

Current to April 20, 2010

S.B.C. 2002, c. 43, s. 10

[eff since December 30, 2002](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 10

Determining the need for assessment

10 (1) The executive director by order

(a) may refer a reviewable project to the minister for a determination under section 14,

(b) if the executive director considers that a reviewable project will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is not required for the project, and

(ii) the proponent may proceed with the project without an assessment, or

(c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

(i) an environmental assessment certificate is required for the project, and

(ii) the proponent may not proceed with the project without an assessment.

(2) The executive director may attach conditions he or she considers necessary to an order under subsection (1) (b).

(3) A determination under subsection (1) (b) does not relieve the proponent from compliance with the applicable requirements pertaining to the reviewable project under other enactments.

SBC 2002-43-10, effective December 30, 2002 (B.C. Reg. 370/2002).

Current to April 20, 2010

S.B.C. 2002, c. 43, s. 11

[eff since December 30, 2002](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 11

Executive director determines assessment scope, procedures and methods

11 (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

(a) the scope of the required assessment of the reviewable project, and

(b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

(a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;

(b) the potential effects to be considered in the assessment;

(c) the information required from the proponent

(i) in relation to or to supplement the proponent's application, and

(ii) at specified times during the assessment, in relation to potential effects specified under paragraph (b);

(d) the role of any class assessment in fulfilling the information requirements for the assessment of the reviewable project;

(e) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);

(f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

(g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

(h) the time limits for steps in the assessment procedure that are additional to the time limits prescribed for section 24 or under section 50 (2) (a).

(3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

SBC 2002-43-11, effective December 30, 2002 (B.C. Reg. 370/2002).

Current to April 20, 2010

S.B.C. 2002, c. 43, s. 12

[eff since December 30, 2002](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 12

Limits on discretion of executive director

12 The executive director's discretion to make a determination under section 11 (1) for a reviewable project does not include the discretion to consign the assessment of the reviewable project to

- (a) a commission,
- (b) a hearing panel, or
- (c) a person not employed in or assigned to the environmental assessment office.

SBC 2002-43-12, effective December 30, 2002 (B.C. Reg. 370/2002).

Current to April 20, 2010

S.B.C. 2002, c. 43, s. 13

[eff since December 30, 2002](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 13

Variation of scope, procedures and methods by executive director

13 The executive director may vary the scope, procedures and methods determined under section 11

(a) to take into account modifications proposed for the reviewable project by the proponent, including modifications proposed in relation to an application submitted under section 16, or

(b) if necessary in his or her opinion to complete an effective and timely assessment of the reviewable project.

SBC 2002-43-13, effective December 30, 2002 (B.C. Reg. 370/2002).

Current to April 20, 2010

S.B.C. 2002, c. 43, s. 14

[eff since June 21, 2007](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 14

Minister determines assessment scope, procedures and methods for referred project

14 (1) If the executive director under section 10 (1) (a) refers a reviewable project to the minister, the minister by order

(a) may determine the scope of the required assessment of the reviewable project, and

(b) may determine procedures and methods for conducting the assessment, including for conducting as part of the assessment a review, under section 16 (6), of the proponent's application.

(2) The minister's discretion under this section to determine scope, procedures and methods includes but is not limited to the discretion by order to exercise any of the powers in section 11 (2).

(3) An order of the minister making a determination under this section may

(a) require that the assessment be conducted

(i) by a commission that the minister may constitute for the purpose of the assessment, consisting of one or more persons that the minister may appoint to the commission,

(ii) by a hearing panel, with a public hearing to be held by one or more persons that the minister may appoint to the hearing panel, or

(iii) by any other method or procedure that the minister considers appropriate and specifies in the order, and by the executive director or other person that the minister may appoint, and

(b) delegate any of the minister's powers under this section to make orders determining scope, procedures and methods to

(i) the executive director, or

(ii) a commission member, hearing panel member or another person, depending on which of them is responsible for conducting the assessment.

