Friends of the Oldman River Society *v.* Canada (Minister of Transport), [1992] 1 S.C.R. 3

Her Majesty the Queen in right of Alberta,
as represented by the Minister of
Public Works, Supply and Services *Appellant*

and

The Minister of Transport and
the Minister of Fisheries and Oceans *Appellants*

v.

Friends of the Oldman River Society *Respondent*

and

The Attorney General of Quebec,
the Attorney General for New Brunswick,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General of Newfoundland,
the Minister of Justice of the Northwest Territories,
the National Indian Brotherhood/Assembly of First Nations,
the Dene Nation and the Metis Association of the Northwest Territories,
the Native Council of Canada (Alberta),
the Sierra Legal Defence Fund,
the Canadian Environmental Law Association,
the Sierra Club of Western Canada,
the Cultural Survival (Canada),
the Friends of the Earth and
the Alberta Wilderness Association *Interveners*

Indexed as: Friends of the Oldman River Society v. Canada (Minister of Transport)

File No.: 21890.

1991: February 19, 20; 1992: January 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the federal court of appeal

Constitutional law -- Distribution of legislative powers -- Environment -- Environmental assessment -- Whether federal environmental guidelines order intra vires Parliament -- Constitution Act, 1867, ss. 91, 92 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law -- Environmental assessment -- Statutory validity of federal environmental guidelines order -- Whether guidelines order authorized by s. 6 of Department of the Environment Act -- Whether guidelines order inconsistent with Navigable Waters Protection Act -- Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6 -- Navigable Waters Protection Act, R.S.C., 1985, c. N-22, ss. 5, 6 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law -- Environmental assessment -- Applicability of federal environmental guidelines order -- Alberta building dam on Oldman River -- Dam affecting areas of federal responsibility such as navigable waters and fisheries -- Whether guidelines order applicable only to new federal projects -- Whether Minister of Transport and Minister of Fisheries and Oceans must comply with

guidelines order -- Department of the Environment Act, R.S.C., 1985, c. E-10, ss. 4(1)(a), 5(a)(ii), 6 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2 "proposal", "initiating department", 6 -- Navigable Waters Protection Act, R.S.C., 1985, c. N-22, s. 5 -- Fisheries Act, R.S.C., 1985, c. F-14, ss. 35, 37.

Crown -- Immunity -- Provinces -- Whether Crown in right of province bound by provisions of Navigable Waters Protection Act, R.S.C., 1985, c. N-22 -- Interpretation Act, R.S.C., 1985, c. I-21, s. 17.

Administrative law -- Judicial review -- Remedies -- Discretion -- Alberta building dam on Oldman River -- Dam affecting areas of federal responsibility such as navigable waters and fisheries -- Environmental group applying for certiorari and mandamus in Federal Court to compel Minister of Transport and Minister of Fisheries and Oceans to comply with federal environmental guidelines order -- Applications dismissed on grounds of unreasonable delay and futility -- Whether Court of Appeal erred in interfering with motions judge's discretion not to grant remedy sought.

The respondent Society, an Alberta environmental group, brought applications for *certiorari* and mandamus in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta -- a project which affects several federal interests, in particular navigable waters, fisheries, Indians and Indian lands. The Guidelines

Order was established under s. 6 of the federal *Department of the Environment Act* and requires all federal departments and agencies that have a decision-making authority for any proposal (i.e., any initiative, undertaking or activity) that may have an environmental effect on an area of federal responsibility to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. The province had itself conducted extensive environmental studies over the years which took into account public views, including the views of Indian bands and environmental groups, and, in September 1987, had obtained from the Minister of Transport an approval for the work under s. 5 of the *Navigable Waters Protection Act*. This section provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the Guidelines Order was made. Respondent's attempts to stop the project in the Alberta courts failed and both the federal Ministers of the Environment and of Fisheries and Oceans declined requests to subject the project to the Guidelines Order. The contract for the construction of the dam was awarded in 1988 and the project was 40 per cent complete when the respondent commenced its action in the Federal Court in April 1989. The Trial Division dismissed the applications. On appeal, the Court of Appeal reversed the judgment, quashed the approval under s. 5 of the *Navigable Waters Protection Act*, and ordered the Ministers of Transport and of Fisheries and Oceans to comply with the Guidelines Order. This appeal raises the constitutional and statutory validity of the Guidelines Order as well as its nature and applicability. It also raises the question whether the motions judge properly exercised his discretion in deciding not to grant the remedy sought on grounds of unreasonable delay and futility.

Held (Stevenson J. dissenting): The appeal should be dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.

Statutory Validity of the Guidelines Order

The Guidelines Order was validly enacted pursuant to s. 6 of the *Department of the Environment Act*, and is mandatory in nature. When one reads s. 6 as a whole, rather than focusing on the word "guidelines" in isolation, it is clear that Parliament has elected to adopt a regulatory scheme that is "law", and amenable to enforcement through prerogative relief. The "guidelines" are not merely authorized by statute but must be formally enacted by "order" with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority.

The Guidelines Order, which requires the decision maker to take socio-economic considerations into account in the environmental impact assessment, does not go beyond what is authorized by the *Department of the Environment Act*. The concept of "environmental quality" in s. 6 of the Act is not confined to the biophysical environment alone. The environment is a diffuse subject matter and, subject to the constitutional imperatives, 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.

The Guidelines Order is consistent with the *Navigable Waters Protection Act*. There is nothing in the Act which explicitly or implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act. The Minister's duty under the Order is supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the Order. There is also no conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in s. 3 of the Guidelines Order, and the remedial power under s. 6(4) of the Act to grant approval after the commencement of construction. That power is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the Order.

Applicability of the Guidelines Order

The scope of the Guidelines Order is not restricted to "new federal projects, programs and activities"; the Order is not engaged every time a project may have an environmental effect on an area of federal jurisdiction. However, there must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". The proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act

of Parliament which relates to the proposed initiative, undertaking or activity. "Responsibility" within the definition of "proposal" means a legal duty or obligation and should not be read as connoting matters falling generally within federal jurisdiction. Once such a duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the "decision making authority" for the proposal and thus responsible for initiating the process under the Guidelines Order.

The Oldman River Dam project falls within the ambit of the Guidelines Order. The project qualifies as a proposal for which the Minister of Transport alone is the "initiating department" under s. 2 of the Order. The *Navigable Waters Protection Act*, in particular s. 5, places an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water.

The Guidelines Order does not apply to the Minister of Fisheries and Oceans, however, because there is no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. The discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a "decision making responsibility" within the meaning of the Order. The Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has only been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty.

The scope of assessment under the Guidelines Order is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Under the Order, the initiating department which has been given authority to embark on an assessment must consider the environmental effect on all areas of federal jurisdiction. The Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, must thus consider the environmental impact of the dam on such areas of federal jurisdiction as navigable waters, fisheries, Indians and Indian lands.

Crown Immunity

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Crown in right of Alberta is bound by the *Navigable Waters Protection Act* by necessary implication. The proprietary right the province may have in the bed of the Oldman River is subject to the public right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. The Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval. The purpose of the Act would be wholly frustrated if the province was not bound by the Act. The provinces are among the bodies that are likely to engage in projects that may interfere with navigation. Were the Crown in right of a province permitted to undermine the integrity of the essential navigational

networks in Canadian waters, the legislative purpose of the *Navigable Waters Protection Act* would effectively be emasculated.

Per Stevenson J. (dissenting): The province of Alberta is not bound by the *Navigable Waters Protection Act*. The Crown is not bound by legislation unless it is mentioned or referred to in the legislation. Here, there are no words in the Act "expressly binding" the Crown and no clear intention to bind "is manifest from the very terms of the statute". As well, the failure to include the Crown would not wholly frustrate the purpose of the Act or produce an absurdity. There are many non-governmental agencies whose activities are subject to the Act and there is thus no emasculation of the Act. If the Crown interferes with a public right of navigation, that wrong is remediable by action. There is no significant benefit in approval under the Act. Tort actions may still lie.

Constitutional Validity of the Guidelines Order

The "environment" is not an independent matter of legislation under the *Constitution Act, 1867*. Understood in its generic sense, it encompasses the physical, economic and social environment and touches upon several of the heads of power assigned to the respective levels of government. While both levels may act in relation to the environment, the exercise of legislative power affecting environmental concerns must be linked to an appropriate head of power. Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction.

The Guidelines Order is *intra vires* Parliament. The Order does not attempt to regulate the environmental effects of matters within the control of the province but merely makes environmental impact assessment an essential component of federal decision making. The Order is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. In essence, the Order has two fundamental aspects. First, there is the substance of the Order dealing with environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. This aspect of the Order can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the Order is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker (the "initiating department"). This facet of the Order has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties. This is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Guidelines Order cannot be used as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. The "initiating department" is only given a mandate to examine matters directly related to the areas of federal responsibility potentially affected. Any

intrusion under the Order into provincial matters is merely incidental to the pith and substance of the legislation.

Discretion

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Federal Court of Appeal did not err in interfering with the motions judge's discretion not to grant the remedies sought on the grounds of unreasonable delay and futility. Respondent made a sustained effort, through legal proceedings in the Alberta courts and through correspondence with federal departments, to challenge the legality of the process followed by the province to build the dam and the acquiescence of the appellant Ministers, and there is no evidence that Alberta has suffered any prejudice from any delay in taking the present action. Despite ongoing legal proceedings, the construction of the dam continued. The province was not prepared to accede to an environmental impact assessment under the Order until it had exhausted all legal avenues. The motions judge did not weigh these considerations adequately, giving the Court of Appeal no choice but to intervene. Futility was also not a proper ground to refuse a remedy in the present circumstances. Prerogative relief should only be refused on that ground in those few instances where the issuance of a prerogative writ would be effectively nugatory. It is not obvious in this case that the implementation of the Order even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.

Per Stevenson J. (dissenting): The Federal Court of Appeal erred in interfering with the motions judge's discretion to refuse the prerogative remedy. The court was clearly wrong in overruling his conclusion on the question of delay. The common law has always imposed a duty on an applicant to act promptly in seeking prerogative relief. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the Minister of Transport's approval. It is impossible to conclude that Alberta was not prejudiced by the delay. The legal proceedings in the Alberta courts brought by the respondent and others need not have been taken into account by the motions judge. These proceedings were separate and distinct from the relief sought in this case and were irrelevant to the issues at hand. The present action centres on the constitutionality and applicability of the Guidelines Order. It raises new and different issues. In determining whether he should exercise his discretion against the respondent, the motions judge was obliged to look only at those factors which he considered were directly connected to the application before him. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. The test has not been met in this case.

Costs

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: It is a proper case for awarding costs on a solicitor-client basis to the respondent, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did earlier not seek leave to appeal to this Court.

Per Stevenson J. (dissenting): The appellants should not be called upon to pay costs on a solicitor and client basis. There is no justification in departing from our own general rule that a successful party should recover costs on the usual party and party basis. Public interest groups must be prepared to abide by the same principles as apply to other litigants and be prepared to accept some responsibility for the costs.

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Transport Commission, [1978] 1 S.C.R. 61; *R. v. Ouellette*, [1980] 1 S.C.R. 568; *In Re Provincial Fisheries* (1896), 26 S.C.R. 444; *Flewelling v. Johnston* (1921), 59 D.L.R. 419; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Attorney-General v. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240; *Wood v. Esson* (1884), 9 S.C.R. 239; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *The Queen v. Fisher* (1891), 2 Ex. C.R. 365; *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Fowler v. The Queen*, [1980] 2 S.C.R. 213; *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292; *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868; *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713; *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), 85 A.R. 321; *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), 89 A.R. 339; *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), 89 A.R. 280; *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216; *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459.

By Stevenson J. (dissenting)

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Municipal Corporation of Bombay, [1947] A.C. 58; *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713; *P.P.G. Industries Canada Ltd. v. Attorney General of Canada,* [1976] 2 S.C.R. 739; *Syndicat des employés du commerce de Rivière-du-Loup (section Émilio Boucher, C.S.N.) v. Turcotte*, [1984] C.A. 316.

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M. W. Mason, for the intervener the Alberta Wilderness Association.

//*La Forest*//

The judgment of Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

LA FOREST J. -- The protection of the environment has become one of the major challenges of our time. To respond to this challenge, governments and international organizations have been engaged in the creation of a wide variety of legislative schemes and administrative structures. In Canada, both the federal and provincial governments have established Departments of the Environment, which have been in place for about twenty years. More recently, however, it was realized that a department of the environment was one among many other departments, many of which pursued policies that came into conflict with its goals. Accordingly at the federal level steps were taken to give a central role to that department, and to expand the role of other government departments and agencies so as to ensure that they took account of environmental concerns in taking decisions that could have an environmental impact.

