OLDMAN AND ENVIRONMENTAL IMPACT ASSESSMENT: AN INVITATION FOR COOPERATIVE FEDERALISM

Steven A. Kennett

INTRODUCTION

This paper describes, from a constitutional perspective, the implications for environmental impact assessment (EIA) of the Supreme Court of Canada's decision in *Oldman*.[1] In particular, *Oldman* indicates that both levels of government will frequently have jurisdiction to conduct EIAs of environmentally significant projects. If they choose to exercise their respective authority, coordination is necessary to avoid regulatory duplication and reduce the risk of intergovernmental conflict. While governments were already moving in the direction of greater coordination in EIA,[2] *Oldman* should provide additional impetus.

The paper begins with a brief overview of the *Oldman* litigation. Three elements of the judgement relevant to shared jurisdiction over EIA are then discussed. First, the Court took an expansive view of the "environment" and of the role for EIA. Second, it rejected arguments, based on Crown and interjurisdictional immunity, which could have limited federal EIA authority regarding the Oldman Dam. Third, the Court's constitutional analysis of environmental management and EIA suggests multiple points of regulatory leverage for both levels of government. The constitutional limitation on EIA is then discussed. In the final section, *Oldman* is related to the general problem of environmental management in a federal system.

OVERVIEW OF THE CASE

The *Oldman* litigation resulted from the Government of Alberta's decision to construct an irrigation dam on the Oldman River. One of the strategies pursued by opponents of the dam was to request a federal EIA. The province, which had conducted its own environmental review of the project, opposed federal intervention and the federal government had refused to apply the *Environmental Assessment Review Process Guidelines Order*[3] under its fisheries jurisdiction, stating that potential problems were being addressed and that "long-standing administrative arrangements ... are in place for the management of fisheries in Alberta."[4] In addition, the federal Minister of Transport granted approval for the dam under s.5 of the *Navigable Waters Protection Act*[5] without conducting an EIA. It is an irony of *Oldman* that the case, which would be hailed by environmentalists as a strong affirmation of federal jurisdiction,[6] was initiated to force an unwilling federal government to evaluate the environmental effects of the dam.

The Friends of the Oldman River Society brought an application for an order in the nature of *certiorari* to quash the federal approval of the dam and an order in the nature of *mandamus* requiring the Ministers of Transport and Fisheries and Oceans to conduct an EIA. Jerome A.C.J. of the Federal Court Trial Division dismissed the application, finding the *Guidelines Order* to be inapplicable and exercising judicial discretion not to grant relief on the grounds of delay and unnecessary duplication if a federal EIA were ordered.[7] This decision was reversed on appeal.[8] Stone J.A. of the Federal Court of Appeal held that the *Guidelines Order* was triggered by the decision-making authority of both ministers and was mandatory. In addition, he overturned the trial judge on the exercise of discretion. Leave to appeal was granted by the Supreme Court of Canada.

The Supreme Court addressed five issues: (1) the statutory validity of the *Guidelines Order*; (2) its applicability to the Oldman Dam (the proponent of which was the Crown in right of Alberta); (3) whether the *Guidelines Order* was mandatory; (4) the interference with the trial judge's discretion; and (5) whether the breadth of the *Guidelines Order* offended s.92 of the *Constitution Act, 1867*.[9] La Forest J. wrote for the eight justice majority, upholding the federal EIA process. Stevenson J. dissented on two issues (Crown immunity and the exercise of discretion) and on the costs award.[10]