(4) For the purposes of an assessment conducted under this section by a commission or hearing panel, the minister, by order, may confer on the commission or hearing panel, as the case may be, the powers, privileges and protection of a commission under sections 16, 17, 22 (1), 23 (a), (b) and (d) to (f) and 32 of the Public Inquiry Act.

**** Editor's Table ****

Provision	Changed by	In force	Authority
14(4)	2007-9-118	2007 Jun 21	BC Reg 226/2007

SBC 2002-43-14, effective December 30, 2002 (B.C. Reg. 370/2002); SBC 2007-9-118.

Current to April 20, 2010

S.B.C. 2002, c. 43, s. 15

[eff since December 30, 2002](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 15

Variation of scope, procedures and methods by minister

15 (1) In relation to an assessment of a reviewable project, the minister by order may

- (a) vary the scope, procedures and methods determined under section 14, or

- (b) provide for the executive director, a commission member, hearing panel member or another person to vary the scope, procedures and methods, depending on whether the commission, hearing panel or other person is responsible for conducting the assessment

for either of the following reasons:

- (c) to take into account modifications proposed for the reviewable project by the proponent, including any modification proposed in relation to an application

submitted under section 16;

(d) if necessary in the minister's opinion to complete an effective and timely assessment of the reviewable project.

(2) The minister may delegate the discretion under subsection (1) to a commission, member, hearing panel member, the executive director or another person, depending on which of them is responsible for conducting the assessment.

SBC 2002-43-15, effective December 30, 2002 (B.C. Reg. 370/2002).

Current to April 20, 2010

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[eff since December 30, 2002](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 16

Applying for environmental assessment certificate

16 (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

(4) On accepting the application for review, the executive director

(a) must notify the proponent of the acceptance for review, and

(b) may require the proponent, for the purpose of the review, to supply a specified number of paper or electronic copies of the application, in the format specified by the executive director.

(5) On receipt of the copies of the application required under subsection (4), the executive director must proceed with and administer the review of the application in accordance with the assessment procedure determined under section 11 (1) or as varied under section 13.

(6) The proponent of a reviewable project for which the minister has made a determination under section 14 may apply for an environmental assessment certificate in the manner determined by the minister, and must pay any prescribed fee in the prescribed manner.

SBC 2002-43-16, effective December 30, 2002 (B.C. Reg. 370/2002).

Current to April 20, 2010

S.B.C. 2002, c. 43, s. 17

[eff since December 30, 2002](Current Version)

ENVIRONMENTAL ASSESSMENT ACT

SBC 2002, CHAPTER 43

Part 3 -- Environmental Assessment Process

SECTION 17

Decision on application for environmental assessment certificate

17 (1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied

(a) under section 11 or 13 by the executive director,

(b) under section 14 or 15 by the minister, or

(c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person the executive director, commission, hearing panel or other person, as the case may be, must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

(a) an assessment report prepared by the executive director, commission, hearing panel or other person, as the case may be,

(b) the recommendations, if any, of the executive director, commission, hearing panel or other person, and

(c) reasons for the recommendations, if any, of the executive director, commission, hearing panel or other person.

(3) On receipt of a referral under subsection (1), the ministers

(a) must consider the assessment report and any recommendations accompanying the assessment report,

(b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and

(c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental

assessment certificate, if granted.

SBC 2002-43-17, effective December 30, 2002 (B.C. Reg. 370/2002).

**HUNTING AND TRAPPING SYNOPSIS
2009-2010**



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**REGION 5
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SKEENA**

**REGION 7
OMINECA &
PEACE**

**REGION 8
OKANAGAN**

For more information on the hunting and trapping regulations, call a MOE Regional Office, Fish & Wildlife Branch, HQ Victoria or the Conservation Officer Service using the numbers listed on the regional maps of each region. Service BC can provide toll-free access to provincial government telephone numbers. Simply call Service BC and request a transfer to the number you wish to call.

