JUSTICE ECHO

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Making regulatory enforcement effective: what are the legal alternatives?

by Lyle Fairbairn, General Counsel, Compliance and Regulatory Remedies Project

Two significant developments could soon impair the effectiveness of current federal regulatory enforcement efforts: the cumulative effect of a decade of fiscal restraint on the size and capacity of the government's force of inspectors, and the impact of recent Charter decisions on the prosecution of regulatory offences in criminal courts. This is particularly true in the case of regulatory programs that rely ultimately on prosecutions in criminal courts to back up regulatory enforcement actions.

Improvements to the compliance and enforcement strategies of many departments are needed if they are to implement regulations effectively in the future.

Several major federal regulators are already collaborating with the Department of Justice and the Office of Privatization and Regulatory Affairs to find innovative solutions to common regulatory compliance problems under a linked initiative: the Compliance and Regulatory Remedies Project. During the coming year that project will be examining

- the scope for greater use of administratively imposed penalties,
- the means to achieve more effective sentences in regulatory cases, and
- possible guidelines to help with the development of more cost-effective compliance and enforcement policies.

Impact of the Charter on regulatory offences

Prior to the enactment of the *Canadian Charter of Rights and Freedoms*, our system of regulatory offences enabled the courts to "convict" a regulatee upon simple proof that the individual or corporate defendant had failed to comply in their business activity with prescribed legal standards. In some cases, the defendant would be held *absolutely* liable for the offence – that is, no defence would be allowed by the court upon proof of a regulatory breach. More commonly, defendants could be held *strictly* liable – that is, a conviction would result unless the defendants established that they were not negligent.

Improvements to the compliance and enforcement strategies of many departments are needed.

Ninety per cent of the more than 100,000 offences created in federal statutes and regulations were dealt with in this manner prior to the enactment of the Charter. Formerly, the courts distinguished "regulatory" offences from true "crimes" and relaxed the legal requirements for proving a regulatory offence, which they regarded as being essentially civil in nature.

A number of recent court decisions interpreting the Charter have had the effect of varying these practices.

The net result of the Charter case law is that federal departments relying on strict or absolute liability offence provisions to deter regulatory noncompliance or to back up compliance agreements "negotiated" by their officials, could find their position significantly weakened owing to the practical difficulties that enforcement officials and prosecutors may face in proving a regulatory offence.

This is especially true where the evidence is highly technical, as is often the case in regulatory matters. Even if strict or absolute liability offences are questioned but are capable of justification under the Charter as necessary to ensure a free and democratic society (section 1 of the Charter), that justification will need to be made on a case-by-case basis, leaving us with an impractical scheme of regulatory enforcement.

This situation provides a powerful incentive to explore the scope for legislative reforms that would take regulatory offences out of the criminal arena.

*(See **Regulatory enforcement**, page 3)*

Justice Echo celebrates first anniversary

December 1988 marked the beginning of a new initiative by Legal Services Units of the Department of Justice, aimed at strengthening their relationships with government managers.

The first issue of *Justice Echo* was distributed to some 1500 managers throughout federal departments and agencies. Over the past year, demand for the publication increased steadily; it now has a circulation of more than 2200.

The *Justice Echo* Editorial Board thanks all readers for the interest they have shown in the publication; we remain committed to offering articles as varied and interesting as possible.

If there are any topics that you feel would warrant coverage in *Justice Echo*, please pass your ideas to a member of your Departmental Legal Services Unit.

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Use of arbitration to settle disputes in contracts: one option for departments

by Jacques Gauthier, General Counsel, Commercial and Property Law and Advisory Services

In a circular letter dated July 23, 1987, the Treasury Board advised deputy heads of departments and heads of agencies that arbitration may be used to resolve contract disputes. The circular also stated that the Department of Justice's Senior Assistant Deputy Minister, Departmental Legal Services, would issue guidelines to counsel covering the format and content of arbitration agreements or of the arbitration clauses to be included in contracts.

