

Environmental Private Prosecution Update: John Custer v. Syncrude Canada

By Shaun Fluker

Cases Considered:

John Custer v. Syncrude Canada

On January 7, John Custer swore an information in front of a Justice of the Peace in Edmonton alleging violation by Syncrude Canada of section 5.1 of the *Migratory Birds Convention Act*, S.C. 1994, c. 22 for depositing substances harmful to migratory birds in its Aurora Mines tailing pond. The prohibition in section 5.1 reads as follows:

5.1 (1) No person or vessel shall deposit a substance that is harmful to migratory birds, or permit such a substance to be deposited, in waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area.

Section 13 of the Act makes it an offence to contravene section 5.1(1). A process hearing has been set for later in February wherein the Court will decide whether or not to compel Syncrude to answer this charge.

I can't help but think history might repeat itself. In the late 1980s Martha Kostuch swore an information alleging that the Alberta government and several construction companies involved in the construction of the Oldman River dam had committed an offence by harming fish habitat contrary to section 35(1) of the *Fisheries Act*, R.S.C. 1985, c. F-14. (See "[Remembering Martha Kostuch: The Private Prosecution and the Oldman River Dam](#)"). Shortly after process was issued by the court to have the government and the accused construction companies answer the charge, the Alberta Attorney General intervened by entering a stay of proceedings. The Attorney General's intervention was made on the basis of 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. Martha Kostuch challenged this policy by filing several subsequent informations, only to be denied each time by the Attorney General. Her attempts to prosecute produced 9 judgments by Alberta courts over approximately 7 years.

Will history repeat itself? Will John Custer face a similar fate to that endured by Martha Kostuch and ultimately be resigned to filing his concerns with an investigation conducted by Alberta Environment and/or Environment Canada over the death of the 500 ducks?

Stay tuned.