• **Service BC**
 from Vancouver 604-660-2421
 from Victoria 387-6121
 elsewhere in BC 1-800-663-7867
 • **Report a Poacher/Polluter (see page 26)** 1-877-952-RAPP (7277)

MINISTER'S MESSAGE

Welcome back to another year of growth and progress in the best place on earth. Although natural resource levels are reduced and fewer people are working, British Columbia is still a great place to live and work. We will continue to create job opportunities for our people and attract investment from around the world.

During the past five years, the Ministry of Environment has invested \$1.2 billion to fund 65 environmental projects through the Environmental Action Fund. This fund is a valuable tool for assisting wildlife and nature to recover in areas where resources have been depleted. We will continue to invest in these projects to ensure a sustainable future for our province.

As part of the B.C. government's plan to help recover the environment, we have established the Environmental Action Fund. This fund is a valuable tool for assisting wildlife and nature to recover in areas where resources have been depleted. We will continue to invest in these projects to ensure a sustainable future for our province.

As of July 1, 2009, an estimated 1.1 million hectares of mountain forest habitat have been designated as protected areas. This is a significant step towards protecting our natural resources and ensuring a sustainable future for our province. We will continue to work with the private sector and other stakeholders to ensure that these areas are managed in a way that is consistent with our environmental goals.

Non-industrial wildlife and water will be used to generate energy and economic benefits to the benefit of the province and the people of British Columbia. The provincial government is now setting the priorities for the next five years. The provincial government is now setting the priorities for the next five years. The provincial government is now setting the priorities for the next five years.

A total of 72 new water projects have been established in British Columbia. These projects will provide a significant amount of water to the province and will be a key contribution to the long-term viability of our natural resources. We will continue to work with the private sector and other stakeholders to ensure that these projects are managed in a way that is consistent with our environmental goals.

Be safe and enjoy your 2009/10 hunting and trapping season.



Gary Korman
Minister of Environment



The Ministry of Environment is pleased to announce that it has received a grant from the federal government to fund a project to improve the quality of water in the province. This project will involve installing water treatment plants in several areas of the province and will be a significant step towards ensuring that our water resources are protected and managed in a sustainable way.

The Ministry of Environment is pleased to announce that it has received a grant from the federal government to fund a project to improve the quality of water in the province. This project will involve installing water treatment plants in several areas of the province and will be a significant step towards ensuring that our water resources are protected and managed in a sustainable way.

YOU and THE LAW:

The British Columbia Hunting and Trapping Regulations Synopsis is intended for general information purposes only. Where there is a discrepancy between this Synopsis and the Regulations, the Regulations are the final authority. Regulations are subject to change from time to time, and it is the responsibility of an individual to be informed of the current Regulations.

RECEIVE NOTIFICATION OF REGULATORY CHANGES

We have developed a new way to receive notification of regulatory changes. You can now receive notification of regulatory changes by email. This is a significant step towards ensuring that you are kept up to date on the latest regulatory changes. To receive notification of regulatory changes, please visit our website at www2.gov.bc.ca/gov/content/land/wildlife/wildlife.htm and click on the "Sign Up" button.



Accompany - means to remain in the company of the other person, able to see the other person without the aid of any device other than ordinary corrective lenses and able to communicate by unamplified voice with that person.

All Terrain Vehicle or ATV - means a wheeled vehicle or tracked vehicle propelled by motorized power, and capable of travel on or off a highway, including motorcycles but not including a snowmobile or motor vehicle that is licensed for highway travel under the *Motor Vehicle Act*.

Antlered Animal - means a member of the deer family over one year of age bearing visible bony antlers.

Antlerless Animal - means a member of the deer family bearing no visible antlers. The small skin or hair covered protuberances of male fawns and calves do not constitute antlers.

Arrow - means a slender shaft, which may be pointed at one end and may be feathered at the opposite end, for shooting from a bow.

Bait - means anything, including meat, cereals, cultivated crops, restrained animal or any manufactured product or material, that may attract wildlife and includes plastic or other imitation foods, but does not include a decoy as described under these regulations.