The promulgation of the *Commercial Arbitration Act* was not intended to alter the traditional approach of using the court system for resolution of substantive legal issues. Indeed, the arbitration process, often referred to as a mode of "alternate dispute resolution", is also a litigious process and is regarded as such by the Department of Justice.

The Treasury Board policy reflects this by emphasizing that arbitration is but an option available to the contractor and the Crown to settle disputes. The Department of Justice considers that arbitration is a valid option for dealing with matters that are properly questions of fact in specialized areas.

The experience acquired by the Department of Justice to date has resulted in a policy and directive to counsel, which will be revised as the Department gains more experience with arbitration.

Arbitration policy

The Department of Justice does not encourage client departments and agencies to resort to arbitration as the general means of resolving disputes. Rather, arbitration agreements should be negotiated after a dispute has arisen and not as a standard provision in every contract. This cautious approach has been chosen so that the government can gain some meaningful hands-on experience of arbitration as a means to resolve disputes, and to build confidence in that means. Such an approach will significantly reduce the risk that a few unfortunate experiences might convey the message that arbitration is an unworthy method of resolving disputes.

Arbitration agreements

In light of the above statement of policy and the need to carefully monitor and control the conduct of arbitration, agreements to arbitrate disputes where no arbitration provision is included in the contract will be negotiated with the disputing party by the Departmental Legal Services counsel, assisted by counsel in Justice's Civil Litigation Section.

Client departments must ensure that sufficient funds are available to cover not only the costs associated with the conduct of arbitration but also the costs of an award. This is necessary in light of the contractual nature of an arbitration agreement.

Such arbitration agreements should include:

- a statement to the effect that the award will be final and binding on the parties;
- a provision defining the exact issues to be put to the arbitral tribunal by stating the specific questions upon which the tribunal must decide;
- an acknowledgment that the arbitration is being conducted pursuant to the Act;
- directly or by reference, a list of the procedural matters agreed upon by the parties pursuant to the Act such as a date, time and place for commencing the arbitral proceedings, and a timetable for its conduct;
- an agreement as to the number of arbitrators, their mode of selection including procedures for challenge, and the decision-making process;
- a determination of the place of arbitration in Canada;
- a determination of the language of arbitration;
- a determination of whether or not oral hearings will be held or evidence and arguments produced in writing only;
- a statement dealing with the appointment of experts and their participation in the process; and
- a statement of the applicable law which deals with whether or not the arbitral tribunal may decide *ex aequo et bono* or as *amiable compositeur* (in equity or as a conciliator).

Client departments must ensure that sufficient funds are available to cover not only arbitration . . . but also the costs of an award.

Arbitration clause

In the event that the parties decide to agree on arbitration at the time of entering into the contract, the arbitration clause should:

- define those matters that will be subject to arbitration;
- state that the arbitration award will be final and binding on both parties;
- state that it shall be subject to the Act;
- determine the number of arbitrators and their method of appointment;
- set the place of arbitration in Canada;
- determine the language of the arbitral proceedings; and
- determine the law applicable.

Furthermore, before the contract containing the arbitration clause is executed, the options set out in the *Commercial Arbitration Code* should be exercised to the extent possible at that time.

Should you wish to consider the insertion of arbitration clauses in a contract, or to resolve a dispute resulting from a pre-existing contract with no such clauses, contact your Departmental Legal Services Unit.

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Legal services for public servants — when will government foot the bill?

by Barbara McIsaac, Counsel, Civil Litigation (Common Law) Section

Under certain circumstances, a public servant faced with any of the following situations may be entitled to legal services provided at government expense. When he or she:

- is sued or threatened to be sued in the civil courts;
- has been charged with an offence;
- is interviewed by the police, a crown attorney or similar official, in circumstances that, in the opinion of the employee's deputy head, could lead to legal proceedings against the employee or the Crown; or
- is required to appear before a judicial, investigative or other inquest or inquiry.

