



## ENVIRONMENT IN THE COURTROOM

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## Federal vs. Provincial Crowning

SUSAN McRORY \*

### Background to the Discussion

This is not an academic paper or a statement of policy. I was a prosecutor for Alberta Justice for over 30 years, the last 20 exclusively in the business of running or overseeing every environmental prosecution done by the province. As a result, the issue of provincial and/or federal jurisdiction over environmental files was a very personal one for me. Every file that crossed my desk had to be evaluated to see which level of government had jurisdiction and what I had to do about it.

There were two major considerations for me: one, primarily legal; the other, primarily practical. First, by law, any release to the environment that might affect fish-bearing waters or federally protected wildlife could create a situation where both Crown offices would be involved. In cases where both jurisdictions had a vested interest, there was always a delicate balancing act involving statutory and common law powers, interests, and resources—which is where the practical considerations became important.

On the practical side, there are never enough Crowns to go around. When I began in 1993, I was the only environmental prosecutor for the Alberta Crown. Even now there are only two lawyers to cover the entire province. In the federal regulatory unit, there are just three prosecutors who specialize in environmental offences. In Alberta, we can't afford not to play well together. And, with so few players to choose from, personal relationships become of vital importance. I hired the two lawyers who are doing the work for the province today, and I worked very closely with the federal Crown for many years. On files where the defendants

\* *The author is grateful for the editorial contributions of Timothy McRory.*

were often one or more multinational corporations, with well-funded defence teams, we had no choice but to cooperate if we wanted our files to go forward with any hope of presenting a solid case.

## Who Is to Act for the Crown?

### THE LAW

As this chapter is not intended to be a comprehensive review of legislation or the case law regarding Crown jurisdiction, I can tell you three things for sure.

First, when you are dealing with provincial environmental charges, even in combination with *Criminal Code* charges, the provincial legislation adopts the *Code* provisions *mutatis mutandis* and the province of Alberta prosecutes. Section 2 provides as follows:

“Attorney General” ... 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, for charges under federal environmental legislation, if the information is laid by the Government of Canada AND the federal Crown appears, then the Attorney General of Canada takes exclusive jurisdiction. But the kicker is that if the Attorney General of Canada chooses not appear on federal charges, then counsel is the provincial Attorney General (See *Stevenson v. Queen*,<sup>1</sup> upholding the decision of the New Brunswick Court of Appeal in *R. v. Sacobie*.<sup>2</sup>

Third, for all private prosecutions under any legislation, the provincial Crown has a right of first refusal. Only if the province doesn't step in does the federal government have the power to do so in accordance with section 579.1(1) of the *Criminal Code*, 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 been rendered; and
- (d) the Attorney General of the province in which the proceedings are taken has not intervened.

In fact, the first really serious environmental prosecutions in Alberta began as private prosecutions under federal legislation but were then taken over by the province.

Summing up: The province prosecutes all charges under provincial legislation, but it may handle charges under federal legislation, or private prosecutions. The federal Crown may or may not prosecute charges under federal legislation, and may take over private prosecutions of certain federal laws if where the province declines.

**But ...**

Simple and logical as the above may sound, section 579.01 of the *Code* adds a note of confusion to the process by positing a fourth scenario. It allows a private prosecutor to *present* the case while the relevant Attorney General (as determined in the three steps listed above), appears only as a *party*, albeit one with the rights of a party opposed in interest, as follows:

If the Attorney General 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.

See, for a brief comment, *Canadian Broadcasting Corporation et al. v. Morrison*,<sup>3</sup> where the Court of Appeal noted in passing that the Attorney General has an obligation to “supervise” all prosecutions and, in the circumstances anticipated by s. 579.01, may do as laid out in the legislation. As nearly as I can tell, the mechanics of how that task might be accomplished have not been the subject of any judicial direction in Canada.

This brings us to the question of who *should* be the Crown. Here, we leave the realm of the theoretical and approach the realm of the practical in the following areas:

**THE POLICY**

In 1990, Canada and Alberta produced a policy document under the title “Federal/Provincial Cooperation in the Prosecution of Offences in Alberta.” With respect to pollution cases at that time, the direction was as follows:

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.