BC Resident - means a person who is a Canadian citizen or permanent resident of Canada, and whose only or primary residence is in British Columbia and who has been physically present in BC for the greater portion of each of 6 calendar months out of the 12 calendar months immediately before doing a thing under the *Wildlife Act*, or if not a Canadian citizen or permanent resident of Canada, but whose only or primary residence is in British Columbia, and has been physically present in BC for the greater portion of each of the 12 calendar months immediately before doing a thing under the *Wildlife Act*.

Bearded Turkey - a turkey with a tuft of hair-like feathers on the chest that grow larger with age.

Big Game - means any mountain sheep, mountain goat, bison, caribou, elk, moose, deer, grizzly bear, black bear, cougar, wolf, bobcat, lynx, wolverine or other animal designated by regulation.

Bolt - means a shaft or missile designed to be shot from a crossbow or catapult.

Bow - means a longbow or crossbow.

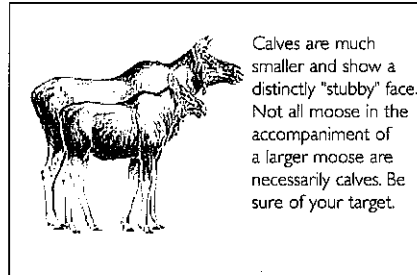
Brow Tine - means the first tine projecting forward or upward in the lower 1/3 of the antler of a moose, caribou, elk or deer.

Buck or Bull - with reference to deer, moose, or elk means one bearing visible bony antlers. Buck or Bull - with reference to caribou, means a male one year of age or older, bearing visible bony antlers.

Calf - means a moose, elk or caribou less than twelve (12) months of age.

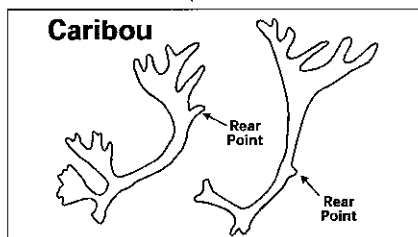
Cow Moose - a female moose recognizable by having no antlers and being 6 feet at shoulder height weighing 600-800 lbs.

Calf Moose - a moose less than 12 months of age usually less than 5 feet at shoulder height weighing 200-300 lbs.



Cancelled Species Licence - means a Species Licence that has been cancelled as indicated on the licence. The Species Licence must be cancelled immediately upon killing the animal.

Caribou - 5 Point Bull - has one antler which bears at least 5 tines (points), including the tip of the main beam above the rear point. If rear point is missing, the first rear-facing point will be used as the rear point.



Compound Crossbow - means a crossbow on which the bow string runs through pulleys.

Cougar Kitten - means any cougar with spots or any cougar under one year of age.

Crossbow - means a bow fixed across a stock with a groove for the arrow or bolt and a mechanism for holding and releasing the string. (NOTE: The use of crossbows is permitted during special bow only seasons unless otherwise indicated under the regional schedules.)

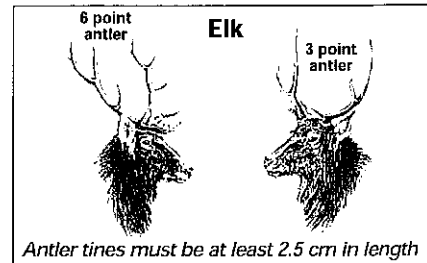
Decoy - means any material or manufactured product that simulates the appearance or has the form of wildlife.

Deer Family - means moose, caribou, deer and elk.

Edible Portions - with respect to big game, excluding grizzly bear, cougar, wolf, lynx, bobcat and wolverine, means the edible portions of the four quarters and the loins of the animal and with respect to game birds, means the edible portions of both breasts of the bird.

Elk - Six Points or Greater Bull - means any bull having at least six tines on one antler.

Elk - Three Points or Greater Bull - means any bull having at least three tines on one antler.



Firearm - includes a device that propels a projectile by means of an explosion, compressed gas or spring and includes a rifle, shotgun, handgun, pellet gun, "BB" gun or spring gun but does not include a bow.