Basically, where the employee has acted within the scope of his or her duties and generally in accordance with the expectations of his or her department, Treasury Board has authorized that the required legal services can be provided by the Department of Justice or, in certain circumstances, by private counsel, whose fees will be paid by the government.

The policy is set out in Treasury Board Circular No. 1983-52, dated October 5, 1983, and applies to all departments and agencies listed in schedules I and II of the *Financial Administration Act,* to branches of the public service designated as departments for the purposes of the Act, and to the Canadian Forces.

Under the policy, a public servant in any of the circumstances described above may request the provision of legal counsel at public expense. This is done by way of a written request to the employee's deputy head, accompanied by a full report of the circumstances. The employee must state whether he or she is willing to be represented by the Department of Justice. If they wish to be represented by private counsel, they must state the reason, the name of the counsel, and the counsel's fee schedule. Private counsel in such cases are not retained as agents of the Attorney General of Canada.

As a matter of policy, the Department of Justice does not represent employees who have been or may be charged with an offence. Otherwise, the policy is that the employee should be represented by the Department of Justice unless that department declines to act because of a potential conflict of interest.

The policy also requires that, before approving a request for legal services, the employee's deputy head is to seek the Department of Justice's opinion as to the need for legal counsel and the application of the policy to the particular circumstance.

The deputy head may approve the payment of legal fees and disbursements to private counsel, including the cost of travel under the Treasury Board's travel policy, to a maximum of $10,000. Thereafter, Treasury Board approval is required.

When it is appropriate to engage private counsel, the deputy head should ensure that both the choice of counsel and the proposed fee schedule are reasonable. The Department of Justice maintains a schedule of fees and can advise and provide assistance on such matters. When the lawyer submits his or her bill, the Department of Justice reviews and approves the account for payment.

When private counsel is engaged, the employee and the selected counsel must be informed in writing of the limits to the Crown's commitment regarding legal fees, and the procedures involved in approval of accounts.

For specific information and advice, managers should refer to Treasury Board Circular No. 1983-52, and seek advice from their Departmental Legal Services Unit.

*(**Regulatory enforcement**, from page 1)*

Trends in enforcement practice

Even before the Charter, criminal prosecution was long regarded by enforcement officials as a blunt instrument of last resort in regulatory cases. The penalty provisions of many federal regulatory statutes are also seriously outdated, which leads, in some cases, to very low fines that tend to trivialize noncompliant behaviour. Although criminal prosecutions have an important role to play in dealing with willful, serious incidents of noncompliance (and our criminal law requires some strengthening in this regard), enforcement officials usually prefer to deal with noncompliance under regulatory statutes with negotiated or administrative solutions. These methods are viewed as more appropriate in most circumstances and are often considered to be more cost-effective.

One of the challenges in regulatory enforcement for the 1990s, therefore, will be to develop better legal support for administrative solutions to regulatory noncompliance in the very broad middle ground that exists between ticketing schemes (designed for very minor offences) and formal criminal prosecutions (designed to sanction intentional breaches of regulatory legislation). Administratively imposed civil monetary penalties, when used to recapture the profits accruing from noncompliant behaviour, could be one important tool for some departments. (Such penalties have been employed to great effect in many European countries and throughout the United States. The U.S. Environmental Protection Agency settles 90 per cent of all administratively imposed penalty cases. An administrative law judge disposes of virtually all of the remaining disputes, with only 1 per cent being further appealed to the courts.) Other forms of administrative monetary penalties are already being employed by federal departments to deal with such matters as aeronautics infractions, UIC overpayments, customs offences and unpaid income tax.

Conclusions and recommendations

Any department evaluating a federal regulatory program or proposing to reformulate regulatory legislation should ensure that such legislation contains the broadest possible array of sanctions, criminal and noncriminal, that are constitutionally permissible. If innovative compliance and enforcement provisions are to be considered when a regulatory statute is amended, your Departmental Legal Services Unit should be involved as early as possible in the policy development process, so that any legal or constitutional difficulties associated with proposed alternative sanctions can be ▷

properly addressed before the draft legislation stage.

