JUSTICE ECHO

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The Oldman case and the environment

By Brian Saunders, General Counsel, Civil Litigation Section, and Ann Beauregard, Counsel, Legal Services, Environmental Issues Secretariat

On January 23, 1992, the Supreme Court of Canada released its long-awaited decision in the *Oldman* case. The case was the first one in which the Court was called upon to consider the Environmental Assessment and Review Process Guidelines Order (EARP). The decision provides guidance respecting the nature and application of EARP and confirms Parliament's jurisdiction to legislate in environmental matters. Since EARP will shortly be replaced by the proposed *Canadian Environment Assessment Act,* now before Parliament, it is the Court's comments on the environment and on the constitutional aspects of the case which will have the most importance in the long run.

The Court has adopted a broad concept of environment

Just as the rest of society is "greening," so too are the courts. This greening is reflected in two aspects of the Supreme Court's approach: its determination of what constitutes the environment, and its endorsement of the value of environmental assessment. The Court has adopted a broad concept of environment similar to that set out in the report of the World Commission on Environment and Development (the Brundtland Report). Instead of limiting the term to biophysical environment alone, this concept insists that environment encompasses the physical, economic, and social world. And in support of environmental assessment, the Court states, "Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making."

In response to Alberta's argument that EARP encroaches on provincial areas of jurisdiction, the Court applied well-established principles of constitutional interpretation. It confirmed that the environment is not a distinct matter coming under any one head of the existing division of powers defined in the *Constitution Act, 1867*; rather, "the environment, as understood in its generic sense, encompasses the physical, economic and social environment, touching several of the heads of power assigned to the respective levels of government."

What has to be considered in determining the extent of the federal government's ability to legislate on environmental matters is the head of power under which the federal government legislates. If the environmental legislation comes clearly under a federal head of power, the fact that it may have an effect on matters falling under a provincial head of jurisdiction does not affect the validity of the statute.

EARP... has added the question of environmental effects to those matters which federal decision-makers must consider

When applying this approach to EARP, the Court characterized EARP as a planning tool that has added the question of environmental effects to those matters which federal decision-makers must consider. EARP requires environmental assessments of projects which are undertaken by the federal government, funded by it, or located on lands administered by it. Assessments are also necessary where the project has an environmental effect on an area of federal responsibility and the federal government has an affirmative regulatory duty — that is, a licensing or approval power — in respect of the project.

In the first three situations, the federal government has the authority to consider and impose conditions that will mitigate all the environmental effects of the project, regardless of whether the effects are otherwise an area of provincial responsibility. The reasoning is that the federal

government can decide how it will build its own projects, under what conditions it will provide funds, or under what conditions it will allow a project to be built on its own lands.

In respect of projects that come within the scope of EARP simply because the federal government exercises an affirmative regulatory duty over them, the federal power to examine environmental effects and to impose conditions is circumscribed. In these situations, the federal government cannot use the assessment tool as a means to regulate those matters under provincial jurisdiction which are unconnected to the head of federal power. EARP, in other words, does not broaden the original head of power. The federal government can examine only matters directly related to the areas of federal responsibility affected. Likewise, any conditions imposed by the decision-maker must be related to those areas. What is connected to the federal power will have to be determined on a case-by-case basis.

the federal government has a legislative authority in environmental matters

In summary, the Supreme Court has confirmed in the *Oldman* case that the federal government has a legislative authority in environmental matters. It has confirmed and recognized that the protection and promotion of the environment needs a comprehensive view of what constitutes the environment. Such a view necessarily means that this matter does not fit neatly under any single existing head of power, but touches many of them. ■

Prosecutions against the federal Crown under environmental statutes

by Kathie MacCormick, General Counsel, Legal Services, Environment Canada, and Kimberly Prost, Senior Counsel, Criminal Prosecutions Section

The *Canadian Environmental Protection Act,* the *Fisheries Act* and the *Transportation of Dangerous Goods Act* are statutes which are expressly binding on the federal and provincial Crown. Federal government departments, officials and employees are therefore subject to prosecution for violations of these environmental statutes.

federal government employees and agents may be prosecuted personally for illegal acts

Under these statutes, federal government employees and agents may be prosecuted personally for illegal acts they commit, direct, or knowingly assist. However, neither employees nor agents can be held criminally liable for the acts of subordinate or fellow employees if they had no personal involvement in the offence.

In addition to proceedings against individuals, prosecutions may be instituted against the government. In such cases, the information will charge an offence committed by Her Majesty the Queen in Right of Canada *as represented by* a minister or department. It is the Crown as an entity that is prosecuted. While the minister may be named to identify the relevant department and the deputy minister may be served with a summons as the representative of the Crown, neither incurs personal criminal liability in such a proceeding.

A number of measures may be implemented by a government department to reduce its exposure to prosecution. Many environmental offences are offences of "strict liability," that is, the performing of the prohibited act, regardless of intention, amounts to an offence. However, a person may be able to avoid liability for an offence of this nature by proving that all reasonable care was taken to prevent the prohibited act. This is called the defence of "due diligence."

For government departments, this means establishing proper systems of control and communication with regard to environmental standards. Each department should take the following steps:

Many environmental offences are offences of strict liability

- Conduct an environmental audit to identify the areas of concern.
- Adopt an environmental policy for such matters as release, storage, and handling of substances, and for emergency clean-up and damage control in the case of accidents.
- Adopt a system to communicate the policies clearly throughout the department.
- Keep records of policies and communications.
- Appoint environmental officers to monitor the implementation of the policies.

- Conduct regular audits on the implementation of the policies.
- Establish a reporting system to ensure that senior management is notified promptly of any environmental problems or incidents.