To that end, s. 6 of the *Department of the Environment Act*, R.S.C., 1985, c. E-10, empowered the Minister for the purposes of carrying out his duties relating to environmental quality, by order, with the approval of the Governor in Council, to establish guidelines for use by federal departments, agencies and regulatory bodies in carrying out their duties, functions and powers. Pursuant to this provision the *Environmental Assessment and Review Process Guidelines Order* ("*Guidelines Order*") was established and approved in June 1984, SOR/84-467. In general terms, these guidelines require all federal departments and agencies that have a decision-making authority for any proposal, i.e., any initiative, undertaking or activity that may have an environmental effect on an area of federal responsibility, to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. If a proposal could have a significant adverse effect on the environment, provision is made for public review by an environmental assessment panel whose members must be unbiased, free of political influence and possessed of special knowledge and experience relevant to the technical, environmental and social effects of the proposal.

The present case raises the constitutional and statutory validity of the *Guidelines Order* as well as its nature and applicability. These issues arise in a context where the respondent Society, an environmental group from Alberta, by applications for *certiorari* and mandamus, seeks to compel two federal departments, the Department of Transport and the Department of Fisheries and Oceans, to conduct a public environmental assessment pursuant to the *Guidelines Order* in respect of a dam constructed on the Oldman River by the Government of Alberta. That government had itself conducted extensive environmental studies which took into

account public views. However, since the project affects navigable waters, fisheries, Indians and Indian lands, federal interests are involved. Specifically, the Society argues that the Minister of Transport must approve the project under the *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22, and in doing so is required to provide for public assessment of the project pursuant to the *Guidelines Order*. It also argues that the Minister of Fisheries and Oceans has a similar duty in the performance of his functions under the *Fisheries Act*, R.S.C., 1985, c. F-14.

The case also raises the question whether the motions judge properly exercised his discretion in deciding whether or not to grant *certiorari* or mandamus. Accordingly the material background must be set forth in some detail.

Background

The history of the project begins in May 1958 when Alberta asked the Prairie Farm Rehabilitation Administration ("P.F.R.A.") of the federal Department of Agriculture to determine the feasibility of constructing a storage reservoir on the Oldman River, at a site called Livingstone Gap. In December 1966 the P.F.R.A. submitted its report and proposed another location, the Three Rivers site on the Oldman River, for further study. There followed a federal-provincial water supply study which lasted from 1966 to 1974. After this, in July 1974, the Alberta Department of the Environment initiated an examination of water demand and potential storage sites on the Oldman River and its tributaries, to be conducted in two phases.

The first phase consisted of an initial evaluation of sites in the Oldman basin for water storage carried out by a Technical Advisory Committee comprised of representatives from several provincial government departments including Environment, Culture and Multiculturalism, Energy Resources Conservation Board, Fish and Wildlife Division, Agriculture, as well as representatives from local municipal districts and industry. The Committee's report was released on July 14, 1976 and was followed by a series of public consultations with local authorities and other groups and individuals. The responses received were evaluated and issues arising from them were identified for further study in the second phase.

The second phase began on February 4, 1977 when the Minister of the Environment announced the creation of the Oldman River Study Management Committee consisting of six representatives of the public and three representatives of the provincial government. Its task was to address the issues raised by the public during the first study, and to make recommendations concerning overall water management in the river basin, including the incorporation of the concerns of area residents. This it was required to do in a more comprehensive way than the first phase by, *inter alia*, studying issues affecting the whole of the river basin such as salinization, sedimentation, recreation, fish habitat and other environmental issues. Public participation was encouraged, a series of public meetings and public workshops was held, and oral and written submissions were made by a variety of interest groups including Indian bands and environmental groups. The Management Committee released its final report in 1978.

That same year, a panel of the Environment Council of Alberta was constituted to hold public hearings on the management of water resources within the Oldman basin. Again, several public hearings were held throughout southern Alberta and the Council received briefs from a wide cross-section of Albertans representing the interests of business, agriculture, local governments, Indian bands and others. The Council submitted its report to the Minister of the Environment in August 1979 and recommended yet another location, the Brocket site on the Peigan Indian Reserve, should a dam be needed.

The provincial government then reviewed this report and the 1978 report and on August 29, 1980 announced its decision to build a dam on the Oldman River. It also stated that the Three Rivers site was the preferred location, but added that the final decision would be deferred until the Peigan Indian Band had an opportunity to submit a proposal for construction at the Brocket site. In November 1983 the Peigan Band presented a position to the Minister of the Environment describing its expected economic compensation if the dam were to be built at the Brocket site.

On August 8, 1984 the Premier of Alberta announced the government's decision to proceed with construction of the dam at the Three Rivers site. Before that announcement was made, however, the dam proposal was reviewed by the Regional Screening and Co-ordinating Committee ("R.S.C.C."), a committee of the federal Department of the Environment. The purpose of the R.S.C.C. was to ensure that proposals that may affect federal areas of concern are subjected to environmental review, and it actively followed the progress of the dam proposal until it was decided that the dam would not be built on Indian land.

Following the Three Rivers site announcement, Alberta commenced the design of the dam and launched an "Environmental Mitigation/Opportunities Action Plan" which spawned further environmental studies and public meetings. The provincial Department of the Environment opened a project information office close to the Three Rivers site to answer public enquiries. Several subcommittees were established by the Municipal District of Pincher Creek to provide input to the Alberta Department of the Environment on areas of local concern, including land use, fish and wildlife, recreation, and agriculture. In addition, the provincial Minister of the Environment ordered the appointment of a Local Advisory Committee to advise the Minister on such matters as road relocation, fish and wildlife concerns, and recreational opportunities. After gathering information from public meetings, the Committee submitted a report to the Minister with recommendations concerning fisheries, wildlife, historical resources, agriculture, recreation and transportation systems.

In 1987 the federal R.S.C.C. once again became involved in the project at the request of the Department of Indian and Northern Affairs to study its impact on federal interests, particularly on the Peigan Indian Reserve located approximately 12 kilometres downstream from the dam site. Alberta had already provided the Peigans with funding to conduct an independent study of the project's effect on the Reserve and its inhabitants. The Peigan report was submitted to the provincial Minister of the Environment in February 1987. It addressed such subjects as irrigation, surface and ground water considerations, dam safety, fisheries assessment, and spiritual and cultural assessment. The report prepared at the behest of the R.S.C.C. in July 1987 concluded that the project's effects on the Reserve would be

either favourable or mitigable, but did note the possibility of negative environmental impacts affecting the Reserve -- i.e., increased dust storms, increased mercury levels in fish and the extinction of flood plain cottonwood forests.

I come now to a step of prime importance in this action. On March 10, 1986 the Alberta Department of the Environment applied to the federal Minister of Transport for approval of the work under s. 5 of the *Navigable Waters Protection Act*. That provision provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing the application, the Minister considered the project's effect on marine navigation and approved the application on September 18, 1987 subject to certain conditions relating to marine navigation. I underline, however, that he did not subject the application to an assessment under the *Guidelines Order*. As we shall see, whether he should have done so raises several of the major issues in this appeal.

It is not until after this transpired that the respondent Society came into the picture. The Society was incorporated on September 8, 1987 to oppose the project and became aware of the approval granted by the Minister of Transport on February 16, 1988. However, earlier efforts to check the progress of the development had been made by certain individuals who later became members of the Society on its formation. Thus in the summer of 1987 the Southern Alberta Environmental Group had written a letter to the Minister of Fisheries and Oceans asking that an initial assessment be conducted under the *Guidelines Order*. The request was refused for the reason that the potential problems were being addressed and because of the "long-standing administrative arrangements that are in place for

the management of fisheries in Alberta". This, like the Minister of Transport's action described earlier, plays an important part in the legal arguments that were subsequently made. Another early effort came on December 3, 1987 when the respondent Society wrote to the Minister of the Environment asking that the matter be subjected to the *Guidelines Order* but again the request was declined, this time principally on the grounds that the dam project fell primarily within provincial jurisdiction and that Environment Canada was satisfied that Alberta's proposed mitigation plan would remedy any detrimental effects on the fisheries. The Society tried once again to have the Minister of the Environment invoke the *Guidelines Order* on February 22, 1988, but was turned down in June 1988 for the same jurisdictional reason.

The Society was also busy on the provincial front to have the project stopped. On October 26, 1987 it brought an application in the Court of Queen's Bench of Alberta to quash an interim licence granted under the *Water Resources Act*, R.S.A. 1980, c. W-5. The licence was, in fact, quashed by order on December 8, 1987. A second interim licence was granted on February 5, 1988 and the Society applied in the Court of Queen's Bench to have that one quashed as well. However, that application was dismissed on April 21, 1988. The Society also asked the Alberta Energy Resources Conservation Board to conduct a public hearing under the *Hydro and Electric Energy Act*, R.S.A. 1980, c. H-13, but its request was refused. That decision was affirmed by the Alberta Court of Appeal. In August 1988 the vice-president of the Society swore an information before a justice of the peace alleging that an offence had been committed against the federal *Fisheries Act* but the Attorney General for Alberta stayed the proceedings.

The contract for construction of the dam was awarded in February 1988, and as of March 31, 1989 the dam was 40 percent complete. The present action was commenced on April 21, 1989 in the Trial Division of the Federal Court, [1990] 1 F.C. 248. In the action, the Society sought an order in the nature of *certiorari* to quash the approval granted by the Minister of Transport as well as an order in the nature of mandamus requiring the Minister of Transport and the Minister of Fisheries and Oceans to comply with the *Guidelines Order*. Jerome A.C.J. dismissed the application but the Society's appeal to the Federal Court of Appeal was successful, [1990] 2 F.C. 18. This Court granted leave to appeal on September 13, 1990, [1990] 2 S.C.R. x.

Legislation

Before going further, it will be useful to set forth the major parts of the relevant legislation. The *Department of the Environment Act* reads in relevant part:

> **4.** (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
>
> (*a*) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;
>
> . . .
>
> **5.** The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall
>
> (*a*) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed

> (i) to promote the establishment or adoption of objectives or standards relating to environmental quality, or to control pollution,
>
> (ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs, and activities that are found to have probable significant adverse effects, and the results thereof taken into account, and
>
> (iii) to provide to Canadians environmental information in the public interest;
>
> (*b*) promote and encourage the institution of practices and conduct leading to the better preservation and enhancement of environmental quality, and cooperate with provincial governments or agencies thereof, or any bodies, organization or persons, in any programs having similar objects; and
>
> (*c*) advise the heads of departments, boards and agencies of the Government of Canada on all matters pertaining to the preservation and enhancement of the quality of the natural environment.
>
> **6.** For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

Pursuant to s. 6, the Minister, by order, with the approval of the Governor in Council, established the *Guidelines Order*. It reads in relevant part as follows:

> 2. In these Guidelines,
>
> . . .
>
> "initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal;
>
> . . .

"proponent" means the organization or the initiating department intending to undertake a proposal;

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

. . .

6. These Guidelines shall apply to any proposal

(*a*) that is to be undertaken directly by an initiating department;

(*b*) that may have an environmental effect on an area of federal responsibility;

(*c*) for which the Government of Canada makes a financial commitment; or

(*d*) that is located on lands, including the offshore, that are administered by the Government of Canada.

Reference must also be made to s. 5 of the *Navigable Waters Protection Act* which reads as follows:

5. (1) No work shall be built or placed in, on, over, under, through or across any navigable water unless

(*a*) the work and the site and plans thereof have been approved by the Minister, on such terms and conditions as the Minister deems fit, prior to commencement of construction;

(*b*) the construction of the work is commenced within six months and completed within three years after the approval referred to in paragraph (*a*) or within such further period as the Minister may fix; and

> (*c*) the work is built, placed and maintained in accordance with the plans, the regulations and the terms and conditions set out in the approval referred to in paragraph (*a*).

Judicial History

Trial Division

Jerome A.C.J. identified the four main issues in the action as follows: (1) the standing of the applicant to bring the application; (2) whether the federal Ministers named were bound to invoke the *Guidelines Order*; (3) the applicability of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309 (T.D.), aff'd (1989), 99 N.R. 72 (F.C.A.), to the facts of this case; and (4) whether he should exercise his discretion to grant the remedies sought. He dealt with the first issue by simply assuming, without deciding, that the Society had the requisite standing to bring the application.

With respect to the *Guidelines Order*, Jerome A.C.J. first held that the Minister of Transport was not bound to apply it in assessing the application under the *Navigable Waters Protection Act*, and indeed he found that the Minister would have exceeded his jurisdiction had he invoked the *Guidelines Order*. The reasoning was that the Act sets out no requirement for environmental review but instead confines the Minister to consider only factors affecting marine navigation. Similarly, the Minister of Fisheries and Oceans was without jurisdiction to apply the *Guidelines Order* because his department had not undertaken a project. In the alternative, if the *Guidelines Order* could be said to apply to provincially initiated projects, it would

only apply where a federal department received a "proposal" requiring its approval. As the *Fisheries Act* did not contemplate an approval procedure for a permit or licence, the *Guidelines Order* did not apply. Nor were environmental factors raised under either the *Fisheries Act* or the *Department of Fisheries and Oceans Act*, R.S.C., 1985, c. F-15.

