing, and over two months after the hearing date had been set by consent, the Crown emailed counsel for the private informant and the Williams Lake Court Registry to advise that the Crown intended to enter a stay of proceedings at the outset of the hearing. The informant was already in transit to Williams Lake.
10. On January 13, 2017 the parties attended at the Williams Lake Provincial Court and Crown indicated his intention to enter a stay of proceedings *in camera*. Counsel for the private informant took the position that only the pre-enquete should be conducted *in camera*, and that any stay of proceedings should be entered in open court. The matter was adjourned by the Court in order for counsel to provide authority supporting their respective positions. During the break, Crown spoke with the public and members of the media outside the court room. The Crown indicated to the media that it intended to enter a stay of proceedings for the following reasons:

The first reason is because there's no reasonable prospect of conviction against these two parties with the materials presented to us by the complainant Mr. Lapointe... The second reason is because it's not in the public's interest to continue a private prosecution at this time because there is an ongoing comprehensive investigation being conducted by three different agencies... It is in the public interest that the more comprehensive investigation be completed before a criminal prosecution.<sup>1</sup>

11. Upon the matter being recalled, Judge Whonnock questioned whether or not Crown was able to stay a private prosecution prior to the process hearing, and the court requested the matter to be adjourned so counsel could prepare submissions on that point. At that point, both counsel tentatively agreed that one hour would likely be sufficient time to make submissions. The Judge indicated that written submissions may be useful.

12. On January 17, 2017 Crown telephoned counsel for the private informant, and stated that other parties may seek intervener status. It was agreed that the matter would likely take a half day, and Crown emailed the judicial case manager to canvass available dates.

13. On January 30, 2017 Crown phoned counsel for the private informant and advised that he was concerned that there was a risk of Mount Polley Mining Corporation mounting a delay argument. On February 13, 2017, counsel for the private informant wrote to Crown Counsel and, among other things, provided an analysis of her interpretation of the cases regarding delay, and their lack of relevance to this case. Counsel for the private informant invited Crown Counsel to provide an alternative argument if he disagreed with the interpretation of the cases regarding delay.

14. Crown has not provided any additional reasoning regarding his decision to enter a stay of proceedings beyond what is outlined above.

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<sup>1</sup> Monica Lamb-Yorski, Williams Lake Tribune, Crown attempts to stay MiningWatch Canada's charges against mine breach, 13 Jan. 2017, online: <http://www.wltribune.com/news/410689685.html> Accessed 02 Feb 2017

## Summary

15. In reviewing the case law, it has become clear that Crown Counsel has the authority to a Stay of Proceedings in a private prosecution before the pre-enquete hearing.<sup>2</sup> However, this authority is limited if it is established that there has been an abuse of process.<sup>3</sup> In order to show abuse of process, the claimant must first satisfy a superior court that a “threshold test” is met that justifies an inquiry into the Crown's conduct.<sup>4</sup> Where the Crown conduct is unusual and raises serious policy implications, this can satisfy the threshold test even in the absence of direct evidence of Crown misconduct.<sup>5</sup> Should the Crown give little or no explanation, this factor will weigh heavily in favour of the party claiming an abuse of process.

16. The explanation provided by Crown in its submissions in seeking to enter a stay prior to the pre-enquete, is substantially the same explanation given to the media on January 13, 2017. This explanation is vague, and would apply to every situation where a private prosecution is warranted. Entering a stay of proceedings prior to the pre-enquete based on these reasons alone seriously affects “the citizen's fundamental and historic right to inform under oath a Justice of the Peace of the commission of a crime,”<sup>6</sup> and risks completely gutting the purpose of private prosecution process, a process that is described as “a valuable constitutional safeguard against inertia or partiality on the part of authority.”<sup>7</sup>

17. The information available to the Crown on January 11, 2017 had been in the public domain for many months, and had been referenced and provided to Crown in the private informant’s May, September, and December, 2016, correspondences. There was nothing preventing the Crown from entering a stay the proceedings in October, 2016, before the private informant incurred significant time and expense in preparing for the pre-enquete hearing.

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<sup>2</sup> *Criminal Code*, s.579(1); *R v. McHale*, 2010 ONCA 361

<sup>3</sup> *R v. Anderson*, 2014 SCC 41

<sup>4</sup> *R v. Nixon*, 2011 SCC 34

<sup>5</sup> *Nixon*, *supra*

<sup>6</sup> *Dowson*, p. 155.