In the case of departments administering regulatory legislation based on a federal head of power other than the criminal law power, the potential for using administratively imposed monetary penalties should be considered, especially where an impartial forum is already available under the regulatory scheme to deal with disputed cases.

Departments significantly broadening their legislative remedies and sanctions (which may include provision for upgrading criminal penalties) should consider preparing a formal compliance and enforcement policy to ensure reasonably predictable and regionally consistent enforcement practices, and also to ensure that the sanctions employed in particular cases are proportionate to the seriousness of the violation, to minimize Charter challenges.

Administratively imposed sanctions (including civil monetary penalties, licence suspensions, product recalls) constitute the most important legal framework for negotiated solutions to noncompliant behaviour in many American and European jurisdictions. In these jurisdictions, however, the rights of regulatees are usually protected under an administrative procedure act, or an equivalent. Accordingly, any expansion of the administrative sanctioning powers of federal departments should be accompanied, in the absence of legislated safeguards, by provisions in their compliance and enforcement policy designed to ensure that the negotiation practices employed by enforcement officials are at least consistent with express or implied protections afforded to regulatees under the Charter.

Non-smokers' Health Act comes into force this month

by Nicole Jeffrey, Counsel, Legal Services Treasury Board of Canada

On December 29, 1989, an amended *Non-smokers' Health Act* will come into effect, bringing the force of law to the Treasury Board's policy prohibiting smoking in government workplaces.

The original Act, introduced as a private member's bill and assented to on June 28, 1988, was never proclaimed because it quickly became apparent that there would be difficulties in implementing and enforcing it.

It therefore was decided to amend the Act. Accordingly, Bill C-27, an Act to amend the *Non-smokers' Health Act*, was passed by the House of Commons on June 26, 1989, received Royal Assent three days later, and comes into force on December 29. The Minister of Labour and the Minister of Transport are responsible for the administration of the Act.

The underlying premise of the Act is that smoking is annoying and harmful to non-smokers . . .

Under the amended legislation, no effort is being made to control the degree of concentration of tobacco byproducts in the ambient air, as was the intent of the original bill. Rather, smoking is essentially banned from the workplace. The underlying premise of the Act is that smoking is annoying and harmful to non-smokers, who should be entitled to work in a smoke-free environment.

Under the Act the employer, or any person acting on the employer's behalf, has the burden of ensuring that there is no smoking in any workspace under the employer's control, except in designated smoking rooms or smoking areas. When making such designations, the employer must respect the requirements of the legislation. In this regard, regulations may be made respecting the size, number, proportionate floor space, location, use, number of occupants, and other characteristics of designated smoking rooms and areas.

Moreover, smoking *areas* can be designated only on aircraft, trains, motor vehicles and ships, and in airport passenger terminals, railway passenger stations, interurban bus stations and marine passenger terminals.

The smoking ban is further reinforced in the Act by placing onus on individuals as well as the employer through the stipulation that *no person shall smoke* in any workspace under the control of an employer except in designated smoking rooms and areas.

An exception is provided in the Act to permit an employer to require employees to work in a smoking area or room if the nature of their duties calls for the performance of tasks in such rooms or areas.

Offences and punishments are provided for employers and all persons who contravene the Act; financial penalties range from $50 to $10,000. A ticketing scheme is also contemplated in the Act. Proceedings in respect of an offence committed under the Act may be instituted by anyone. However, proceedings commenced by way of a ticket can be instituted only by inspectors designated by the Minister of Labour or by a peace officer.

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Justice Echo is a quarterly publication of the Departmental Legal Services Sector of the Department of Justice. Its objective 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 should contact their Departmental Legal Services Unit. Permission to reproduce articles appearing in ***Justice Echo*** may be obtained by contacting the Communications and Public Affairs Directorate at (613) 957-4214.

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