Jerome A.C.J. then turned to the *Canadian Wildlife* case. In that case, which I shall discuss with more particularity later, the Federal Court of Appeal had held that before the project in question there, the Rafferty-Alameda Dam, could be undertaken, it was necessary to obtain the approval of the Minister of the Environment. Jerome A.C.J. distinguished that case on two grounds. First, the case involved authorization under the *International River Improvements Act*, R.S.C., 1985, c. I-20, which required prior approval from the Minister of the Environment, as opposed to the instant case where approval may be granted under the *Navigable Waters Protection Act* after the project is commenced. Second, the Rafferty-Alameda project involved the Minister of the Environment whose statutory duties under the *Department of the Environment Act* included consideration of environmental factors.

Lastly, on the issue of the discretionary nature of the relief sought, Jerome A.C.J. found against the Society because of delay and the unnecessary duplication that would result. Between the grant of approval on September 18, 1987 and the commencement of this action on April 21, 1989, he noted, no steps had been taken to quash the approval and compel the application of the *Guidelines Order*. By the time the action was started the project was 40 percent complete. Furthermore, Alberta had already conducted an extensive environmental review of the project and

had "identified every possible area of environmental social concern and ha[d] given every citizen, including the members of the applicant organization, ample opportunity to voice their views and to mobilize their opposition" (pp. 273-74). That being so, applying the *Guidelines Order* would be needlessly repetitive. Accordingly, he dismissed the application.

The Society then launched an appeal to the Federal Court of Appeal.

Court of Appeal

Stone J.A., writing for the court, began by noting that the Oldman River Dam may have an environmental effect on at least three areas of federal responsibility, namely fisheries, Indians and Indian lands. He disagreed with the view that the Minister of Transport was restricted to considering matters affecting marine navigation only. He found that the dam project fell within the ambit of the *Guidelines Order* and that the Department of Transport was an "initiating department" for the purposes of the *Guidelines Order* thereby engaging the application of the *Guidelines Order*. Stone J.A. referred to the *Canadian Wildlife* case for authority that the *Guidelines Order* was a law of general application, and as such imposed on the Minister a "superadded" duty over and above his other statutory powers. Nor was there any conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in the *Guidelines Order*, and the remedial power under s. 6 of the *Navigable Waters Protection Act* to grant approval after the commencement of construction. That power, he held, is an exception to the general rule in s. 5 of the

Act requiring approval prior to construction, and in exercising his discretion to grant approval after commencement, the Minister is not precluded from applying the *Guidelines Order*.

Stone J.A. next turned to the question whether the Minister of Fisheries and Oceans was compelled to apply the *Guidelines Order*. He first considered whether the Minister had been seized with a "proposal" as defined in the Act so as to make him subject to the *Guidelines Order*. He concluded in the affirmative. "Proposal", in Stone J.A.'s view, is there used in a far broader sense than its ordinary meaning. In particular it is not limited to something in the nature of an application. An application is but one way in which an "initiative, undertaking or activity" can come to the attention of the Minister but it is not the only way. Another way is for an individual to request that the Minister take action under the appropriate statute, as was done here, and since the Minister was aware of an initiative within a federal area of responsibility, there was a "proposal" as defined in the *Guidelines Order*. Moreover, the Minister's decision not to intervene constituted him as a "decision making authority" and thus triggered his obligations under the *Guidelines Order*.

Stone J.A. then dealt with the issue of discretion and reviewed the relevant principles which apply to an appellate court interfering with a trial judge's exercise of discretion. Shortly put, such interference is not warranted absent a finding that the trial judge proceeded on an erroneous principle or a misapprehension of the facts, or where the order is not just and reasonable. Parenthetically, and by way of footnote, Stone J.A. was of the view that refusing to grant prerogative relief on the ground of delay was not "well-founded in principle", because the delay was

explained by the facts, especially that the respondent did not become aware of the approval granted by the Minister of Transport until only two months before the action was commenced. Further, the respondent was otherwise engaged in challenging the provincial licence issued, and it was not until the eve of this action that the Trial Division of the Federal Court handed down its decision in the *Canadian Wildlife* case holding that the *Guidelines Order* was binding on the Minister of the Environment.

As to the unnecessary duplication that could result from granting the relief sought, Stone J.A. found that the provincial environmental review process was deficient in two respects when contrasted with the environmental impact assessment required by the *Guidelines Order*. First, the provincial legislation did not place the same emphasis on public participation in the process as the *Guidelines Order*. Secondly, there was nothing in the provincial legislation requiring the same degree of independence of the review panel.

The last issue addressed by Stone J.A. that has been raised in this appeal is whether the *Navigable Waters Protection Act* binds the Crown in right of Alberta. Referring to this Court's decision in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, he held that the Act, especially s. 4 when read in context, evidenced an intention to bind the Crown. Furthermore, the purpose of the Act would be wholly frustrated if the Crown were not bound, it being well known that many obstructions placed in navigable waters are sponsored by government.

As a result the appeal was allowed, the approval was quashed and the Ministers of Transport and Fisheries and Oceans ordered to comply with the *Guidelines Order*.

The Appeal to this Court

As earlier noted, leave to appeal to this Court was sought and granted, and the Chief Justice stated the following constitutional question on October 29, 1990:

> Is the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by the appellant, Her Majesty the Queen in right of Alberta?

Interventions were then filed by the Attorneys General of Quebec, New Brunswick, Manitoba, British Columbia, Saskatchewan and Newfoundland and the Minister of Justice of the Northwest Territories, and a number of environmental groups, namely the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada), Friends of the Earth and the Alberta Wilderness Association, as well as several Indian organizations, namely, the National Indian Brotherhood and the Assembly of First Nations, the Dene Nation and the Metis Association of the Northwest Territories, and the Native Council of Canada (Alberta).

Issues

The many issues arising in this appeal have been variously ordered by the parties in their written submissions, but I prefer to deal with them as follows:

1. Statutory Validity of the *Guidelines Order*

    a. Is the *Guidelines Order* authorized by s. 6 of the *Department of the Environment Act*?

    b. Is the *Guidelines Order* inconsistent with the *Navigable Waters Protection Act* and the *Fisheries Act*?

2. Obligation of the Ministers to Comply with the *Guidelines Order*

    a. Does s. 4(1) of the *Department of the Environment Act* preclude the application of the *Guidelines Order* to the Ministers?

    b. Does the *Guidelines Order* apply to projects other than new federal projects?

    c. Are the Ministers "initiating departments"?

    d. Is the *Navigable Waters Protection Act* binding on the Crown in right of Alberta?

3. Constitutional Question

Is the *Guidelines Order* so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867* and therefore constitutionally inapplicable to the Oldman River Dam owned by Alberta?

4. Discretion

Did the Federal Court of Appeal err in interfering with the discretion of Jerome A.C.J. whereby he declined to grant the remedies sought?

Statutory Validity of the Guidelines Order

Is the *Guidelines Order* Authorized by s. 6 of the *Department of the Environment Act*?

The appellant Alberta argued that the *Guidelines Order* is *ultra vires* because it does not fall within the scope of the powers conferred under its enabling legislation, s. 6 of the *Department of the Environment Act*. For convenience, I shall repeat this provision:

> **6.** For the purposes of carrying out his duties and functions related to environmental quality, the Minister may, by order, with the approval of the Governor in Council, establish guidelines for use by departments, boards and agencies of the Government of Canada and, where appropriate, by corporations named in Schedule III to the *Financial Administration Act* and regulatory bodies in the exercise of their powers and the carrying out of their duties and functions.

The principal ground on which it is contended that the *Guidelines Order* is invalid is that by using the term "guidelines" s. 6 does not empower the enactment

of mandatory subordinate legislation, but instead only contemplates a purely administrative directive not intended to be legally binding on those to whom it is addressed. There is of course no doubt that the power to make subordinate legislation must be found within the four corners of its enabling statute, and it is there that one must turn to determine if the Act can support delegated legislation of a mandatory nature, the non-compliance with which can found prerogative relief.

This issue was addressed in *Canadian Wildlife*, *supra*. In that case the applicant challenged the issuance of a licence by the Minister of the Environment under the *International River Improvements Act* and sought an order in the nature of *certiorari* quashing the licence, and mandamus requiring the Minister to comply with the *Guidelines Order*. In the Trial Division, Cullen J. found that the *Guidelines Order* is an enactment or regulation as defined in s. 2(1) of the *Interpretation Act*, R.S.C., 1985, c. I-21, which provides:

> **2.** (1) In this Act,
>
> . . .
>
> "enactment" means an Act or regulation or any portion of an Act or regulation;
>
> . . .
>
> "regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (*a*) in the execution of a power conferred by or under the authority of an Act, or
>
> (*b*) by or under the authority of the Governor in Council;

Cullen J. then concluded, at p. 322:

> Therefore, EARP Guidelines Order is not a mere description of a policy or programme; it may create rights which may be enforceable by way of *mandamus* (see *Young v. Minister of Employment and Immigration* (1987), 8 F.T.R. 218 (F.C.T.D.) at page 221).

In the Court of Appeal, Hugessen J.A. relied on both the English and French versions of s. 6 of the *Department of the Environment Act* to find that it was capable of supporting a power to enact binding subordinate legislation. "The word `guidelines'", he stated, "in itself is neutral in this regard." Turning then, to the question whether the Guidelines were so written as to make them mandatory, he observed, at pp. 73-74:

> Finally, there is nothing in the text of the Guidelines themselves which indicates that they are not mandatory; on the contrary, the repeated use of the word "shall" . . . throughout, and particularly in ss. 6, 13 and 20, indicates a clear intention that the Guidelines shall bind all those to whom they are addressed, including the Minister of the Environment himself.

I would agree with him on both points. The first question depends on legislative intent. The guidelines under the Act reviewed by this Court in the *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, for example, were clearly mandatory in nature. I am satisfied that s. 6 of the Act can sustain the enactment of mandatory guidelines, and that the Guidelines as framed are mandatory in nature.

There is nothing here to indicate that the *Guidelines Order* is merely another form of administrative directive which cannot confer enforceable rights, as

was the case in *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118. In *Martineau* the issue was whether a directive concerning the discipline of inmates, authorized by s. 29(3) of the *Penitentiary Act*, R.S.C. 1970, c. P-6, was "law" within the wording of s. 28 of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and thus gave the Federal Court jurisdiction to review a disciplinary order made by the Board. This Court, by majority, held that the directive was not "law" within s. 28, Pigeon J. noting, at p. 129:

> It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. [Emphasis added.]

There is little doubt that ordinarily a Minister has an implicit power to issue directives to implement the administration of a statute for which he is responsible; see for example *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2. It is also clear that a violation of such directives will only give rise to administrative rather than judicial sanction because they do not have the full force of law.

Here though we are dealing with a directive that is not merely authorized by statute, but one that is required to be formally enacted by "order", and promulgated under s. 6 of the *Department of the Environment Act*, with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the

minister's authority. To my mind this is a vital distinction. Its effect is thus described by R. Dussault and L. Borgeat in *Administrative Law* (2nd ed. 1985), vol. 1, at pp. 338-39:

> When a government considers it necessary to regulate a situation through norms of behaviour, it may have a law passed or make a regulation itself, or act administratively by means of directives. In the first case, it is bound by the formalities surrounding the legislative or regulatory process; conversely, it knows that once these formalities have been observed, the new norms will come within a framework of "law" and that by virtue of the Rule of Law they will be applied by the courts. In the second case, that is, when it chooses to proceed by way of directives, whether or not they are authorized by legislation, it opts instead for a less formalized means based upon hierarchical authority, to which the courts do not have to ensure obedience. To confer upon a directive the force of a regulation is to exceed legislative intent. It is said that the Legislature does not speak without a purpose; its implicit wish to leave a situation outside the strict framework of "law" must be respected.

The word "guidelines" cannot be construed in isolation; s. 6 must be read as a whole. When so read it becomes clear that Parliament has elected to adopt a regulatory scheme that is "law", and thus amenable to enforcement through prerogative relief.

Alberta also argues that the *Guidelines Order* is *ultra vires* on the ground that the scope of the subject matter covered in the delegated legislation goes far beyond that authorized by the *Department of the Environment Act*. More specifically, it contends that the authority to establish guidelines for the purposes of carrying out the Minister's duties related to "environmental quality" does not comprehend a process of environmental impact assessment, such as found in the *Guidelines Order*, in which the decision maker is required to take into account socio-economic considerations. Rather, it is argued, the Act only permits the enactment of delegated

legislation that is strictly concerned with matters relating to environmental quality as understood in a physical sense.