Theoretically, this allows for two separate sets of charges and two parallel prosecutions. And, presumably, that could lead to two separate trials, two different decisions, etc., etc. It seldom, if ever, has come to that particular duplication of effort.

## **THE PRACTICE**

First, as I mentioned, there are very few environmental Crowns available to cover an entire province. It makes little sense to duplicate effort. Second, it creates some very real difficulties in both communications and provision of disclosure with the investigators who originate it and the defence counsel who receive it. Third, it could take up valuable court time for no apparent good reason. Fourth, and perhaps most persuasive given the Crown's duty of fairness, it could lead to inconsistent verdicts.

I found that the best way to divide responsibility for files where there is overlapping jurisdiction was through very informal discussions. (In my case, at any rate, these usually took place over a nice lunch.) The questions we discussed over the salad revolved around capacity, interest, and in some rare cases, conflict.

### **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. In my day, when the federal Crown was short staffed, we helped them out. Sometimes that meant taking over the whole file; sometimes it was just a question of a division of labour on joint prosecutions. Sometimes it meant sharing resources. When the province had the ability to hire expert witnesses, they did. At a time when the federal Crown had a full time paralegal and I didn't, I was allowed to "borrow" her services.

### **Interest**

Every lawyer has different strengths, and it makes sense to play to them. On *Synchrude*, Alex Bernard handled the legal research on constitutional challenges

because he likes that sort of thing. We had another lawyer in our office with a talent for research and an interest in obscure legislation, so she enjoyed working on dangerous goods and PCB files, in which there is a lot of overlap between the federal and provincial legislation. She got involved in the federal files because she wanted to.

### **A Conflict**

As to a conflict, there were a few files where the accused was another provincial department. In those cases, we needed the federal Crown to assume conduct of the provincial proceedings. We “paid it back” by assuming conduct of some of their files. (In one particularly ugly file, we agreed that we owed the feds at least two files in return!)

So does this mean that provincial/federal relations were all happiness and light in Alberta? Sometimes yes, and sometimes no, but there was always a way to make things work. And it is much easier to find one by sitting down and talking it out then by spouting policy at each other over emails.

### **RUNNING JOINT PROSECUTIONS**

Sometimes the files are just too big or too important to be handled by one branch of government, *R. v. Syncrude* being the prime example. When cases like that came along, we had to find a way to work together. I would like to pass on to you what we learned to do to handle the challenge.

### **Be proactive, be proactive, be proactive**

You must assume that another mega-trial is just down the road. First of all, there really is always one lurking just over the horizon and, second, the more you prepare for these files, the better you can handle the details of the smaller ones.

### **Be prepared to give quick advice about differing search and seizure powers under all relevant legislation**

The early hours of an investigator’s file are often critical, and evidence needs to be collected appropriately and legally from the beginning. So Crowns are often consulted in the early days with respect to evidence gathering, and this is an area where you need to be proactive in preparing your responses. Case in point: one of the counsel in my office got a call from an investigator asking what his powers of search and seizure were on a particular file. The lawyer in question was meticulous and thoughtful, and she spent almost half an hour summarizing the various options. At the end, the investigator blew up: “Lady, I’m in a metal boat on the North Saskatchewan River and it’s 20 below! Just tell me what to do!”

One of our major roles is to clarify what powers of search and seizure are allowed under what Acts, and the differences from one Act to another can be vast. For legislation where the resource is Crown-owned, as in the *Water Act* or the *Public Lands Act* (what I like to call “owner’s legislation”), the investigators have wide-ranging powers. There are also broad powers under the provincial environmental legislation (section 198, *Environmental Protection and Enhancement Act*), but those powers are pretty much limited to the *early* days of the investigation. It is vital for the investigators to be aware of the exact differences. But other relevant legislation can have much more restrictive clauses.

Finally, there is the question of how evidence gathered under one Act can be used in a prosecution under other legislation. The differences in powers can lead to very different approaches in execution.