<sup>7</sup> *Gouriet v. Union of Post Office Workers* [1977] 3 All ER 70 (H.L.) at p. 79

### **Costs Against the Crown**

18. Provincial courts have the ability to award costs against the Crown outside of the *Charter* context where there has been “a marked and unacceptable departure from the standards expected of the prosecution”.<sup>8</sup>
19. The Court in *R v. Sayers*, 2017 ONCJ 77 determined that delay by the Crown in deciding to halt proceedings, and halting proceedings on the eve of a trial, constituted a “marked and unacceptable departure from the standards expected of the prosecution” such that costs were justified.
20. It is submitted that costs should be awarded in favour of Mining Watch because the Crown has delayed unnecessarily in deciding to issue a stay of proceedings in a private prosecution where the private informant is commencing proceedings in the public interest. The private informant stands to gain no personal benefit from undertaking the task of preparing for a private prosecution, and Crown should be particularly sensitive to the expense to which the private informant is put, particularly given the magnitude and significance of the offence. The Crown stood by and permitted the private informant to incur significant costs in legal fees, disbursements, and travel expenses over a period of many months before seeking to enter a stay. This constitutes a marked and unacceptable departure from the standards expected of the prosecution, and costs should be awarded on solicitor client basis.

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<sup>8</sup> *R v. Fercan Developments Inc.*, 2016 ONCA 269

## **Argument**

### **Does Crown have the authority to enter a Stay of Proceedings prior to the pre-enquete hearing?**

15. Crown's authority to stay charges, including those initiated via a private information, comes from section 579(1) of the *Criminal Code*:

The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated. [Emphasis added]

Thus, the Crown may enter a stay "...at any time after any proceedings in relation to an accused... are commenced".

16. The consensus of the courts is that criminal proceedings begin at the laying of an information. In *R. v. McHale*, 2010 ONCA 361, the Ontario Court of Appeal concluded that this did allow a Crown prosecutor to enter a stay at any time after a private information was laid, even before the pre-enquete.<sup>9</sup> The court in *McHale* did conclude that Crown could not "withdraw" charges until after process had issued. However, the Crown authority to withdraw charges is a common-law power distinct from the statutory power to enter a stay, and *McHale* expressly acknowledges the discrepancy in their timing.<sup>10</sup>

### **If Crown can enter a stay of proceedings prior to the pre-enquete, what are the limits to their authority.**

17. Crown's decision whether or not to enter a stay is generally afforded a high degree of deference by the courts. However, where it has been found that there has been an abuse of process, a superior

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<sup>9</sup> *R. v. McHale*, 2010 ONCA 361, paras. 85-86 and 89-90.

<sup>10</sup> *McHale*, para. 90.

court may review an act of prosecutorial discretion.<sup>11</sup> The kind of behaviour that will amount to an “abuse of process” has been described by the courts in various ways. Most recently, the Supreme Court of Canada, in *R. v. Anderson*, 2014 SCC 41, summarized an “abuse of process” as “Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system.”<sup>12</sup>

18. To establish that an inquiry into prosecutorial discretion is warranted, the claimant does not need to have direct evidence of prosecutorial misconduct. In *R. v. Nixon*, 2011 SCC 34, the Supreme Court of Canada accepted that a Crown decision to repudiate a plea agreement was, in and of itself, sufficient to meet the threshold test, because of the rarity of such an event and the serious policy concerns it implicated.<sup>13</sup> The Court in *Nixon* also noted that if the Crown cannot provide a satisfactory explanation for its decision, this in itself can weigh in favour of a finding of abuse of process.<sup>14</sup>

19. As in *Nixon*, the Crown is taking a step with serious public policy implications: staying a private informant before the pre-enquete hearing, which nullifies “the citizen's fundamental and historic right to inform under oath a Justice of the Peace of the commission of a crime”<sup>15</sup> in such a way as to risk rendering that right meaningless. Also as in *Nixon*, the Crown's reasons for arriving at this decision are largely known only by the Crown itself, and could have serious implications for the integrity of the justice system if such decisions were being made for poor or improper reasons.

20. However, whether there has been behaviour that will amount to an abuse of process is outside of the jurisdiction of the provincial courts, and the private informant would have to make an application to the Supreme Court in the event that it wishes to pursue this remedy.

### **Should costs be awarded against the Crown?**

21. Prior to 2016, the jurisdiction of provincial courts to award costs against the Crown in criminal matters was unclear. The Court in *Fercan* clarified this and found that:

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11 *R. v. Anderson*, 2014 SCC 41, paras. 36 and 48.