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; see *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. The point was made by the Canadian Council of Resource and Environment Ministers, following the "Brundtland Report" of the World Commission on Environment and Development, in the *Report of the National Task Force on Environment and Economy*, September 24, 1987, at p. 2:

> Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment. It also affects the environment in many ways. Ensuring environmentally sound and sustainable economic development requires the technology and wealth that is generated by continued economic growth. Economic and environmental planning and management must therefore be integrated.

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, an issue I will address later.

I have therefore concluded that the *Guidelines Order* has been validly enacted pursuant to the *Department of the Environment Act*, and is mandatory in nature.

Inconsistency With the *Navigable Waters Protection Act* and *Fisheries Act*

The appellants Alberta and the federal Ministers argue that the *Guidelines Order* is inconsistent with and therefore must yield to the requirements of the *Navigable Waters Protection Act* for obtaining an approval under s. 5 of that Act. Specifically, they say, the Minister of Transport is confined by the Act to a consideration of matters pertaining to marine navigation alone, and that the *Guidelines Order* cannot displace or add to the criteria mentioned in the Act. Alberta also submits that the *Guidelines Order* is similarly inconsistent with the *Fisheries Act*, but for the reasons set out later I do not find it necessary to address that issue.

The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. The King* (1916), 54 S.C.R. 265), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (*Re George Edwin Gray* (1918), 57 S.C.R. 150). Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. "Inconsistency" in this context refers to a situation where two legislative enactments cannot stand together; see *Daniels v. White*, [1968] S.C.R. 517. The rule in that case was stated in respect of two inconsistent statutes

where one was deemed to repeal the other by virtue of the inconsistency. However, the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament -- there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where inconsistency has also been defined in terms of contradiction -- i.e., "compliance with one law involves breach of the other"; see *Smith v. The Queen*, [1960] S.C.R. 776, at p. 800.

The inconsistency contended for is that the *Navigable Waters Protection Act* implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act, whereas the *Guidelines Order* requires, at a minimum, an initial environmental impact assessment. The appellant Ministers concede that there is no explicit prohibition against his taking into account environmental factors, but argue that the focus and scheme of the Act limit him to considering nothing other than the potential effects on marine navigation. If the appellants are correct, it seems to me that the Minister would approve of very few works because several of the "works" falling within the ambit of s. 5 do not assist navigation at all, but by their very nature interfere with, or impede navigation, for example bridges, booms, dams and the like. If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances.

It is likely that the Minister of Transport in exercising his functions under s. 5 always did take into account the environmental impact of a work, at least as regards other federal areas of jurisdiction, such as Indians or Indian land. However that may be, the *Guidelines Order* now formally mandates him to do so, and I see nothing in this that is inconsistent with his duties under s. 5. As Stone J.A. put it in the Court of Appeal, it created a duty which is "superadded" to any other statutory power residing in him which can stand with that power. In my view the Minister's duty under the *Guidelines Order* is indeed supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the *Guidelines Order*.

Section 8 of the *Guidelines Order* already recognizes that the environmental impact assessment thereunder will not apply where it would conflict with other statutory provisions. It reads:

> **8.** Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

A broad interpretation of the application of the *Guidelines Order* is consistent with the objectives stated in both the Order itself and its parent legislation -- to make environmental impact assessment an essential component of federal decision-making. A similar approach has been followed in the United States with respect to

their *National Environmental Policy Act*. As Pratt J. put it in *Environmental Defense Fund, Inc. v. Mathews*, 410 F.Supp. 336 (D.D.C. 1976), at p. 337:

> NEPA does not supersede other statutory duties, but, to the extent that it is reconcilable with those duties, it supplements them. Full compliance with its requirements cannot be avoided unless such compliance directly conflicts with other existing statutory duties.

To hold otherwise would, in my view, set at naught the legislative scheme for the protection of the environment envisaged by Parliament in enacting the *Department of the Environment Act*, and in particular s. 6.

Nor do I think s. 3 of the *Guidelines Order*, which requires that the assessment process be initiated "as early in the planning process as possible and before irrevocable decisions are taken", is in any way inconsistent with s. 6 of the *Navigable Waters Protection Act*. Section 6 is largely concerned with empowering the Minister to remove or take other remedial action in relation to works constructed without complying with s. 5, but the appellants draw attention to s. 6(4) which permits the Minister to approve of a work that has already been built. On this point, I am in complete agreement with Stone J.A. where, at p. 41, he stated:

> As I see it, the provisions of section 6 of that Act pertain to the remedial powers of the Minister in deciding what action he might take in the event of a failure to secure a section 5 approval prior to the commencement of construction. Subsection (4) thereof is an exception to the general rule, is entirely discretionary and clearly subservient to the fundamental requirement set out in paragraph 5(1)(*a*) that an approval be obtained prior to the commencement of construction. Nor can I see anything in the Guidelines Order that would prevent the Minister from complying with its terms to the fullest extent possible in exercising his discretion under subsection 6(4) of the *Navigable Waters Protection Act*.

> That being so, I can find no inconsistency or conflict between these two pieces of federal legislation.

It is thus clear to me that the *Guidelines Order* not only falls within the powers given by the *Department of the Environment Act*, but is completely consistent with the *Navigable Waters Protection Act*. It therefore falls to be decided whether the order applies in the instant case.

Obligation of the Ministers to Comply with the Guidelines Order

Section 4(1) of the *Department of the Environment Act*

Section 4(1)(*a*) of the *Department of the Environment Act* reads as follows:

> **4.** (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to
>
> (*a*) the preservation and enhancement of the quality of the natural environment, including water, air and soil quality;

Alberta contends that by restricting the Minister of the Environment's jurisdiction to "matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada" (emphasis added), s. 4 has rendered the *Guidelines Order* inoperative in the present case. Because the *Fisheries Act* regulates the management of Canada's fisheries resource, it is argued, the Minister of the Environment's jurisdiction has been ousted in respect of all

matters affecting fish habitat. This argument can be dealt with shortly. Its premise entirely misapprehends the "matters" covered by the respective pieces of legislation. The *Guidelines Order* establishes an environmental assessment process for use by all federal departments in the exercise of their powers and the performance of their duties and functions, whereas the *Fisheries Act* embraces the substantive matter of protecting fish and fish habitat. There is, of course, a connection between the two, but the crucial difference is that one is fundamentally procedural while the other is substantive in nature. Again, the approach suggested by the appellants would make the power given by s. 6 of the *Department of the Environment Act* virtually meaningless.

New Federal Projects

Alberta next takes issue with the purported application of the *Guidelines Order* to proposals other than "new federal projects, programs and activities" mentioned in s. 5(*a*)(ii) of the *Department of the Environment Act*. That provision reads:

> **5.** The Minister, in exercising his powers and carrying out his duties and functions under section 4, shall
>
> (*a*) initiate, recommend and undertake programs, and coordinate programs of the Government of Canada that are designed
>
> . . .
>
> (ii) to ensure that new federal projects, programs and activities are assessed early in the planning process for potential adverse effects on the quality of the natural environment and that a further review is carried out of those projects, programs, and activities that are found to have probable significant adverse effects, and the results thereof taken into account . . . . [Emphasis added.]

The wording of that subparagraph, it is argued, is determinative of Parliament's intention to restrict the scope of the *Guidelines Order* to new federal projects, and consequently cannot apply to any project that is provincially sponsored. Here again, as I see it, Alberta seeks to place an unduly narrow construction on the extent of the Minister of the Environment's duties and functions under s. 6 of the Act. The *Guidelines Order* was enacted under s. 6, not s. 5, and the powers, duties and functions of the Minister there referred to encompass matters found in s. 4 as well as s. 5, including, *inter alia*, "the preservation and enhancement of the quality of the natural environment" (s. 4(1)(*a*)). Section 6 is thus not confined to new projects, programs and activities. Section 5 merely defines the Minister's minimum duties under s. 4. Section 4 is much broader. It is there that one finds the true range of the Minister's duties and functions related to environmental quality for which guidelines may be established.

Initiating Departments

Central to the arguments of the appellant Ministers is whether the *Guidelines Order* by its own terms has any application to the Oldman River Dam project. That question was not addressed by Alberta, and the Ministers concede that the Minister of Transport is an "initiating" department but argue that the *Guidelines Order* is inconsistent with and thus cannot stand with the *Navigable Waters Protection Act*. I have found the two enactments compatible for reasons already given, so there remains no issue between the parties that the provisions of the *Guidelines Order* govern the Minister of Transport. For the Minister of Fisheries and Oceans, it is argued that he is not bound to invoke the *Guidelines Order* in the instant

case because he does not have "decision making authority" pursuant to the relevant provisions of the *Fisheries Act*. Because the matter of the *Guidelines Order*'s application was the subject of profound disagreement in the courts below, I feel that it is necessary to first consider the terms of the *Guidelines Order* to construe its general application provisions.

The starting point, in my view, must be s. 6 of the *Guidelines Order* which sets out its governing principle of application. It bears repeating here:

> 6. These Guidelines shall apply to any proposal
>
> (*a*) that is to be undertaken directly by an initiating department;
>
> (*b*) that may have an environmental effect on an area of federal responsibility;
>
> (*c*) for which the Government of Canada makes a financial commitment; or
>
> (*d*) that is located on lands, including the offshore, that are administered by the Government of Canada. [Emphasis added.]

There can be no serious doubt that the Oldman River Dam project may have an environmental effect on an area of federal responsibility, including the matters falling within s. 91 of the *Constitution Act, 1867* already identified -- i.e., navigation, Indians, lands reserved for the Indians and inland fisheries. Thus, the *Guidelines Order* applies if the project here is a "proposal" within the meaning of s. 2, which defines that term as follows:

> 2. In these Guidelines,

. . .

> "proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility. [Emphasis added.]

If there is such a proposal, the *Guidelines Order* under ss. 3 and 10 allocates responsibility for the application of the process to the "initiating department" to ensure that it fully considers the environmental implications of a proposal properly before it and subjects such proposal to an initial assessment to determine whether there may be any potentially adverse environmental effects from it. The entity designated as an "initiating department" is also defined by s. 2. It provides that an:

> 2. In these Guidelines,
>
> . . .
>
> "initiating department" means any department that is, on behalf of the Government of Canada, the decision making authority for a proposal; [Emphasis added.]

It has been argued that the definite article "the" in the definition of "initiating department", as contrasted with the indefinite article "a" used in the definition of "proposal", may evince an intention to narrow the scope of the application of the *Guidelines Order* to projects where the federal government is the predominant or sole decision-making authority; see for example C. J. Gillespie, "Enforceable Rights from Administrative Guidelines?" (1989-1990), 3 *C.J.A.L.P.* 204. I do not agree. As I see it, the only consequence of shifting from the indefinite in "proposal" to the definite in "initiating department" is to designate the particular emanation of the Government of Canada that is charged with the implementation of

the *Guidelines Order* once it has been determined that the federal government has a decision-making responsibility.

In *Angus v. Canada*, [1990] 3 F.C. 410 (C.A.), Décary J.A. adopted a similar approach to construing the *Guidelines Order* but in a different context. There the issue was whether the *Guidelines Order* applied to an order in council issued by the Governor in Council under s. 64 of the *National Transportation Act, 1987*, R.S.C., 1985, c. 28 (3rd Supp.), which required VIA Rail to eliminate or reduce certain passenger services. Although the case turned on the narrow issue of whether the *Guidelines Order* was binding on the Governor in Council, which does not arise here, and Décary J.A. was dissenting on this point, his overall analysis of the application of the *Guidelines Order* is helpful where he stated, at p. 434:

> The emphasis has been put by the learned Trial Judge and by the respondents on the words "initiating department" which relate to the administration of the Guidelines. I would rather put the emphasis on the words "proposal" and "Government of Canada", which relate to the "application" of the Guidelines. There is no requirement, in the definition of "proposal", that it be made by an initiating department within the meaning of the Guidelines. The intention of the drafter seems to be that whenever there is an activity that may have an environmental effect on an area of federal responsibility and whoever the decision-maker may be on behalf of the Government of Canada, be it a department, a Minister, the Governor in Council, the Guidelines apply and it then becomes a matter of practical consideration, when the final decision-maker is not a department, to find which department or Minister is the effective original decision-maker or the effective decision-undertaker, for there is always a department or a Minister involved "in the planning process" and "before irrevocable decisions are taken" or in the "direct undertaking" of a proposal.

Since the issue does not arise, I do not wish to comment on the application of the *Guidelines Order* to the Governor in Council, but the foregoing passage does capture the essence of its framework.

That is not to say that the *Guidelines Order* is engaged every time a project may have an environmental effect on an area of federal jurisdiction. There must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". (Emphasis added.) In my view the proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. It cannot have been intended that the *Guidelines Order* would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction. Therefore, "responsibility" within the definition of "proposal" should not be read as connoting matters falling generally within federal jurisdiction. Rather, it is meant to signify a legal duty or obligation. Once such duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the decision-making authority for the proposal and thus responsible for initiating the process under the *Guidelines Order*.

