# FEDERAL VERSUS PROVINCIAL CROWNING

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A Symposium on
Environment in the Courtroom (II): Environmental Prosecutions

March 18-19, 2013
University of Ottawa

This project was undertaken with the financial support of:
Environment Canada Environnement Canada
Ce projet a été réalisé avec l'appui financier de :
Environnement Canada Environment Canada

Centre du droit de l'environnement et de la durabilité mondiale
Centre for Environmental Law and Global Sustainability

uOttawa

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## BACKGROUND TO THE DISCUSSION

This is not an academic paper or a statement of policy. I've been a provincial Crown for 30 years now, the last twenty exclusively in the business of environmental prosecutions. The issue of provincial and/or federal jurisdiction over environmental files is a very practical one for me. The province is crisscrossed by thousands of miles of pipeline, all with a best before date that expired 20 years ago. Whenever we have a pipeline rupture or any kind of release, for that matter, into fish bearing waters, we have a situation where the two Crown offices are involved.

The other very practical consideration is that there is not enough Crown to go around. On the provincial side there are two of us, myself and Peter Roginski. While the federal Crown has a unit that handles all regulatory offences, there are only three Crowns in that office that specialize in environmental offences, but they are also called upon to do other regulatory work. So in Alberta, we can't afford not to play well together.

## WHO IS THE CROWN? THE LEGAL QUESTION

I won't pretend to review the legislation or the case law. I'm an old Crown and unless there is a live issue on a live file, I don't care, but from the live files that I have prosecuted I can tell you three things for sure.

First, when you have a combination of provincial environmental charges and *Criminal Code* charges, the answer is easy: the provincial legislation adopts the provisions of the Code and it is the Provincial Crown who is the Crown for all proceedings under the *Criminal Code*. Section 2 provides as follows:

> "Attorney General" … means with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken.

Second, unless the federal legislation says otherwise, federal legislation equals federal Crown and that kind of makes sense to me.

Third, when dealing with an information sworn by a private citizen, regardless of whether the charges are federal or provincial, the Crown will always be the Provincial Crown. That's because the Federal Agents Manual says:

> … if a private individual lays an Information, the Attorney General of Canada lacks authority to intervene in the case, whether to conduct or stay the proceedings. This is because the proceedings were not "commenced at the instance of the Government of Canada."

Interestingly, the first really serious environmental prosecutions in the province began as private prosecutions under federal legislation that were taken over by the Province.

Now this is the stuff I don't know about. There are some very strange provisions in the Code that seem to talk about stuff outside the Code itself. If you read section 579.1(1) there appears to be a limited right for the federal Crown to interfere in respect to federal legislation other than the *Criminal Code*, but that even with the federal proceedings, the provincial Crown has a right of first refusal. Section 579.1(1) provides as follows:

> The Attorney General of Canada or counsel instructed by him or her for that purpose may intervene in proceedings in the following circumstances:
>
> (a) the proceedings are in respect of a contravention of, a conspiracy or attempt to contravene or counseling the contravention of an Act of Parliament or a regulation made under that Act, other than this Act or a regulation made under this Act;
>
> (b) the proceedings have not been instituted by an Attorney General;
>
> (c) judgment has not be rendered; and
>
> (d) the Attorney General of the province in which the proceedings are taken has not intervened.

There is even a stranger provision in section 579.01:

> If the Attorney General [Canada] intervenes in proceedings and does not stay them under section 579, he or she may, without conducting the proceedings, call witnesses, examine and cross-examine witnesses, present evidence and make submissions.

It's hard to imagine that calling witnesses, et cetera, is something other than "conducting the proceedings", but whatever all of this means, I will leave the whole legal debate to those more qualified.

## WHO SHOULD BE THE CROWN? THE POLICY QUESTION

Way back in 1990, the feds and the province got together and wrote a policy document under the title "Federal/Provincial Cooperation in the Prosecution of Offences in Alberta" otherwise known as the Major/Minor Agreement. At that time, with respect to pollution cases, the direction was:

> In certain types of particularly sensitive cases, such as those involving the pollution of the environment and the transportation of dangerous goods, both the Attorney General of Alberta and the Attorney General of Canada will be instructing their own counsel to assume conduct of concurrent resulting prosecutions.

## WHO SHOULD BE THE CROWN? THE PRACTICAL QUESTION

So we each conduct our own files? Not so much. The policy cannot work. First of all, there aren't enough of us to go around. Second, defence counsel and investigators hate it when there are two Crown assigned to the same file. What's that old saying? Ask two

lawyers and you get three different opinions. Third, and probably most importantly, the all time worst scenario for the accused and the court would be separate proceedings on the same fact situation.