And, of course, where legislative regimes overlap, the potential problems multiply. A proactive approach to the difficult questions will allow you to be ready to go when you need to be.

#### **Agree on who is responsible for disclosure up front**

Disclosure is the Achilles’ heel in every mega-file. Managing the vast amount of information and proving that it was delivered to defence counsel is a huge undertaking. There is a Major Case Management System for investigations that has been proven to work. Unfortunately, not every investigating agency uses it. And sometimes those agencies that do use it are required to work with agencies that do not. Protocols and a division of responsibility on disclosure *have* to be worked out in advance.

#### **Have a common file review process**

There are two basic, and mutually exclusive, ways in which an investigation file results in charges. If the involved Crown agencies are not using the same one, disaster can ensue. The more traditional model is that the police or other investigating agency lays the charges before the file ever reaches the Crown. Only when a trial date has been set is it sent to a Crown for review and trial prep. (This was my understanding of how the *Wabumun* file was handled.) That might work for small files, but for the “mega-file” (which describes many environmental files) the poor Crown is stuck reading thousands of pages of materials under the threat of the 18-month timeline set by *Jordan* (more on that later).

The other is the “pre-charge approval” system, which we used in Specialized Prosecutions where the file was almost “trial ready” at the point when

charges were approved. That meant the Crown would read every page of the thousands of pages in a major file more than once, produce a status report detailing the strengths and weaknesses in the case and summarize the evidence in support of a recommendation to proceed. It is a lot of work! Within the Specialized Prosecutions Branch, we had the luxury and the privilege of having the time to do that kind of intensive review. The file review took a long time, but setting a matter down for trial didn't. (If I may, I would like to say a word of thanks to Alberta Justice for giving me the time and freedom to handle these files—mostly!—in the way I thought they needed to be done. I realize now how very lucky I was.)

Early consultation on which system is to be used on joint files is crucial to the smooth running of a prosecution file. Otherwise, the differing time constraints of opposing systems can create unbearable friction between offices. On the *Syncrude* file, planning and discussion allowed the federal and provincial Crown to receive the file on the same day. Then we worked together to have the file “trial ready” (or almost) on the day that we jointly recommended that charges proceed. And, by the way, disclosure was then ready to go out, too.

### **Work towards the shortest limitation period**

Under the provincial legislation, you have two years from the offence date (or its discovery) to lay charges—period, no exceptions. Federal legislation usually contains an option to proceed by way of indictment, which means no statutory time limit. If the feds choose to proceed summarily, of course, they may face similar constraints. (Note: The *Jordan* “clock” starts ticking when the charges are laid.)

So the time crunch is a constant for provincial investigators and Crown. We must get charges out the door in less than two years, regardless of the seriousness of the offence or the size of the investigation. Adding to the pressure on the provincial side is the practice of allowing the accused an opportunity to provide additional information prior to a final decision to proceed. If they choose to provide it, it must be reviewed (however lengthy) and may trigger the necessity of follow-up investigations. But the 24-month deadline does not change in any way to allow for the additional time.

Our federal colleagues don't face the same time constraints, but it really helps when they understand what we on the provincial side might face. On one particularly memorable file (for me), 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.” Frankly, I wasn't terribly



concerned, but it was nice when my federal colleagues made a point of speeding up their work to allow me to avoid finding out if the threat was real.

### ***Jordan* and the right to a speedy trial**

The 2016 decision of the Supreme Court of Canada in *R. v. Jordan*<sup>4</sup> has put new pressure on both the federal and provincial Crown to get their act in order. In *Jordan*, the court held that there is a presumption that the accused's right to a trial within a reasonable time (s. 11(b) of the Charter) is violated if more than 18 months elapse between first appearance and trial. Delay attributable to the defence doesn't count towards the 18-month limit, but assuming that isn't a factor, then the onus shifts to the Crown to prove that the delay was reasonable. The importance of the charge isn't a consideration; basically it's only the complexity of the trial that counts. I am not aware of any decisions that have given *Jordan* rights to corporate accused but can certainly see it is a possibility. Crown working in the area had best be aware of the arguments that might be made about just that issue. Any defence lawyer worth his salt certainly will be!