That there must be an affirmative regulatory duty for a "decision making responsibility" to exist is evident from other provisions found in the *Guidelines Order* which suggest that the initiating department must have some degree of regulatory power over the project. For example s. 12 provides:

> 12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if
>
> . . .
>
> (*f*) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

Again, s. 14 reads:

> 14. Where, in any case, the initiating department determines that mitigation or compensation measures could prevent any of the potentially adverse environmental effects of a proposal from becoming significant, the initiating department shall ensure that such measures are implemented.

Those provisions amplify the regulatory authority with which the Government of Canada must have clothed itself under an Act of Parliament before it will have the requisite decision-making responsibility.

Applying that interpretation to the present case, it will be seen that the Oldman River Dam project qualifies as a proposal for which the Minister of Transport alone is the initiating department. In my view the *Navigable Waters Protection Act* does place an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water. Section 5 gives the Minister the power to impose such terms and conditions as he deems fit on any approval granted, and if

those terms are not complied with the Minister may order the owner to remove or alter the work. For these reasons I would hold that this is a "proposal" for which the Minister of Transport is an "initiating department".

There is, however, no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. Section 35 prohibits the carrying on of any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat, and s. 40 lends its weight to that prohibition by penal sanction. The Minister of Fisheries and Oceans is given a discretion under s. 37(1) to request information from any person who carries on or proposes to carry on any work or undertaking that will or may result in the alteration, disruption or destruction of fish habitat. However, the purpose of making such a request is not to further a regulatory procedure, but is merely to assist the Minister in exercising an *ad hoc* delegated legislative power granted under s. 37(2) to allow an exemption from the general prohibition. That provision reads:

> **37.** . . .
>
> (2) If, after reviewing any material or information provided under subsection (1) and affording the persons who provided it a reasonable opportunity to make representations, the Minister or a person designated by the Minister is of the opinion that an offence under subsection 40(1) or (2) is being or is likely to be committed, the Minister or a person designated by the Minister may, by order, subject to regulations made pursuant to paragraph (3)(*b*), or, if there are no such regulations in force, with the approval of the Governor in Council,
>
> (*a*) require such modifications or additions to the work or undertaking or such modifications to any plans, specifications, procedures or schedules relating thereto as the Minister or a person designated by the Minister considers necessary in the circumstances, or
>
> (*b*) restrict the operation of the work or undertaking,

> and, with the approval of the Governor in Council in any case, direct the closing of the work or undertaking for such period as the Minister or a person designated by the Minister considers necessary in the circumstances. [Emphasis added.]

In my view a discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a decision-making responsibility within the meaning of the *Guidelines Order*. Whereas the Minister of Transport is responsible under the terms of the *Navigable Waters Protection Act* in his capacity as regulator, the Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty. For that reason, I do not think the application for mandamus to compel the Minister to act is well founded.

Crown Immunity

Alberta takes the position that even if the *Guidelines Order* could be said to apply to the project in its own terms, the Crown in right of Alberta is not bound by the *Navigable Waters Protection Act* and hence there can be no "decision making responsibility" on the part of the Government of Canada within the meaning of the *Guidelines Order* which could affect the province. The appellant Ministers agree that the Act is not binding on the Crown in right of a province, but argue that Alberta has waived its immunity by making application for approval under the Act.

The starting point on this issue is s. 17 of the *Interpretation Act* which codifies the presumption that the Crown is not bound by statute:

> **17.** No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

It is agreed by all concerned that there are no express words in the *Navigable Waters Protection Act* binding the Crown, and it therefore remains to be decided whether the Crown is bound by necessary implication.

It is helpful to turn first to the common law. The leading case is the Privy Council decision in *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58. The issue there was whether the province of Bombay was exempt from the *City of Bombay Municipal Act*, 1888, which conferred power on the city to lay water-mains "into, through or under any land whatsoever within the city". The province owned land under which it was proposed to lay a water-main and it objected to the city's plans, unless the city complied with certain conditions which the city found unacceptable. Although there were no express words in the statute binding the Crown, the High Court of Bombay held that the Crown was bound by necessary implication because the statute "cannot operate with reasonable efficiency unless the Crown is bound".

The Privy Council agreed that the rule of Crown immunity admitted of at least one exception, necessary implication. Lord du Parcq explained the exception as follows, at p. 61:

> If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must

> then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

Their Lordships then went on to consider the argument, supported by some early authority, that a statute enacted for the public good must be held to bind the Crown, because the Act was manifestly intended to secure the public welfare. That contention was rejected on the simple ground that all statutes are presumptively for the public good. That, however, did not necessarily mean that the purpose of an enactment is altogether irrelevant. At page 63, it is stated:

> Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound.

As I mentioned in *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at p. 1022, some doubt was expressed in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, and *Her Majesty in right of Alberta v. Canadian Transport Commission*, [1978] 1 S.C.R. 61 (cf. *R. v. Ouellette*, [1980] 1 S.C.R. 568), as to whether the necessary implication exception survived the 1967 revision of what is now s. 17 of the *Interpretation Act*. There may also have been room for doubt as to whether the "wholly frustrated" test articulated in *Bombay* was determinative in finding the Crown bound by necessary implication. Professor Hogg in his text *Liability of the Crown* (2nd ed. 1989), argues that the necessary implication exception set out at the beginning of *Bombay* refers to a contextual analysis of the statute whereby one may discern an intention to bind the Crown by

logical implication, and is thus a different species of necessary implication from that which arises when the purpose of the statute is wholly frustrated. He states, at p. 210:

> What is contemplated in this passage is that a statute, while lacking an express statement that the Crown is bound, may contain references to the Crown or to governmental activity which make no sense unless the Crown is bound. If these textual indications are sufficiently clear, the courts will hold that the presumption is rebutted and the Crown is bound.

However, any uncertainty in the law on these points was put to rest by this Court's recent decision in *Alberta Government Telephones*, *supra*. After reviewing the authorities, Dickson C.J. concluded, at p. 281:

> In my view, in light of *PWA* and *Eldorado*, the scope of the words "mentioned or referred to" must be given an interpretation independent of the supplanted common law. However, the qualifications in *Bombay*, *supra*, are based on sound principles of interpretation which have not entirely disappeared over time. It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17 of the *Interpretation Act*] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

In my view, this passage makes it abundantly clear that a contextual analysis of a statute may reveal an intention to bind the Crown if one is irresistibly drawn to that conclusion through logical inference.

That analysis however cannot be made in a vacuum. Accordingly, the relevant "context" should not be too narrowly construed. Rather the context must include the circumstances which led to the enactment of the statute and the mischief to which it was directed. This view is consistent with the reasoning in *Bombay* as is evident from the passages quoted above where the test for necessary implication is expressed in terms of the time of enactment. In fact the approach taken by the High Court of Bombay in that case was criticized by the Privy Council for that very reason, at p. 62:

> Even if the High Court were correct in its interpretation of the principle, its method of applying it would be open to the objection that regard should have been had, not to the conditions which it found to be in existence many years after the passing of the Act, but to the state of things which existed, or could be shown to have been within the contemplation of the legislature, in the year 1888.

I begin then by examining the circumstances that existed when the legislation was first enacted, bearing in mind that the general subject matter of the statute concerns navigation.

In so doing, it is useful to return to some of the fundamental principles of water law in this area, particularly those pertaining to navigable waters. It is important to recall that the law of navigation in Canada has two fundamental dimensions -- the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation -- both of which are necessarily interrelated by virtue of s. 91(10) of the *Constitution Act, 1867* which assigns exclusive legislative authority over navigation to Parliament.

The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago; see *In Re Provincial Fisheries* (1896), 26 S.C.R. 444; for a summary of the cases, see my book on *Water Law in Canada* (1973), at pp. 178-80. Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North-West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling v. Johnston* (1921), 59 D.L.R. 419, that the English rule was not suitable to the conditions of the province. There is no issue between the parties that the Oldman River is in fact navigable.

The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way; see *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839 (H.L.), at p. 846. It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. For example, in *Attorney-General v. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240, a relator action to enjoin a public nuisance causing an obstruction in the River Thames and an adjoining thoroughfare along its bank, the Lord Chancellor said, at p. 246:

> I consider it to be quite immaterial whether the title to the soil between high and low water-mark be in the Crown, or in the City of *London*, or whether the City of *London* has the right of conservancy, operating as a check on an improper use of the soil, the title being in the Crown, or whether either Lord *Grosvenor* or Mr. *Johnson* have any derivative title by grant from any one having the power to grant. . . . It is my present opinion, that the Crown has not the right either itself to use its title to the soil between high and low water-mark as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects. If the Crown has not such a right, it could not give it to the City of *London*, nor could the City transfer it to any other person.

This Court later came to the same conclusion in *Wood v. Esson* (1884), 9 S.C.R. 239. There, the plaintiffs had extended their wharf so as to interfere with access to the defendant's wharf. The defendant pulled up the piles and removed the obstruction to allow passage to his wharf, and the plaintiffs then brought an action in trespass on the ground that they enjoyed title under a grant from the province of Nova Scotia to the soil of the harbour on which the wharf was constructed. The Court held that the defendant was entitled to abate the nuisance created by the obstruction to navigation in the harbour. Strong J. remarked, at p. 243:

> The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance, which upon the evidence, such an obstruction of the harbour amounted to, <u>for the Crown cannot grant the right so to obstruct navigable waters; nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance</u>. [Emphasis added.]

This passage also underscores another aspect of the paramountcy of the public right of navigation -- that it can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation; see also *The Queen v. Fisher* (1891), 2 Ex. C.R. 365; *In*

Re Provincial Fisheries, *supra*, at p. 549, *per* Girouard J.; and *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

What is more, the provinces are constitutionally incapable of enacting legislation authorizing an interference with navigation, since s. 91(10) of the *Constitution Act, 1867* gives Parliament exclusive jurisdiction to legislate respecting navigation. That was made clear by this Court in *Queddy River Driving Boom Co. v. Davidson* (1883), 10 S.C.R. 222, where an injunction was sought to restrain the defendant company from erecting piers and booms in the Queddy River in New Brunswick. The defendant relied on its constituent legislation, passed by the provincial legislature, which permitted a certain degree of interference with navigation. The only issue before the Court was the authority of the legislature to pass the Act incorporating the defendant. Ritchie C.J. concluded, at p. 232:

> . . . the legal question in this case, which is, to which legislative power, that of the Dominion Parliament or the Assembly of *New Brunswick*, belongs the right to authorize the obstruction by piers or booms of a public tidal and navigable river, and thereby injuriously interfere with and abridge the public right of navigation in such tidal navigable waters. It is not disputed that this legislation interfered with the navigation of the river . . .
>
> I think there can be no doubt that the legislative control of navigable waters, such as are in question in this case, belongs exclusively to the Dominion Parliament. Everything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament, by the B.N.A. Act.

These cases served as an impetus for the enactment of what ultimately became the *Navigable Waters Protection Act*. Of relevance here is the enactment of one of the antecedent pieces of legislation -- *An Act respecting booms and other*

works constructed in navigable waters whether under the authority of Provincial Acts or otherwise, S.C. 1883, c. 43 -- preceding the consolidated Act which was to govern all aspects of the protection of navigable waters. Section 1 provided:

> **1.** No boom, dam or aboiteau shall be constructed whether under the authority of an Act of a Legislature of a Province of Canada, or under the authority of an Ordinance of the North-West Territories or of the District of Keewatin or otherwise, so as to interfere with navigation, unless the site thereof has been approved, and unless the boom, dam or aboiteau has been built and is maintained in accordance with plans approved by the Governor General in Council.

The Act also provided a means whereby existing structures which interfered with navigation, and thus created a public nuisance, could be legalized by seeking approval from the Governor General in Council.

That statute was but one enactment in which Parliament exercised its jurisdiction to prevent the erection or continuation of impediments to navigation. It had already legislated, *inter alia*, in respect of bridges (*An Act respecting Bridges over navigable waters, constructed under the authority of Provincial Acts*, S.C. 1882, c. 37); the removal of obstructions and wrecks from navigable waters (*An Act for the removal of obstructions, by wreck and like causes, in Navigable Waters of Canada, and other purposes relative to wrecks*, S.C. 1874, c. 29); and effluent from sawmills into navigable waters (*An Act for the better protection of Navigable Streams and Rivers*, S.C. 1873, c. 65).

The consolidation process began with the passage of *An Act respecting certain works constructed in or over Navigable Waters*, S.C. 1886, c. 35, dealing with

construction of any "work" in navigable waters, and its companion legislation *An Act respecting the protection of Navigable Waters*, S.C. 1886, c. 36, concerning obstruction of navigable waters by wrecks. Section 1 of the former compendiously defined the term "work" to mean:

> **1.** In this Act, unless the context otherwise requires, the expression "work" means and includes any bridge, boom, dam, aboiteau, wharf, dock, pier or other structure, and the approaches or other works necessary or appurtenant thereto; . . .