So in Alberta, the division of responsibility for files where there is overlapping jurisdiction is a topic for friends over lunch. It's a question of capacity and interest and in some rare cases, conflict.

As to capacity: holidays, maternity and paternity leave, secondments and teaching assignments mean that we are not always operating at full strength. And even if we have all hands on deck, a mega trial sucks up all of our time and energy. So if the federal Crown is short staffed, we will help them out. Sometimes that means taking over the whole file; sometimes it's just a question of a division of labour on joint prosecutions. Even the costs associated with the investigation and prosecution are resolved on a friendly basis. The Province typically has more resources to hire expert witnesses so the Province picks up the tab. Our federal counterparts have a full time Paralegal; we don't, so we "borrow".

As to interest, Lynda Jenkins, who used to work for us, had a fabulous talent for research and an interest in obscure legislation, so she enjoyed working on dangerous goods and PCB files where there is a lot of overlap between the federal and provincial legislation. She got involved in the federal files because she wanted to.

As to conflict, if the accused is another provincial department, we need the federal Crown to assume conduct of the provincial proceedings. We "pay it back" by assuming conduct of some of their files. We had one particularly ugly conflict file and we agreed that we owed the feds at least two files in return.

This might give you the impression that it is all happiness and light in Alberta, but there are evil influences at work and conflict does arise.

## SOURCES OF CONFLICT

### File Review Process

The feds manage their files differently than we do and I believe that this is the single most divisive issue between us.

On the provincial side we work within the Specialized Prosecutions Unit and we follow their rules. That means that the investigating agency does not lay the charge but refers it to us for a recommendation whether to proceed or not. Only if we say so will charges be laid. However, the expectation in our shop is that the file be almost "trial ready" at that point. That means the Crown has read every page of the thousands of pages in a major file more than once, we have produced a status report detailing the strengths and

weaknesses in the case and we've summarized the evidence in support of a recommendation to proceed. This is a hugely labour intensive process but within the Specialized Prosecution Branch, we have the luxury and the privilege of having the time to do that kind of intensive review.

The federal system, although technically a pre-charge approval system, is more like the traditional file management system in use elsewhere in the province. It's very much like the system that I was familiar with when I used to do regular criminal prosecutions for Alberta Justice. The police lay the charges without consultation and the Crown isn't assigned to a file until a trial date has been set.

On the federal side, there is a bit of a twist in that the decision whether or not to go ahead is made by the Crown but it is based not a review of the file but on a summary of the evidence prepared by the investigator. There is no expectation and therefore no time allotted for the Crown to read the file until a trial date is set.

While that system works for high volume and relatively routine prosecutions, it cannot work with a mega file. Problems in the file aren't revealed until after a trial date has been set. By that point it may be difficult to find experts and on a pure time management basis, there may not be enough time for the Crown to prepare. In negotiations with defense counsel, the federal Crown is at a distinct disadvantage in not having read the file and under incredible pressure to settle, well knowing that there aren't the Crown resources to dedicate to a mega file.

And pity the poor investigator. While preparing a file summary on a "usual of its type" file isn't rocket science, I think it's unfair to ask the investigator to summarize all of the evidence and wrestle with issues of admissibility on a complex file. Case in point, on the CN Wabamun prosecution, the federal investigator used my status report to prepare his file summary.

**Differing Limitation Periods**

Under the provincial legislation the limitation period is two years; under the federal legislation, most of the time there is an option to proceed by way of indictment.

This simple difference is huge because it changes the time sensitivity for the provincial investigators and Crown. We *have* to get it done in less than two years. What adds to the pressure is that on the provincial side we have a practice of allowing the accused a last chance opportunity to provide additional information prior to a final decision to proceed, and that pushes back the date for a final decision. We've also had the unfortunate situation on high publicity files where our political masters announced in the press that charges were pending. I remember reading in the paper that charges in connection with the derailment of a Canadian National Railways train that dumped thousands of litres of

bad stuff into Lake Wabumun file would be laid by the end of the week when the file hadn't yet arrived in my office. Laying charges on the eve of the limitation period is dangerous and it looks bad, so we are under a lot of pressure to get the file out the door.

Yet our federal friends don't face the same time constraints. Fair enough, their priorities are different, but this can and has lead to some unpleasantness. On a file that I won't name, the federal investigators and Crown weren't in any particular hurry, but on my side I was told that a failure to get the matter to trial quickly might be "career-ending" for me. Now I'm a country Crown so I really don't care, but such a threat might be disconcerting to a younger, more vulnerable Crown. Knowing that my neck might be on the chopping block might inspire a friend to work harder, so it is important to have friends on the federal side.