On the first issue, the Court held that the *Guidelines Order* was validly enacted under the *Department of the Environment Act*[11] and was consistent with other statutory authority regarding the dam because it simply created a "superadded" duty to review environmental effects.[12] Second, the Court held that the licensing requirement under the *Navigable Waters Protection Act* gave rise to an "affirmative regulatory duty" on the part of the Minister of Transport, making that Minister an "initiating department" and triggering the federal EIA requirement for the dam.[13] In addition, the *Navigable Waters Protection Act* was found to be binding on the Crown in right of Alberta.[14] The Court held, however, that the *Fisheries Act*[15] does not create a regulatory scheme triggering the *Guidelines Order*.[16] Third, the *Guidelines Order* was held to be a mandatory regulatory scheme enacted as subordinate legislation.[17] Fourth, the

interference with the trial judge's discretion was justified since he failed to weigh adequately the sustained legal effort to challenge the project and the absence of prejudice to Alberta resulting from any delay in bringing the application.[18] Finally, the Court held that the *Guidelines Order* is constitutionally valid as a means of facilitating decision-making (under the particular heads of federal power related to the dam) and as a procedural or organizational device governing the internal operations of the Government of Canada (under the "peace, order and good government" power).[19]

At several points in the judgement, La Forest J. emphasised the broad scope of environmental management and EIA, refused to insulate the Oldman Dam from federal authority and noted the constitutional basis for both federal and provincial roles in environmental management. These elements, reviewed in the following three sections, establish overlapping federal and provincial responsibility for EIA as a central feature of environmental decision-making in Canada.

THE EXPANSIVE VIEW OF 'ENVIRONMENT' AND EIA

The first element of *Oldman* relevant to shared jurisdiction over EIA is the Court's expansive view of both the environment as a subject matter of government activity and of the role of EIA in decision-making. While this reasoning is not, strictly speaking, constitutional, it lays the groundwork for extensive jurisdictional overlap in the EIA of environmentally significant projects.

La Forest J.'s interpretation of the scope of the Minister's duties under the *Department of the Environment Act* emphasises the broad ambit of authority regarding environmental quality. He states:

> I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter ... Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives....[20]

At another point, La Forest J. remarks that "the environment is comprised of all that is around us and as such must be a part of what actuates many decisions of any moment."[21] This broad view of environmental quality suggests that EIAs have a role in a wide variety of contexts and may be far-reaching in their scope.

The potential ubiquity of the EIA process is also suggested by La Forest J.'s statement that EIA is "a planning tool that is now generally regarded as an integral component of sound decision-making.... In short, environmental impact assessment is simply descriptive of a process of decision-making."[22] It is thus clear that EIA — the evaluation of activities in terms of their consequences for environmental quality — may be an adjunct of virtually all government decision making.

THE REJECTION OF CROWN AND INTERJURISDICTIONAL IMMUNITY

The second element of *Oldman* relevant to shared EIA jurisdiction is the Court's rejection of arguments, based on Crown and interjurisdictional immunity, that the dam should be insulated from federal authority. The first argument was that the *Navigable Waters Protection Act*, which triggered the *Guidelines Order*, was inapplicable to the Crown in right of Alberta. The issue arose because the Act does not explicitly bind the Crown. La Forest J.'s conclusion that the Crown in right of Alberta is bound by necessary implication is based in large part on his discussion of the *Interpretation Act*[23] and the common law right of navigation. His discussion also contains reasoning which is relevant to environmental regulation in general. Noting that navigation systems may be integral to interprovincial transportation networks which are vital for international trade and commerce, La Forest J. states that:

> The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province were left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.[24]

The need for an integrated approach, a common feature of environmental management, supported the application of federal legislation to the Crown in right of a province even absent explicit terms binding the province.

The second argument addressed by La Forest J. is that the Oldman Dam is "a 'provincial project' or an undertaking 'primarily subject to provincial regulation.'"[25] Following Dickson C.J. in *Alberta Government Telephones*,[26] La Forest J. rejects the "erroneous principle that ... there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation."[27]

The Supreme Court of Canada thus indicates its unwillingness to recognize a privileged provincial position with respect to environmental management. While the

provinces may, by virtue of their proprietary rights[28] and broad legislative powers,[29] exercise the preponderance of environmental jurisdiction in Canada, federal authority over environmental matters has equal constitutional legitimacy and is unlikely to be restricted by claims of provincial immunity.