The Department of Justice does not participate in the defence of any charges against a federal department or employee if the prosecution is being conducted by the Attorney General of Canada. The Department of Justice will assist an accused department, through the departmental legal services unit, in engaging private counsel to defend against charges. Where both individuals and the department are charged, officials of the accused department and the individuals charged, in consultation with independent counsel, will have to decide whether the same counsel can defend both. In some cases, the circumstances of the offence or the nature of the defence may be such that separate counsel is advisable. Because of the obvious conflict of interest, private counsel engaged to defend a department will be hired directly by that department and will not be an agent of the Attorney General of Canada. ■

The New Federal Real Property Act

by Bill Nelson, Senior Counsel, Legal Services, Treasury Board Secretariat

The current system for buying, selling, and leasing federal real property has remained essentially the same since Confederation. A transaction involving a small parcel of land of no significant market value can take upwards of nine months to complete — hardly comparable to modern methods and practices.

[the Act] will let government departments talk the same language as the private sector

This will all be fundamentally changed when the new *Federal Real Property Act* is proclaimed this summer. The new Act will be the primary authority for the acquisition and disposition of real property transactions. It will bring real property conveyancing by the government into the modern era by permitting the use of the methods employed by the private sector. It will let government departments talk the same language as the private sector, though they will still have the option to use the letters patent under the Great Seal as is required by today's regime.

The *Federal Real Property Act* deals first and foremost with management. It permits departments, along with Justice, to design management programs involving conveyancing. This legislation permits departments and Justice to use provincial land where appropriate and to delegate where it makes sense to delegate. Special program legislation such as the *National Parks Act*, the *Territorial Lands Act* and the *Indian Act* will not be affected, since the Act is designed as residual legislation so its provisions may be overridden by specialized legislation.

The current general legislation and regulations do not provide a unified framework for real property transactions for massive centralization and, as everyone knows, the result is an incredible amount of paperwork. Accordingly, the *Public Lands Grants Act* and sections 36 and 29.1 of the *Public Works Act* will no longer apply to real property and section 61 of the *Financial Administration Act* will be amended so that it will apply only to public property that is not real property.

Roles and Responsibilities

The new Act clarifies the roles of Treasury Board and the Minister of Justice as well as the "custodian department" (i.e. any department that administers real property on behalf of its ministers), which will have both greater authority and clearer accountability to manage federal property. The new role for Justice is critical. We will be using provincial law, so the need for quality control is paramount.

The Governor in Council will have the power to make regulations which, among other things, would empower ministers to enter into a wide range of real property transactions without the need for approval from Treasury Board or the Governor in Council. Ministers will still be entitled, though, to seek the authority of the Governor in Council for real property transactions.

The Minister of Justice will have the powers necessary to ensure quality control in real property transactions

Treasury Board will have the power to influence the management of transactions under the Act by means of the general regulations, policy directives, and guidelines for the efficient management of real property.

The Minister of Justice will have the powers necessary to ensure quality control in real property transactions under the Act, including the powers:

- to determine the type of instrument to be used, and to settle and approve the form and legal content of any Crown grant or other instrument;
- to effect delivery of an instrument subject to conditions;

- to give and accept solicitors' undertakings; and

- to have the sole discretion to authorize ministers regarding the use of instructions under the laws in force in a province to transfer real property.

a department... is the steward of the property for the Crown

The Act clarifies the role of the ministers of departments engaging in real property transactions. Although these departments and their real property managers will be given more direct responsibility and will be held accountable for the results, the Act emphasizes the fact that a department does not own the real property it administers but is the steward of the property for the Crown. This stewardship carries with it two main responsibilities to the government and to taxpayers with respect to those lands:

- a responsibility to use the property to deliver government programs during the temporary possession of the property; and

- a responsibility to manage and maintain the property in a manner that fully recognizes the intrinsic value of that property.

Department of Justice regional offices will no doubt be involved in the more interesting arrangements for buying, selling, leasing, licensing and transferring federal real property. This will improve service to the public, reducing delays and frustration for those who deal with the government in property transactions. It will also reduce the cost and increase the efficiency of how the government manages federal real property. ■

Legislative Update

Legislative Update is a summary of recently enacted legislation that has broad impact across government.

■ AN ACT TO ESTABLISH THE CANADIAN CENTRE FOR MANAGEMENT DEVELOPMENT
On May 18, 1990, Parliament adopted Bill C-34, establishing the Canadian Centre for Management Development. It was assented to on March 27, 1991, and proclaimed in force on December 1, 1991.

By Order-in-Council, the Prime Minister is designated the Minister for the purposes of the Act.

The Centre has been commissioned to "encourage pride and excellence in the management of the Public Service and to foster among Public Service managers a sense of the purposes, values and traditions of the Public Service," and generally "to formulate and provide training, orientation and development programs for managers in the public sector and particularly for senior managers in the Public Service."

The conduct and management of the affairs of the Centre fall under the statutory responsibility of a Board of Governors consisting of not more than 15 members. Within that number, the Clerk of the Privy Council acts as the Chair of the Board, with the assistance of the Secretary of the Treasury Board, the Chairman of the Public Service Commission, and the principal of the Centre. The Board as a whole is composed of an equal number of public and private sector representatives. Among the private sector group, university faculty members are represented.

The Centre is a departmental corporation as defined by the *Financial Administration Act.* ■

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The purpose of this newsletter is to help public service managers keep abreast of legal developments and topics that have broad interest and impact across government. The contents do not constitute legal advice.

Managers seeking further information or additional copies should contact their Departmental Legal Services Unit.

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