The definition was far more comprehensive in scope than its predecessors, and this aspect of the law, coupled with the requirement for approval from the Governor in Council of all such works, caused considerable consternation at the time as to the breadth of its potential retrospective effect for existing structures erected in navigable waters.

However, the statute was merely declaratory of the common law. To the extent that a structure interfered with the public right of navigation, it was a public nuisance, and the provinces were constitutionally powerless to authorize an interference of that nature. The retrospective effect of the law with respect to works built under the statutory authority of a provincial legislature, however, only went back as far as the time the province joined Confederation. Section 7 provided:

> **7.** Nothing hereinbefore contained, except the provisions of the first and fifth sections hereof, shall apply to any work constructed under the authority of any Act of the Parliament of Canada, or of the legislature of the late Province of Canada, or of the legislature of any Province now forming part of Canada, passed before such Province became a part thereof.

Thus, no permission would be required for a work authorized by the legislature of a province before it joined Canada. That is because the province would then have had the constitutional jurisdiction to authorize the work. Similarly, the Act did not apply to works constructed under any other Act of Parliament so that it was clear which Act governed. Parliament had already passed legislation authorizing certain works of that nature; see for example *An Act to authorize the Corporation of the Town of Emerson to construct a Free Passenger and Traffic Bridge over the Red River in the Province of Manitoba*, S.C. 1880, c. 44.

The 1886 Acts were re-enacted in R.S.C. 1886, cc. 91 and 92, and consolidated in R.S.C. 1906, c. 115, when they were given the short title *Navigable Waters' Protection Act*. The Act has remained substantially the same since. In particular, s. 7 of c. 35 of the 1886 statute has remained materially unaltered, and is now found in s. 4 of the present Act. It was this provision that the Court of Appeal relied upon to find that the Crown in right of Alberta was bound by necessary implication. I agree with this position. By expressly excepting from the operation of the Act works authorized by Parliament since Confederation and by pre-Confederation provincial legislatures, at a time these bodies had power to interfere with navigation, the statute by necessary implication must be taken to provide that post-Confederation works undertaken by the provinces are subject to the Act. There are, however, even more fundamental considerations that lead to the view that the conclusion arrived at by the Court of Appeal was correct. To these I now turn.

In my view, the circumstances surrounding the passage of the legislation, informing as they must the context of the statute, do lead to the logical inference that

the Crown in right of a province is bound by the Act by necessary implication. Neither the Crown nor a grantee of the Crown may interfere with the public right of navigation without legislative authorization. The proprietary right the Crown in right of Alberta may have in the bed of the Oldman River is subject to that right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Parliament has entered the field principally through the passage of the *Navigable Waters Protection Act* which delegated to the Governor General in Council, and now the Minister of Transport, authority to permit construction of what would otherwise be a public nuisance in navigable waters. The Crown in right of Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. It follows that the Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval.

My colleague, Stevenson J., has however referred to the statement of Fitzpatrick C.J. in *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216 (S.C.C.), to the effect that the Act was merely permissive and did not prevent a third party from bringing action for an interference with the public right of navigation despite the Minister's approval of the work. This statement, however, was mere dicta. The issue there was whether the structure concerned interfered with the plaintiffs' private right of access. The other two majority judges confined their remarks to this matter, and the two minority judges *a fortiori* did not agree with the statement. For my part, I prefer the view expressed in *Isherwood v. Ontario and Minnesota Power Co.* (1911), 18 O.W.R. 459 (Div. Ct.), that the Act does permit interference with the public right

of navigation but does not interfere with the private rights of individuals. That is the proposition for which *Champion* is authority.

For these reasons I have concluded that the Crown in right of Alberta is, as a matter of necessary or logical implication, bound by the *Navigable Waters Protection Act*. I am also of the view that the purpose of the Act would be wholly frustrated if this were not the case. I am affected by the considerations referred to by Stone J.A. that the provinces are among the bodies that are likely to engage in projects -- bridges, for example -- that may interfere with navigation, and that this was the case in this country well before the passage of the Act, but here again I am affected as well by even more fundamental considerations, namely the nature of navigation in this country and of Parliament's legislative power over this activity.

Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. With respect to the contrary view, it makes little sense to suggest that any semblance of Parliament's legislative objective in exercising its jurisdiction for the conservancy of navigable waters would be achieved were the Crown to be excluded from the operation of the Act. 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 was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.

The practical necessity for a uniform regulatory regime for navigable waters has already been recognized by this Court in *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, and the reasoning given there in support of a single body of maritime law within federal jurisdiction is equally applicable to this case. At pages 1294-95, it is stated:

> Quite apart from judicial authority, the very nature of the activities of navigation and shipping, at least as they are practised in this country, makes a uniform maritime law which encompasses navigable inland waterways a practical necessity. Much of the navigational and shipping activity that takes place on Canada's inland waterways is closely connected with that which takes place within the traditional geographic sphere of maritime law. This is most obviously the case when one looks to the Great Lakes and the St. Lawrence Seaway, which are to a very large degree an extension, or alternatively the beginning, of the shipping lanes by which this country does business with the world. But it is also apparent when one looks to the many smaller rivers and waterways that serve as ports of call for ocean going vessels and as the points of departure for some of Canada's most important exports. This is undoubtedly one of the considerations that led the courts of British North America to rule that the public right of navigation, in contradistinction to the English position, extended to all navigable rivers regardless of whether or not they were within the ebb and flow of the tide . . . . It probably also explains why the Fathers of Confederation thought it necessary to assign the broad and general power over navigation and shipping to the central rather than the provincial governments . . . .

Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative purpose of the *Navigable Waters Protection Act* would, in my view, effectively be emasculated. In light of these findings, it is unnecessary to comment on the issue of waiver that was raised by the appellant Ministers.

Constitutional Question

The constitutional question asks whether the *Guidelines Order* is so broad as to offend ss. 92 and 92A of the *Constitution Act, 1867*. However, no argument was made with respect to s. 92A for the apparent reason that the Oldman River Dam project does not, in the appellants' view, fall within the ambit of that provision. At all events, the matter is of no moment. The process of judicial review of legislation which is impugned as *ultra vires* Parliament was recently elaborated on in *Whitbread v. Walley*, *supra*, and does not bear repetition here, save to remark that if the *Guidelines Order* is found to be legislation that is in pith and substance in relation to matters within Parliament's exclusive jurisdiction, that is the end of the matter. It would be immaterial that it also affects matters of property and civil rights (*Whitbread*, at p. 1286). The analysis proceeds first by identifying whether in pith and substance the legislation falls within a matter assigned to one or more of the heads of legislative power.

While various expressions have been used to describe what is meant by the "pith and substance" of a legislative provision, in *Whitbread v. Walley* I expressed a preference for the description "the dominant or most important characteristic of the challenged law". Naturally, the parties have advanced quite different features of the *Guidelines Order* as representing its most important characteristic. For Alberta, it is the manner in which it is said to encroach on provincial rights, although no specific matter has been identified other than general references to the environment. Alberta argues that Parliament has no plenary jurisdiction over the environment, it being a matter of legislative jurisdiction shared by both levels of government, and that the *Guidelines Order* has crossed the line which circumscribes Parliament's authority over the environment. The appellant Ministers argue that in pith and

substance the *Guidelines Order* is merely a process to facilitate federal decision-making on matters that fall within Parliament's jurisdiction -- a proposition with which the respondent substantially agrees.

The substance of Alberta's argument is that the *Guidelines Order* purports to give the Government of Canada general authority over the environment in such a way as to trench on the province's exclusive legislative domain. Alberta argues that the *Guidelines Order* attempts to regulate the environmental effects of matters largely within the control of the province and, consequently, cannot constitutionally be a concern of Parliament. In particular, it is said that Parliament is incompetent to deal with the environmental effects of provincial works such as the Oldman River Dam.

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. Professor Gibson put it succinctly several years ago in his article "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85:

> . . . "environmental management" does not, under the existing situation, constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that "environmental management" could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal.

I earlier referred to the environment as a diffuse subject, echoing what I said in *R. v. Crown Zellerbach Canada Ltd.*, *supra*, to the effect that environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the "national concern" doctrine as articulated by Beetz J. in *Reference re Anti-Inflation Act*, *supra*. Although I was writing for the minority in *Crown Zellerbach*, this opinion was not contested by the majority. The majority simply decided that marine pollution was a matter of national concern because it was predominately extra-provincial and international in character and implications, and possessed sufficiently distinct and separate characteristics as to make it subject to Parliament's residual power.

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. A variety of analytical constructs have been developed to grapple with the problem, although no single method will be suitable in every instance. Some have taken a functional approach by describing specific environmental concerns and then allocating responsibility by reference to the different heads of power; see, for example, Gibson, *supra*. Others have looked at the problem from the perspective of testing the ambit of federal powers according to their general description as "conceptual" or "global" (e.g., criminal law, taxation, trade and commerce, spending and the general residuary power) as opposed to "functional" (e.g., navigation and fisheries); see P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972), 10 *Osgoode Hall L.J.* 647, and M.

E. Hatherly, *Constitutional Jurisdiction in Relation to Environmental Law*, background paper prepared for the Protection of Life Project, Law Reform Commission of Canada (1984).

In my view the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting. This can best be understood by looking at specific powers. A revealing example is the federal Parliament's exclusive legislative power over interprovincial railways under ss. 92(10)(*a*) and 91(29) of the *Constitution Act, 1867*. The regulation of federal railways has been entrusted to the National Transportation Agency pursuant to the *National Transportation Act, 1987*, which enjoys a broad mandate as summarized in the declaration found in s. 3, which reads in part:

> **3.** (1) It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services making the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy and to legal and constitutional requirements,
>
> . . .
>
> (*d*) transportation is recognized as a key to regional economic development and commercial viability of transportation links is balanced with regional economic development objectives in order that the potential economic strengths of each region may be realized,
> . . .

This gives some insight into the scope of Parliament's legislative jurisdiction over railways and the manner in which it is charged with the responsibility of weighing both the national and local socio-economic ramifications of its decisions. Moreover, it cannot be seriously questioned that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as it is legislation relating to railways. This could involve issues such as emission standards or noise abatement provisions.

To continue with the example, one might postulate the location and construction of a new line which would require approval under the relevant provisions of the *Railway Act*, R.S.C., 1985, c. R-3. That line may cut through ecologically sensitive habitats such as wetlands and forests. The possibility of derailment may pose a serious hazard to the health and safety of nearby communities if dangerous commodities are to be carried on the line. On the other hand, it may bring considerable economic benefit to those communities through job creation and the multiplier effect that will have in the local economy. The regulatory authority might require that the line circumvent residential districts in the interests of noise abatement and safety. In my view, all of these considerations may validly be taken into account in arriving at a final decision on whether or not to grant the necessary approval. To suggest otherwise would lead to the most astonishing results, and it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature.

The same can be said for several other subject matters of legislation, including one of those before the Court, namely navigation and shipping. Some provisions of the *Navigable Waters Protection Act* are aimed directly at biophysical environmental concerns that affect navigation. Sections 21 and 22 read:

> **21.** No person shall throw or deposit or cause, suffer or permit to be thrown or deposited any sawdust, edgings, slabs, bark or like rubbish of any description whatever that is liable to interfere with navigation in any water, any part of which is navigable or that flows into any navigable water.
>
> **22.** No person shall throw or deposit or cause, suffer or permit to be thrown or deposited any stone, gravel, earth, cinders, ashes or other material or rubbish that is liable to sink to the bottom in any water, any part of which is navigable or that flows into any navigable water, where there are not at least twenty fathoms of water at all times, but nothing in this section shall be construed so as to permit the throwing or depositing of any substance in any part of a navigable water where that throwing or depositing is prohibited by or under any other Act.

As I mentioned earlier in these reasons, the Act has a more expansive environmental dimension, given the common law context in which it was enacted. The common law proscribed obstructions that interfered with the paramount right of public navigation. Several of the "works" referred to in the Act do not in any way improve navigation. Bridges do not assist navigation, nor do many dams. Thus, in deciding whether a work of that nature is to be permitted, the Minister would almost surely have to weigh the advantages and disadvantages resulting from the interference with navigation. This could involve environmental concerns such as the destruction to fisheries, and all the *Guidelines Order* does then is to extend the ambit of his concerns.

It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities. The foregoing observations may be demonstrated by reference to two cases involving fisheries. In *Fowler v. The Queen*, [1980] 2 S.C.R. 213, the Court found that s. 33(3) of the *Fisheries Act* was *ultra vires* Parliament because its broad prohibition enjoining the deposit of "slash, stumps or other debris" into water frequented by fish was not sufficiently linked to any actual or potential harm to fisheries. However, s. 33(2), prohibiting the deposit of deleterious substances in any place where they might enter waters frequented by fish, was found *intra vires* Parliament under s. 91(12) in *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292.