Furbearing Animal - means a fox, beaver, black bear, marten, fisher, lynx, bobcat, mink, muskrat, river otter, raccoon, striped and spotted skunk, northern flying squirrel, red and Douglas' squirrel, ermine, weasel, wolverine, wolf or coyote.

Game Bird - means any grouse, partridge, quail, pheasant, ptarmigan, migratory game bird, or wild turkey.

Game - includes all big game, small game, game birds and furbearing animals.

Handgun - is a firearm that is designed, altered or intended to be aimed and fired by the action of one hand or that has a barrel less than 305 mm (12 in.) in length.

Hunt and Hunting - includes shooting at, attracting, searching for, chasing, pursuing, following after or on the trail of, stalking, or lying in wait for wildlife or attempting to do any of those things, whether or not the wildlife is then or subsequently wounded, killed or captured:

- (a) with intention to capture the wildlife, or
- (b) while in possession of a firearm or other weapon.

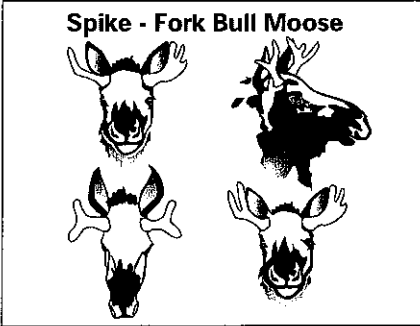
Licence Year - Hunting and Guide Licences - means the period from April 1 to March 31 of the following year. Trapping and Fur Trading Licences - means the period from July 1 to June 30 of the following year.

Loaded Firearm - means any firearm containing live ammunition in either the breech or the magazine. A clip containing live ammunition, when attached to the firearm, is considered as the magazine. **Muzzle loaders** - see page 17.

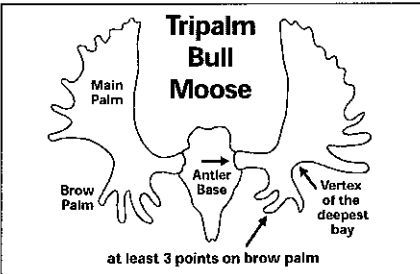
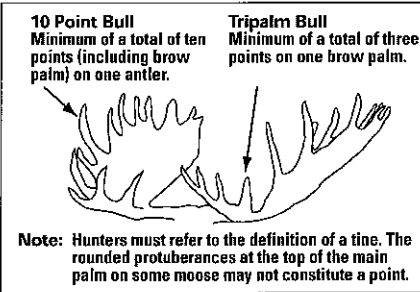
Migratory Game Birds - for which there may be an open season in BC and for which a Canadian Migratory Game Bird hunting permit is required are: waterfowl (ducks and geese, including Brant); coot; snipe; band-tailed pigeon and mourning dove.

BEFORE YOUR HUNT

Moose - Spike-fork Bull - means a bull moose having no more than two tines on one antler. (Includes tines on main antler and brow palms.) **Does not include a calf.** See diagram.



Moose - 10 Point Bull - means a bull moose having at least one antler with a minimum of ten points (tines), including the tines on the brow palm. (See diagram and tine definition.)



Moose - Tripalm Bull - means a bull moose having at least one antler with a brow palm bearing three or more points (tines). The brow palm is separated from the main palm by the deepest antler bay. The deepest bay is the bay whose vertex (deepest location) is the shortest distance from the antler base, when measured along the surface of the antler. See diagram

Motorcycle - means a motor vehicle that runs on 2 or 3 wheels and has a saddle or seat for the driver to sit astride.