**Kienapple**

It's very hard when so much work and resources go into a file when at the end of the day, one set of charges may be stayed by reason of the rule in Kienapple. Case in point: had the Kienapple argument in the Syncrude case been successful, the investigators and Crown on both sides agreed that the federal charge was the more serious one because there was the option for dual procedure, custodial sentences and greater fines based on a per bird calculation. But that agreement was made at the start of the file, not at the end.

**Section 725(2) Criminal Code**

Although the federal Crown can't withdraw provincial charges and *vice versa*, there is a treacherous provision in the Code that effectively does exactly that. In sentencing, unless the Court decrees otherwise, the Crown and the accused can agree to read in facts supporting other offences with the result that:

> no further proceedings may be taken with respect to any offence described in those charges or disclosed by those facts …

In theory, that means that I could craft a statement of facts that includes evidence in support of a federal offence, thus precluding federal charges down the road. Yikes. Talk about an end to good federal provincial relations.

## PRACTICAL SOLUTIONS

This isn't a one- size-fits-all solution; these are the strategies that have been successful in a jurisdiction where everyone knows everyone. They are presented in the hope that others don't have to go through the bad experiences that I have suffered through.

### Solve the problem at the operational level, not in head office

There is an immediacy and incentive to solve problems when you are the poor bastard who will be standing before the Court in the near future that no head office manager could appreciate. Enough said.

### The only folks allowed to make decisions on a file are the folks who have read the file

The typical accused on an environmental file is a very different creature than the traditional criminal. They are multi-million, if not billion, dollar corporations who in other circumstances are good corporate citizens. They commit offences not because they want to but because they assign such a low priority to environmental protection. The strategies and approaches to charging, negotiations and sentencing that work for a bank robber don't work here. Unless the traditional criminal boss has read the file, his or her suggestions aren't helpful or welcome.

### The health of the file should be the overriding consideration, not turf protection

When conflict arises as to whose file it is, it's easy to get your back up. Little things like who is lead counsel can cause friction. But as an old friend of mine (Jay Nagendran, former assistant deputy Minister for Alberta Environment) would remind me, the file must come first. Being frustrated with the federal investigator or Crown is a luxury that I don't have if it interferes with the progress of the file. So I remember the immortal words of my mother-in-law: "suck it up, princess."

### Invest in each other

There will be bad days and conflict with any joint enterprise and it's worse when there is a ton of publicity on a file, so it is important to invest in the relationship with the other office well in advance. It may be as simple as going for lunch and keeping each other up-to-date on files of mutual interest. It might extend to helping out on research or even sending each other to conferences. Federal/Provincial relations were at an all time high when we sent the federal Crown to one of our conferences in California.

**Establish the business rules *before* the big file**

In the early days of the Syncrude investigation, the Crown and investigators from both sides agreed in advance that regardless of which charges went ahead, we would help each other. We divided up the work on the file, and we agreed to follow the Specialized Prosecutions process for recommending charges.

**Have a piece of paper prepared**

This is new to me and it is based on reading the case law in preparing for this paper. Where there have been challenges as to who the Crown ought to be, they are solved easily by having a piece of paper identifying each other as agent for the other guy. I had a case where having a piece of paper saying that this was a joint prosecution would have helped. Defense counsel indicated that his client would plead to the provincial charge provided I, in his words, would "withdraw my professional services" from assisting in the federal prosecution. While that didn't happen, I did wonder if defense counsel could have brought an application for prohibition to bounce me off the file.

**Invest in the investigative services regardless of who they belong to**

This isn't just about federal versus provincial investigators; it's about cross training for all government investigating agencies. None of them have the resources when it comes to a mega file. I think of the Hub Oil explosion in Calgary, CN Wabamun or Syncrude or every big pipeline rupture. On a major file, investigators from multiple agencies will be involved and the time to make introductions is not at the scene.

Since 2006 we have hosted an annual one week conference for investigators from agencies across government, provincial and federal alike, using instructors from the RCMP, the city police forces, Fish and Wildlife, whoever has the expertise. We also have fought to have Major Case Management adopted as the system for managing all investigations, so that when there is a joint venture the investigators know how to communicate and work with each other.

## CONCLUSION

In the environmental business, we are out gunned by the accused in terms of the resources, power and expertise that they can bring to bear. We have to help each other.