The provinces may similarly act in relation to the environment under any legislative power in s. 92. Legislation in relation to local works or undertakings, for example, will often take into account environmental concerns. What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question and posits an erroneous

principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation. As Dickson C.J. remarked in *Alberta Government Telephones*, *supra*, at p. 275:

> It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other. Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives.

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.

There is, however, an even more fundamental fallacy in Alberta's argument, and that concerns the manner in which constitutional powers may be exercised. In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of *bona fides*, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.

An Australian case, *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1 (H.C.), illustrates the point well in a context similar to the present. There the plaintiffs carried on the business of mining for mineral sands from which they produced zircon and rutile concentrates. The export of those substances was regulated by the *Customs (Prohibited Exports) Regulations* (passed pursuant to the Commonwealth's trade and commerce power) and approval from the Minister of Minerals and Energy was required for their export. The issue in the case arose when an inquiry was directed to be made under the *Environment Protection (Impact of Proposals) Act* 1974-1975 (Cth), into the environmental impact of mineral extraction from the area in which the plaintiffs had their mining leases. The Minister responsible informed the plaintiffs that the report of that inquiry would have to be considered before allowing any further export of concentrates.

The plaintiffs contended that the Minister could only consider matters relevant to "trading policy" within the scope of the Commonwealth's trade and commerce power, rather than the environmental concerns arising from the anterior mining activity which was predominantly a state interest. That argument was unanimously rejected, Stephen J. putting it as follows, at p. 12:

> The administrative decision whether or not to relax a prohibition against the export of goods will necessarily be made in the light of considerations affecting the mind of the administrator; but whatever their nature the consequence will necessarily be expressed in terms of trade and commerce, consisting of the approval or rejection of an application to relax the prohibition on exports. It will therefore fall within constitutional power. The considerations in the light of which the decision is made may not themselves relate to matters of trade and commerce but that will not deprive the decision which they induce of its inherent constitutionality for the decision will be directly on the subject matter of exportation and the considerations actuating that decision will not detract from the character which its subject matter confers upon it.

I hasten to add that I do not mean to draw any parallels between the Commonwealth's trade and commerce power as framed in the Australian Constitution and that found in the Canadian Constitution. Obviously there are important differences in the two documents, but the general point made in *Murphyores* is nonetheless valid in the present case. The case points out the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions. Clearly, this cannot be the case. Quite simply, 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.

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:

> The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, *Environmental Approvals in Canada* (1989), at p. 1.2, {SS} 1.4; D. P. Emond, *Environmental*

Assessment Law in Canada (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.

The *Guidelines Order* has merely added to the matters that federal decision makers should consider. If the Minister of Transport was specifically assigned the task of weighing concerns regarding fisheries in weighing applications to construct works in navigable waters, could there be any complaint that this was *ultra vires*? All that it would mean is that a decision maker charged with making one decision must also consider other matters that fall within federal power. I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the *Guidelines Order* 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. However, on my reading of the *Guidelines Order* the "initiating department" assigned responsibility for conducting an initial assessment, and if required, the environmental review panel, are only given a mandate to examine matters directly related to the areas of federal responsibility affected. Thus, an initiating department or panel cannot use the *Guidelines Order* as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power.

Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction"; see *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 808. Given the necessary element of proximity

that must exist between the impact assessment process and the subject matter of federal jurisdiction involved, this legislation can, in my view, be supported by the particular head of federal power invoked in each instance. In particular, the *Guidelines Order* prescribes a close nexus between the social effects that may be examined and the environmental effects generally. Section 4 requires that the social effects examined at the initial assessment stage be "directly related" to the potential environmental effects of a proposal, as does s. 25 in respect of the terms of reference under which an environmental assessment panel may operate. Moreover, where the *Guidelines Order* has application to a proposal because it affects an area of federal jurisdiction, as opposed to the other three bases for application enumerated in s. 6, the environmental effects to be studied can only be those which may have an impact on the areas of federal responsibility affected.

I should make it clear, however, that the scope of assessment is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Such a responsibility, as I stated earlier, is a necessary condition to engage the process, but once the initiating department has thus been given authority to embark on an assessment, that review must consider the environmental effect on all areas of federal jurisdiction. There is no constitutional obstacle preventing Parliament from enacting legislation under several heads of power at the same time; see *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, and *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 350. In the case of the *Guidelines Order*, Parliament has conferred upon one institution (the "initiating department") the responsibility, in the exercise of its decision-making authority, for assessing the

environmental implications on all areas of federal jurisdiction potentially affected. Here, the Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, is directed to consider the environmental impact of the dam on such areas of federal responsibility as navigable waters, fisheries, Indians and Indian lands, to name those most obviously relevant in the circumstances here.

In essence, then, the *Guidelines Order* has two fundamental aspects. First, there is the substance of the *Guidelines Order* dealing with environmental impact assessment to facilitate decision-making under the federal head of power through which a proposal is regulated. As I mentioned earlier, this aspect of the *Guidelines Order* can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the legislation is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker, or in the vernacular of the *Guidelines Order*, the "initiating department". This facet of the legislation has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties. This, in my view, is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Court adopted a similar approach in the related situation that arose in *Jones v. Attorney General of New Brunswick*, *supra*. There this Court dealt with

the constitutional validity, on a division of powers basis, of certain provisions of the *Official Languages Act*, R.S.C. 1970, c. O-2, the *Evidence Act* of New Brunswick, R.S.N.B. 1952, c. 74, and the *Official Languages of New Brunswick Act*, S.N.B. 1969, c. 14. The federal legislation made English and French the official languages of Canada, and the impugned provisions recognized both languages in the federal courts and in criminal proceedings. Laskin C.J. held, at p. 189:

> . . . I am in no doubt that it was open to the Parliament of Canada to enact the *Official Languages Act* (limited as it is to the purposes of the Parliament and Government of Canada and to the institutions of that Parliament and Government) as being a law "for the peace, order and good government of Canada in relation to [a matter] not coming within the classes of subjects . . . assigned exclusively to the Legislatures of the Provinces". The quoted words are in the opening paragraph of s. 91 of the *British North America Act*; and, in relying on them as constitutional support for the *Official Languages Act*, I do so on the basis of the purely residuary character of the legislative power thereby conferred. No authority need be cited for the exclusive power of the Parliament of Canada to legislate in relation to the operation and administration of the institutions and agencies of the Parliament and Government of Canada. Those institutions and agencies are clearly beyond provincial reach. [Emphasis added.]

The Court went on to uphold the federal legislation on the additional grounds that it was valid under Parliament's criminal jurisdiction (s. 91(27)) and federal power over federal courts (s. 101). Laskin C.J. also remarked that there was no constitutional impediment preventing Parliament from adding to the range of privileged or obligatory use of English and French in institutions or activities that are subject to federal control. For similar reasons, the provincial legislation providing for the use of both official languages in the courts of New Brunswick was upheld on the basis of its power over the administration of justice in the province (s. 92(14)).

In the end, I am satisfied that the *Guidelines Order* is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. Consequently, it is nothing more than an adjunct of the federal legislative powers affected. In any event, it falls within the purely residuary aspect of the "Peace, Order, and good Government" power under s. 91 of the *Constitution Act, 1867*. Any intrusion into provincial matters is merely incidental to the pith and substance of the legislation. It must also be remembered that what is involved is essentially an information gathering process in furtherance of a decision-making function within federal jurisdiction, and the recommendations made at the conclusion of the information gathering stage are not binding on the decision maker. Neither the initiating department nor the panel are given power to subpoena witnesses, as was the case in *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 868, where the Court held that certain provisions of the *Act respecting occupational health and safety*, S.Q. 1979, c. 63, which, *inter alia*, allowed the province to investigate accidents and issue remedial orders, were inapplicable to an interprovincial railway undertaking. I should add that Alberta's extensive reliance on that decision is misplaced. It is wholly distinguishable from the present case on several grounds, most importantly that the impugned provincial legislation there was made compulsory against a federal undertaking and was interpreted by the Court as regulating the undertaking.

For the foregoing reasons I find that the *Guidelines Order* is *intra vires* Parliament and would thus answer the constitutional question in the negative.

Discretion

The last substantive issue raised in this appeal is whether the Federal Court of Appeal erred in interfering with the motions judge's discretion not to grant the remedies sought, namely orders in the nature of *certiorari* and mandamus, on the grounds of unreasonable delay and futility. Stone J.A. found that the motions judge had erred in a way that warranted interference with the exercise of his discretion on both grounds.

The principles governing appellate review of a lower court's exercise of discretion were not extensively considered, only their application to this case. Stone J.A. cited *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713 (C.A.), which in turn approved of the following statement of Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130, at p. 138:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

That was essentially the standard adopted by this Court in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, where Beetz J. said, at p. 588:

> Second, in declining to evaluate, difficult as it may have been, whether or not the failure to render natural justice could be cured in the appeal, the learned trial judge refused to take into consideration a major element for the determination of the case, thereby failing to exercise his discretion on relevant grounds and giving no choice to the Court of Appeal but to intervene. [Emphasis added.]

What, then, are the relevant considerations that should have been weighed by the motions judge in exercising his discretion? The first ground on which the motions judge exercised his discretion to refuse prerogative relief was delay. There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case; see S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at p. 423, and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (1985), at pp. 373-74. The motions judge took cognizance of the period of time that elapsed between approval being granted by the Minister of Transport on September 18, 1987 and the filing of the notice of motion in this action on April 21, 1989, and the fact that the project was approximately 40 percent complete by that time. With respect, however, he ignored a considerable amount of activity undertaken by the respondent Society before taking this action, some of which was referred to by Stone J.A. I should note at this point that Stone J.A. was mistaken when he stated that this action was taken only two months after the Society became aware that approval had been granted. During cross-examination on her affidavit in support of the application, Ms. Kostuch, the vice-president of the Society, admitted that the Society became aware of the approval on February 16, 1988, some fourteen months before the present action was launched.

This was not the only action taken by the Society in opposition to the dam, however. The Society first brought an action in October 1987 seeking *certiorari* with prohibition in aid to quash an interim licence issued by the Minister of the Environment of Alberta pursuant to the *Water Resources Act*. On December 8, 1987 Moore C.J.Q.B. quashed all licences and permits issued by the Minister on the grounds that the department had not filed the requisite approvals with its application, that it had not referred the matter to the Energy Resources Conservation Board as required by s. 17 of the Act, and that the Minister's delegate had wrongfully exercised his discretion in waiving the public notice requirements set out in the Act: *Friends of the Oldman River Society v. Alberta (Minister of the Environment)* (1987), 85 A.R. 321. Another interim licence was issued on February 5, 1988 and again the respondent brought an application to quash that licence, principally on the ground that the requirement for giving public notice had been improperly waived. The application was dismissed by Picard J. who held that the appropriate material had been filed with the application for the licence and that the Minister's delegate had acted within his jurisdiction in waiving public notice: *Friends of Oldman River Society v. Alberta (Minister of the Environment)* (1988), 89 A.R. 339 (Q.B).

In the meantime, the respondent Society had been petitioning the Alberta Energy Resources Conservation Board to conduct a public hearing into the hydro-electric aspects of the dam pursuant to the *Hydro and Electric Energy Act*. The Board replied on December 18, 1987 refusing the Society's request for the reason that the dam did not constitute a "hydro development" within the meaning of the Act. An application was taken for leave to appeal that decision to the Alberta Court of Appeal which refused leave, agreeing with the Board that the project was not a hydro

development, even though it was designed to allow for the future installation of a power generating facility: *Friends of the Old Man River Society v. Energy Resources Conservation Board (Alta.)* (1988), 89 A.R. 280. Finally, Ms. Kostuch swore an information before a justice of the peace alleging that an offence had been committed under s. 35 of the *Fisheries Act*. After summonses were issued, the Attorney General for Alberta intervened and stayed the proceedings on August 19, 1988. I have already documented the correspondence directed to the federal Minister of the Environment and Minister of Fisheries and Oceans through 1987 and 1988 in which members of the Society sought to have the *Guidelines Order* invoked, all to no avail. This action was taken shortly after the Trial Division of the Federal Court in *Canadian Wildlife* held that the *Guidelines Order* was binding on the Minister of the Environment.

In my view, this chronology of events represents a concerted and sustained effort on the part of the Society to challenge the legality of the process followed by Alberta to build this dam and the acquiescence of the appellant Ministers. While these events were taking place, construction of the dam continued, despite ongoing legal proceedings, and as at the date of the hearing before this Court, counsel for Alberta advised that the dam had been substantially completed. I can find no evidence that Alberta has suffered any prejudice from any delay in taking this action; there is no indication whatever that the province was prepared to accede to an environmental impact assessment under the *Guidelines Order* until it had exhausted all legal avenues, including an appeal to this Court. The motions judge did not weigh these considerations adequately or at all. Accordingly, the Court of Appeal was justified in interfering with the exercise of his discretion on this point.