THE BASIS AND EXTENT OF ENVIRONMENTAL JURISDICTION

The third element of *Oldman* relevant to authority regarding EIA is the Court's analysis of environmental jurisdiction. La Forest J. explains the constitutional implications of his broad view of the environment as follows:

> I agree that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. 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.[30]

He also states that, in constitutional terms, EIA has an "auxiliary nature"[31] in that it is dependent on other heads of power. There is no separate constitutional jurisdiction with respect to EIA; rather, authority to require an EIA exists whenever governments exercise jurisdiction.

La Forest J.'s approach is to examine the catalogue of powers in the *Constitution Act, 1867* in terms of their use to address environmental issues.[32] Since provincial jurisdiction was not at issue in *Oldman*, his focus is federal powers. Two illustrations of federal environmental jurisdiction are discussed. The first is based on federal jurisdiction over an area of activity. In the second example, environmental jurisdiction arises from the effects of an activity on an area of federal authority.

La Forest's first example arises from federal authority over interprovincial railways.[33] On this basis, the federal government has broad latitude for environmental regulation including both "biophysical environmental concerns" and "the national and local socio-economic ramifications" of decisions regarding these railways.[34]

The second example is jurisdiction under the "navigation and shipping" power[35] to regulate "biophysical environmental concerns that affect navigation."[36] La Forest J. cites ss.21 and 22 of the *Navigable Waters Protection Act*, which prohibit the deposit of substances liable to interfere with navigation into navigable waters. Legislation of this type, he notes, must have a clear nexus with the head of power relied on. This analysis is supported by the *Fowler*[37] and *Northwest Falling*[38] cases concerning anti-pollution sections of the *Fisheries Act*. In *Fowler*, a general pollution prohibition was struck down on the grounds that a link with harm to fisheries was not established. In contrast, *Northwest Falling* upheld a section prohibiting the deposit of deleterious substances (defined as being harmful to fish, fish habitat or to the human use of fish) where they might enter waters frequented by fish.

Environmental jurisdiction, then, may be based on constitutional authority over activities or on authority to regulate the environmental effects of activities for areas of jurisdiction. As a result, projects like the Oldman Dam, which have significant consequences for environmental quality, likely will affect both federal and provincial heads of power. La Forest states:

> What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here.[39]

Federal jurisdiction in *Oldman* arose from the effects of the dam on navigation, fisheries, and Indians and lands reserved for Indians. Since jurisdiction over the dam is shared, both levels of government are competent to undertake EIAs in the exercise of their respective regulatory authority.

THE CONSTITUTIONAL LIMITATION ON EIA

Although projects having consequences for both federal and provincial jurisdiction may be subject to EIA by both levels of government, the scope of these EIAs is not necessarily coextensive. La Forest J. recognizes the risk that EIA might serve "as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."[40] His response is that the *Guidelines Order* restricts EIA panels to examining only "matters directly related to the areas of federal responsibility affected."[41] Consequently, it cannot be used as a "colourable device" to extend federal control to aspects of the project unrelated to federal heads of power.[42] Since federal jurisdiction over the dam relates to the project's effects on fisheries, navigation, and Indians and land reserved for Indians, *Oldman* suggests that a federal EIA must be limited to evaluating these areas of concern.

This restriction on the scope of EIA makes constitutional sense, but raises two practical problems. First, there remains a risk of duplication, delay and

intergovernmental conflict if two separate EIAs of a single project are required. Evaluating a project's consequences for fisheries, for example, will involve many of the same considerations of a general assessment of the its effects on water flow and quality, issues likely to be addressed in a provincial EIA. Second, there is a certain contradiction between the policy rationale for EIA and the constitutional restriction. EIA is promoted as a holistic process for reviewing and weighing the environmental effects (and the options for their mitigation) of entire projects. Can this objective be achieved if EIA is restricted to an examination of only a few consequences, or only part of a project?

CONCLUSION

The *Oldman* decision suggests that jurisdiction to require an EIA of environmentally significant projects frequently will be shared. The broad definitions of "environment" and of the role of EIA, the rejection of provincial arguments based on Crown or interjurisdictional immunity and the basing of environmental jurisdiction on the activities regulated (e.g. interprovincial railways) or the effects of activities on areas of jurisdiction (e.g. effects on navigation) give both levels of government ample grounds for environmental regulation. The constitutional limitation on EIA leaves room for considerable overlap in practice.