12 *Anderson*, para. 50.

13 *Nixon*, para. 63.

14 *Nixon*, para. 63.

15 *Dowson*, p. 155.

the power to award costs... while... not strictly necessary for provincial courts to simply exist or function, ...is necessary to permit them to respond appropriately when their process has been offended. The ability to award costs is “integrally connected” to a court’s control of its own process and denying statutory courts a power to award costs may deprive them of the only effective remedy to control their process...<sup>16</sup>

22. In *Fercan* the Crown abandoned its applications against one of three respondents for the forfeiture of properties under s. 16 of the *Controlled Drugs and Substances Act*, and 5 days later the application judge dismissed Crown’s application against the other two respondents. The Court found that:

This case exemplifies ...necessity. Here, the application judge could award costs or take no action whatsoever. The power to hold someone in contempt or to enter a stay of proceedings, alternatives suggested by the Crown, were not possible here as the need for a response was not apparent before the end of the forfeiture application. Having found that the Crown had demonstrated a marked and unacceptable departure from the standards expected of the prosecution, the application judge could award costs or simply fail to respond to an offence against the court’s process. In these circumstances, the power to award costs was reasonably necessary for the court to protect the integrity of its process, to denounce the abuse that had occurred, and to deter further misconduct.<sup>17</sup>

23. The Court went on to find that the standard of “a marked and unacceptable departure from the standards expected of the prosecution” is the correct standard for costs outside of the *Charter* context.

24. The Ontario Court of Justice in *R v. Sayers*, 2017 ONCJ 77 (“*Sayers*”) confirmed provincial courts’ jurisdiction to award costs based on the court’s ability to control its own process, as outlined in *Fercan*. Crown in *Sayers*, as in this case, halted the proceedings on the eve of the hearing date, despite having been provided with sufficient evidence to make its decision several months prior. The court in *Sayers* found that the delay by Crown in reaching a decision to withdraw charges was “a

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<sup>16</sup> *Fercan*, supra at paragraph 68

<sup>17</sup> *Fercan*, supra at paragraph 69

marked and unacceptable departure from the reasonable standards expected of prosecution” and as such the exceptional circumstances in that case would justify a costs award. The award in *Sayers* was on a solicitor and own client basis at an hourly rate of \$250, less deductions for time spent on unsuccessful applications.

25. Federal governmental departments have been aware of MiningWatch’s intention to initiate a private prosecution since May 2016, and an information was sworn in Court on October 18, 2016.

Documents on which the private informant would be relying were referenced in the May 20, 2016, letter and in December 14, 2016 correspondence to Crown; all the documents were publicly available and had been widely published in multiple media, government, MPMC, and independent reports in the days, months, and years that followed the 2014 spill. Crown had the information it needed to reach a decision to enter a Stay of Proceedings as of October 2016. The decision to consent to schedule a full day for the pre-enquete in October 2016, and then at the last minute seek to enter a stay after preparations had been made and the parties were in transit to Williams Lake constitutes a marked and unacceptable departure from the standards expected of the prosecution. If the Crown contemplated a stay of the charges prior to the pre-enquete, it could have done so in October 2016, thus saving the private informant and other parties significant costs and expenses.

26. As in *Fercan*, this is a case where the application judge can award costs or fail to respond to an offence against the court’s process. In these circumstances, as in *Fercan*, we submit that the power to award costs is reasonably necessary for the court to protect the integrity of its process, to denounce the abuse that had occurred, and to deter further misconduct.<sup>18</sup> This case is an exceptional case. A private informant is acting in the public interest to lay a private information as a result of Canada’s biggest mining spill and one of the worst environmental disaster in the country. There is no personal gain or benefit to the private informant. In dealing with private informants within the context of a public prosecution, Crown should be particularly sensitive to the costs incurred by the private informant, and should take all reasonable steps to mitigate those costs when possible, such as by deciding to enter a stay of proceedings in a timely fashion.

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<sup>18</sup> *Fercan*, supra at paragraph 69.

**Remedy Sought**

27. The private informant is seeking costs against the Crown on a solicitor and own client basis, plus disbursements, taxes and other costs incurred by Mining Watch.

All of which is respectfully submitted

A handwritten signature in black ink, appearing to read 'Lilina Lysenko', with a long horizontal flourish extending to the right.

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Lilina Lysenko, counsel

For Mining Watch Canada