The remaining ground for refusing to grant prerogative relief was on the basis of futility, namely that environmental impact assessment under the *Guidelines Order* would be needlessly repetitive in view of the studies that were conducted in the past. In my view this was not a proper ground to refuse a remedy in these circumstances. Prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory. For example, a case where the order could not possibly be implemented, such as an order of prohibition to a tribunal if nothing is left for it to do that can be prohibited; see de Smith, *supra*, at pp. 427-28. It is a different matter, though, where it cannot be determined *a priori* that an order in the nature of prerogative relief will have no practical effect. In the present case, aside from what Stone J.A. has already said concerning the qualitative differences between the process mandated by the *Guidelines Order* and what has gone before, it is not at all obvious that the implementation of the *Guidelines Order* even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction. I have therefore concluded that the Court of Appeal did not err in interfering with the motions judge's exercise of discretion to deny the relief sought.

On the matter of costs, it is my view that this is a proper case for awarding costs on a solicitor-client basis to the respondent Society, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did not earlier seek leave to appeal to this Court.

Disposition

For these reasons, I would dismiss the appeal, with the exception that there shall be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the *Guidelines Order*, with solicitor and client costs to the respondent throughout. I would answer the constitutional question in the negative.

//*Stevenson*//

The following are the reasons delivered by

STEVENSON J. (dissenting) -- I have had the benefit of reading the judgment of my colleague La Forest J. and respectfully disagree with him on three points. In my view,

1. The Crown is not bound by the *Navigable Waters Protection Act,* R.S.C., 1985, c. N-22 ("*N.W.P.A.*").

2. The Federal Court of Appeal, [1990] 2 F.C. 18, wrongly interfered with the discretion exercised by the motions judge in refusing the prerogative remedy.

3. The appellants should not be called upon to pay costs on a solicitor and client basis.

I agree with his analysis of the constitutional questions and with his interpretation of the provisions implementing the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467.

1. Crown Immunity

The question here is a simple one: is the Crown bound by the *N.W.P.A.*? For the purposes of this discussion, no distinction is to be drawn between the federal and provincial Crowns. The Crown is indivisible for this purpose: *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225, at pp. 272-73.

Pursuant to the *Interpretation Act*, R.S.C., 1985, c. I-21 (formerly R.S.C. 1970, c. I-23), the Crown is not bound by legislation unless it is mentioned or referred to in the legislation. This has been interpreted in *Alberta Government Telephones*, at p. 281, as follows:

> It seems to me that the words "mentioned or referred to" in s. 16 [now s. 17] are capable of encompassing: (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

All parties agree that there are no words in the *N.W.P.A.* "expressly binding" the Crown. In my view, it also cannot be said that a clear intention to bind the Crown "is manifest from the very terms of the statute". In making that determination, one is confined to the four corners of the statute. We must not forget that *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58 (P.C.), is no longer applicable in light of the express provisions of the *Interpretation Act*, except to the extent that it is adopted as it was in *Alberta Government Telephones*, which I take to be governing.

The respondent Society must therefore show that excluding the Crown would wholly frustrate the purpose of the *N.W.P.A.* or produce an absurdity. I am reminded by the Privy Council in *Bombay* that if the intention is to bind the Crown, "nothing is easier than to say so in plain words" (p. 63).

Does the failure to include the Crown work an absurdity? It is not enough that there be a gap: *Alberta Government Telephones*, at p. 283. The *N.W.P.A.* applies to private and municipal undertakings and a moment's reflection reveals that there are many non-governmental agencies whose activities are thus subject to the *N.W.P.A.* There is thus no emasculation of the *N.W.P.A.*

Nor are the courts to assume bad faith on the part of the Crown in carrying out activities which might otherwise be regulated.

If the Crown interferes with public rights of navigation, that wrong is remediable by action. In short, there is no ground for saying that the *N.W.P.A.* will

be frustrated by actions of government. There is ample scope in the regulation of non-governmental activities, and it cannot be said the object of the *N.W.P.A.* is frustrated.

I must mention briefly an argument that in invoking the *N.W.P.A.*, the appellant Alberta accepted the burden of the environmental regulation regime. There is no significant benefit in approval under the *N.W.P.A.* Tort actions may still lie. The *N.W.P.A.* does not expressly confer benefits of any type. Moreover, it is not clear that approval under s. 5 of the *N.W.P.A.* would necessarily provide any protection from possible actions in tort. In *Champion v. City of Vancouver*, [1918] 1 W.W.R. 216 (S.C.C.), Fitzpatrick C.J. of this Court held at pp. 218-19 that:

> In considering the interpretation to be put upon this Act [the *N.W.P.A.*, R.S.C. 1906, c. 115], it must be borne in mind that every work constructed in navigable waters is not necessarily such an interference with navigation as to constitute an illegal obstruction. It may, however, be so and, as such, liable to be removed by the proper authority. It is therefore of great advantage to persons proposing to construct works for which there is no sanction to be able to obtain beforehand the approval of the Governor-in-Council under sec. 7; the provision is, however, purely permissive and the section does not provide for any consequences following upon the approval, certainly not that it shall render legal anything which would be illegal. Any interference with a public right of navigation is a nuisance which the Courts can order abated notwithstanding any approval by the Governor-in-Council under sec. 7. [Emphasis added.]

2. Discretion

The remedies sought by the respondent Society are discretionary: *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561, at p. 574: "The principle that *certiorari* and *mandamus* are discretionary remedies by nature cannot be disputed",

and D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (1985), at pp. 372-73.

Interference by an appellate court is only warranted when a lower court has "gone wrong in principle" or "has given no weight (or no sufficient weight) to those considerations which ought to have weighed with [it]": *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713 (C.A.), at p. 724.

The Federal Court of Appeal was clearly wrong in dismissing the motions judge's conclusion on the question of delay, which it was "not persuaded" was well-founded in principle. The Court of Appeal says the respondent Society did not become aware of the grant of the approval under the *N.W.P.A.* until some two months before the proceedings were actually launched. In fact, it knew of the approval some 14 months beforehand and the principal promoters of the Society knew even before then.

The common law has always imposed a duty on an applicant to act promptly in seeking extraordinary remedies:

> Owing to their discretionary nature, extraordinary and ordinary review remedies must be exercised promptly. Donaldson J. of the Court of Appeal of England aptly explained the principle in *R. v. Aston University Senate* [[1969] 2 Q.B. 538, at p. 555]: "The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights".
>
> (R. Dussault and L. Borgeat, *Administrative Law* (2nd ed. 1990), vol. 4, at pp. 468-69.)

That duty was recognized by Laskin C.J. on behalf of this Court in *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1976] 2 S.C.R. 739, at p. 749:

> In my opinion, discretionary bars are as applicable to the Attorney General on motions to quash as they admittedly are on motions by him for prohibition or in actions for declaratory orders. The present case is an eminently proper one for the exercise of discretion to refuse the relief sought by the Attorney General. Foremost among the factors which persuade me to this view is the unexplained two year delay in moving against the Anti-dumpting Tribunal's decision. [Emphasis added.]

The importance of acting promptly when seeking prerogative relief has also been recognized in much of the legislation now governing judicial review. For example, Ontario's *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, empowers a court to extend the prescribed time for initiating an application for judicial review, but only where it is satisfied that there are *prima facie* grounds for relief and no substantial prejudice or hardship will result to those who would be affected by the delay (s. 5). Under British Columbia's *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209, an application for judicial review may be barred by the affluxion of time if a court considers that substantial prejudice or hardship will result by reason of the delay (s. 11). The *Federal Court Act*, R.S.C., 1985, c. F-7, s. 28(2) stipulates than an application for judicial review before the Federal Court of Appeal must be made within ten days from the time the impugned decision or order is first communicated. That time limit can only be extended with leave of the court. In Alberta, Rule 753.11(1) of the *Alberta Rules of Court* (Alta. Reg. 390/68) stipulates that where the relief sought is the setting aside of a decision or act, the application for judicial review must be filed and served within six months after that decision or act. Finally, in art. 835.1 of Quebec's *Code of Civil Procedure*, R.S.Q., c. C-25,

which applies to all extraordinary remedies, it is stipulated that motions must be served "within a reasonable time". The Court of Appeal of Quebec held in *Syndicat des employés du commerce de Rivière-du-Loup (section Émilio Boucher, C.S.N.) v. Turcotte*, [1984] C.A. 316, at p. 318, that: [TRANSLATION] "This article [835.1] merely codified the common law rule that the remedy must be exercised within a reasonable time".

By the time this application was brought, the dam was 40 per cent complete. A significant amount of public money had already been spent. It is a matter of public record that individual members of the respondent Society were aware of the approval issued under the *N.W.P.A.* prior to February, 1988. Even if such were not the case, the respondent Society still could have launched its action in early 1988. At that time, major construction had not yet taken place. Had the respondent Society initiated proceedings then as compared to April of 1989, the appellant Alberta would have been in a much better position objectively to assess any potential legal risk associated with continuing. Faced with the possibility of invalid federal approval, it may well have chosen at that point not to put out the public funds that it did.

After years of extensive planning, innumerable public hearings, environmental studies and reports, and after the establishment of various councils and committees for the purpose of reviewing proposals that were put forward, the appellant Alberta embarked upon an enormous undertaking to meet the needs of its constituents. It did so at the expense of the public. And it did so after having been advised by the federal government that it could legitimately proceed. The Oldman

River dam no doubt necessitates comprehensive administration. Its construction also involves a significant number of contracts with third parties. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the decision of the Minister of Transport. In the context of this case, it was imperative that the respondent Society respect the common law duty to act promptly.

Had the respondent Society acted more promptly, the appellant Alberta would have been able to assess its position without regard to the economic and administrative commitment that was a reality by the time these proceedings were launched. It is impossible to conclude that the appellant Alberta was not prejudiced by the delay. Moreover, the motions judge made a finding on prejudice, and found that there was no justification for waiting to launch the attack until the dam was nearly 40 per cent completed.

The rationale for requiring applicants for prerogative relief to act promptly is to enable their erstwhile respondents to act upon the authority given to them. The applicant cannot invoke the fact that the respondent did what he or she was legally entitled to do as an answer to its own delay. Such a view would put a premium on delay and deliver the wrong message to those who plan prerogative challenges.

My colleague, La Forest J., would also give some weight to the fact that the appellant Alberta was aware of the opposition of the respondent Society and others because of the other unsuccessful challenges by the Society and others. In my

view, those challenges are completely irrelevant to this question. Those attacks were all ill-founded, and the appellant Alberta was not bound to expect that these peripheral and collateral proceedings presaged a fundamental attack on the original permit. The fact that detractors are harassing a travelling train does not put one on guard against the proposition that they are going to attack the authority to depart in the first instance. In my opinion, those activities need not have been taken into consideration by the motions judge. None of the activities undertaken by the Society or its members precluded the respondent Society from undertaking this challenge.

The activities referred to by my colleague were qualitatively different from that which is sought in this action, and irrelevant to the issue at hand. The applications for *certiorari* brought by the respondent Society in October 1987 and early 1988 respectively, were directed at interim licences issued by Alberta's Minister of Environment pursuant to that province's *Water Resources Act,* R.S.A. 1980, c. W-5. The petitioning of the Alberta Energy Resources Conservation Board focused on the hydro-electric aspects of the dam. The information sworn before a justice of the peace alleged an offence pursuant to the federal *Fisheries Act*, R.S.C., 1985, c. F-14.

This action centres on the constitutionality and applicability of the *Environmental Assessment and Review Process Guidelines Order*. It raises new and different issues. The previous efforts of the respondent Society were not necessary preliminaries; they were separate and distinct from the relief sought here. It is my view that in determining whether he should exercise his discretion against the respondent Society, Jerome A.C.J. was obliged to look only at those factors which

he considered were directly connected to the application before him. He was clearly in the best position to assess the relevancy of that put forward by the parties. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. For the reasons stated above, I am of the opinion that the test has not been met in this case.

3. Costs

I see no justification for awarding the respondent Society costs on a solicitor and client basis. The general rule in this Court is that a successful party recovers costs on the usual party and party basis. That was the rule applied by the courts below. My colleague proposes an award of solicitor and client costs extending to the courts below. I see no ground for suggesting they were in error, and I see no ground for our departing from our own general rule. Public interest groups must be prepared to abide by the same principles as apply to other litigants. Were we to produce special rules for such litigants, we would jeopardize an important principle: those undertaking litigation must be prepared to accept some responsibility for the costs. I see nothing here to justify calling upon the taxpayers to meet the solicitor and client costs of this party.

4. Conclusion

I would allow the appeal with costs.

Appeal dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order. STEVENSON J. *is dissenting*.

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