Oldman illustrates a general tension between environmental management and federalism.[43] Since virtually all decision-making raises environmental issues, the decentralization that characterizes Canadian federalism means that both levels of government will be engaged in environmental management. This inevitable fragmentation of authority, however, brings with it certain risks. Regulatory duplication or conflict may result and the integrated approach to environmental issues, necessary to take account of interrelationships within ecosystems, is made more difficult. These problems are illustrated by shared jurisdiction to conduct EIAs of a project like the Oldman Dam. Dividing EIA responsibility on constitutional lines raises the possibility of duplication and the risk that a restricted EIA (in this case federal) will provide an inadequate basis for decision-making.

As is frequently the case in Canadian federalism, the solution is likely to be political rather than constitutional. By confirming that both levels of government have solid constitutional grounds for involvement in EIA, the Supreme Court of Canada is effectively inviting governments to work out a cooperative approach. Overlapping authority should be acknowledged and a coherent and effective structure for joint EIA should be put in place.

STEVEN A. KENNETT, Research Associate, Canadian Institute of Resources Law, The University of Calgary.

1. *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 2 W.W.R. 193 (S.C.C.).
2. The *Canadian Environmental Assessment Act* (Bill C-13, 3d Sess., 34th Parl., 1991-1992), ss.40-42 provides for joint EIAs. Agreement has also been reached to conduct a joint EIA of Hydro-Quebec's Great Whale project.
3. SOR/84-467 [hereinafter *Guidelines Order*].
4. *Oldman, supra*, note 1 at 207.
5. R.S.C. 1985, c. N-22.
6. See E. May, "Oldman Dam Victory: Federal Environmental Power Affirmed" *The Sierra Report* (February/March 1992) 1.
7. [1990] 1 F.C. 248 (T.D.)
8. [1990] 2 F.C. 18 (A.D.)
9. *Oldman, supra*, note 1 at 214-215.
10. The majority awarded costs on a solicitor and client basis, a significant development for public interest litigants.
11. R.S.C. 1985, c. E-10.
12. *Oldman, supra*, note 1 at 215-221.
13. *Oldman, supra*, note 1 at 223-226.
14. *Oldman, supra*, note 1 at 227-236.
15. R.S.C. 1985, c. F-14.
16. *Oldman, supra*, note 1 at 226-227.
17. *Oldman, supra*, note 1 at 215-217.
18. *Oldman, supra*, note 1 at 246-250.
19. *Oldman, supra*, note 1 at 244-245.
20. *Oldman, supra*, note 1 at 218.
21. *Oldman, supra*, note 1 at 242.
22. *Oldman, supra*, note 1 at 242-243.
23. R.S.C. 1985, c. I-21.
24. *Oldman, supra*, note 1 at 235.
25. *Oldman, supra*, note 1 at 241.
26. *Alberta Government Telephones* v. *Canada (C.R.T.C.)*, [1989] 2 S.C.R. 225.
27. *Oldman, supra*, note 1 at 241.
28. *Constitution Act, 1867*, s.109.
29. *Constitution Act, 1867*, ss. 92(13), 92(16) and 92(10).
30. *Oldman, supra*, note 1 at 237.
31. *Oldman, supra*, note 1 at 243.
32. *Oldman, supra*, note 1 at 238.
33. *Constitution Act, 1867*, ss. 92(10)(a) and 91(29).
34. *Oldman, supra*, note 1 at 239.
35. *Constitution Act, 1867*, s.91(10).
36. *Oldman, supra*, note 1 at 239.
37. *Fowler* v. *The Queen*, [1980] 2 S.C.R. 213.
38. *Northwest Falling Contractors Ltd.* v. *The Queen*, [1980] 2 S.C.R. 292.
39. *Oldman, supra*, note 1 at 241.
40. *Oldman, supra*, note 1 at 243.
41. *Oldman, supra*, note 1 at 243.
42. *Oldman, supra*, note 1 at 243.
43. See M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 24 Alta. L. Rev. 420.