### **Don't get *Kienapple*'d**

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* against duplicitous charges. We knew that might happen heading into *Synchrude*. So before we ever got to the courthouse steps, we had our strategy already laid out in the event of a successful defence application. The investigators and Crown on both sides agreed that the federal charge was the better one on which to proceed based on the option for dual procedure, potential custodial sentences, and greater fines based on a per-bird calculation.

### **Beware of *Criminal Code* Section 725(2)**

Although the federal Crown cannot directly withdraw provincial charges, and *vice versa*, there is a provision in the *Code* that, *de facto*, allows precisely that thing to happen. 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 I could craft a statement of facts that includes evidence which would have been used in support of a federal offence, thus precluding federal charges down the road. Talk about a quick way to end good federal-provincial relations!

### **Solve the problem on a personal level, not in head office**

Now this is just me. My experience is that 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 damn file**

Another personal “rule.” 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 prosecutions boss has read the file and knows the relevant law, his or her suggestions aren’t very helpful or welcome and may even interfere with proper and due process. Therefore, improper instructions are to be resisted at all costs.

### **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 determining who is lead counsel can cause friction. Even though I did not always remember it right away during difficult moments, it helped to be reminded that at all times “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. Leave your ego at the door if you want to do your job well.

### **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. (Note: funding was provided by the Western States Project, a federation of American environmental

prosecuting agencies that makes it possible for our lawyers to attend their conferences.)

### **Establish the business rules BEFORE the big file**

In the early days of the *Synchrude* 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 Alberta Specialized Prosecutions' process for recommending charges.

### **Cross-appoint agents**

This is new to me, and it is based on reading the case law in preparing for this chapter. Where there have been challenges as to who the Crown ought to be, they are solved easily by having written appointments identifying each other as agent for the other guy. You might even consider filing them with the court, the way defence counsel do.

### **Invest in the investigative services**

This is not just about federal versus provincial investigators; it's about cross training for all government investigating agencies. In reality, some of these files are so big that no one agency could handle them. Examples in my career where cooperation between investigators was vital included the Hub Oil explosion in Calgary, the derailment of a CN train at Lake Wabumun or Synchrude, 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, or whoever else had 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 will know how to communicate and work with each other.

### **Never proceed on the expectation that there will be a guilty plea**

This one is hard. The stats say that something like 80 to 90 percent of criminal trials are resolved by way of a guilty plea, and if you were looking at the world from a time management perspective, it would make sense to defer the effort in preparation until such time as a trial was inevitable.

But we are not in the time management business. Files only proceed if the Crown determines that there is a reasonable expectation of conviction and that the prosecution is in the public interest. The strengths and weaknesses of the Crown's case are revealed through an intensive review of the file. Recommending the appropriate sentence requires an in-depth understanding of the file. And let's be practical: the defence counsel who handle big environmental files are some of the best in the business. They can smell the lack of preparation from a mile off. Seldom are they afraid to take a matter to trial and will certainly do so if there is even a sniff of a possibility that it is in their client's best interests. If you are not ready for them, rest assured they will be ready for you.

## Conclusion

I enjoyed tremendously my chance to work on environmental and regulatory files. They certainly present unique challenges! They are big, complex, hard-fought, and cover areas of law that are unfamiliar to most courts. Just the jurisdictional questions alone between the two senior levels of government require special handling, and as to the actual investigations and taking the matters to trial, well, anyone who wants to prosecute these cases had better like hard work. When I look back at what I have written, I realize that most of my recommendations come down to "work hard and play nice with the other people on your team."

Perhaps it did not require 4,000 words to say it, but I hope that my suggestions are useful to anyone who has the courage and the desire to get a megatrial into a courtroom. I wish you the best of luck. May you enjoy yourself as much as I always do!

### NOTES

- 1 1983 CanLII 3141 (SCC).
- 2 (1979), 51 CCC (2d) 430.

- 3 2017 MBCA 36 at para 24.
- 4 [2016] 1 SCR 631.