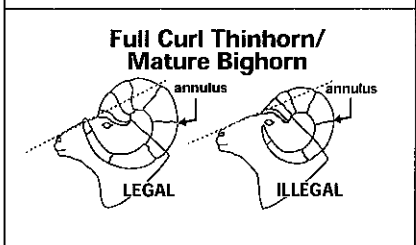
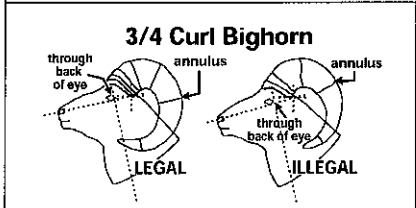
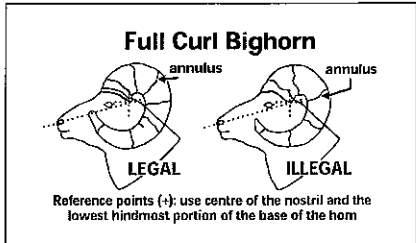
Motor Vehicle - means a device in, on or by which a person or thing is being or may be transported or drawn, and which is designed to be self propelled, and includes an ATV or snowmobile, but does not include a device designed to be moved by human, animal or wind power; a device designed to be used exclusively on stationary rails or stationary tracks; or a boat propelled by motorized power.

Mountain Sheep - Full Curl Bighorn Ram - means any male bighorn mountain sheep, the head of which, when viewed squarely from the side, has at least one horn tip extending upwards beyond a straight line drawn through the centre of the nostril and the lowest hindmost portion of the horn base. If the skull and horns are presented for examination, when viewed squarely from the side with both horns in alignment, at least one horn tip extends upward beyond a straight line drawn through the lowest hindmost portion of the horn base and the lowermost edge of the eye socket.

Mountain Sheep - 3/4 Curl Bighorn Ram - means any male bighorn mountain sheep, the head of which, when viewed squarely from the side, has at least one horn tip extending beyond a straight line drawn through the back of the eye opening and at right angles to a line drawn between the centre of the nostril and the lowest hindmost portion of the horn base. If the

skull and horns are presented for examination, when viewed squarely from the side with both horns in alignment, at least one horn tip extends beyond a straight line through the back edge of the eye socket and at right angles to a line drawn through the lowest hindmost portion of the horn base and the lowermost edge of the eye socket.

Mountain Sheep - Mature Bighorn Ram - means any bighorn ram mountain sheep that has attained the age of 8 years as evidenced by true horn annuli as determined by the regional manager or designate, or whose horn tip, when viewed squarely from the side extends upwards beyond the forehead-nose bridge.



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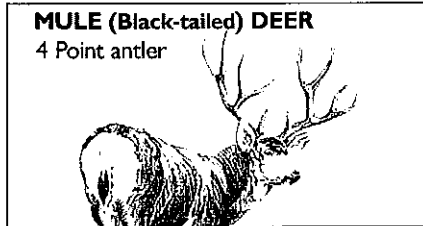
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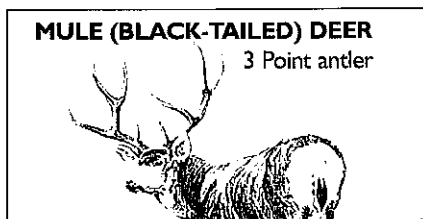
FREE BROCHURE

Mountain Sheep - Full Curl Thinhorn Ram - means any male thinhorn mountain sheep whose horn tip extends upwards beyond the forehead-nose bridge when viewed squarely from the side or which has attained the age of 8 years as evidenced by yearly horn growth annuli as determined by the Regional Manager or designate. Do not use yearly horn growth annuli to determine the age of a ram in the field, because "false" annuli may be present.

Mule (Black-tailed) Deer - Four Points or Greater Buck - means any buck having at least four tines, excluding the brow tine, on one antler.



Mule (Black-tailed) Deer - Three Points or Greater Buck - means any buck having at least three tines, excluding the brow tine, on one antler.



No Hunting Area - means a designated area in which hunting (see definition) is prohibited.

Non-Resident - means a person who is not a BC resident but who is a Canadian citizen or a permanent resident of Canada, or a person who is not a BC resident but whose only or primary residence is in Canada and has resided in Canada for the 12 month period immediately before doing a thing under the *Wildlife Act*.

Non-Resident Alien means a person who is neither a BC resident nor a non-resident.

Non-Toxic Shot - means shotgun pellets consisting of, by weight, not more than one percent lead.

No Shooting Area - means a designated area in which the discharge of firearms is prohibited.

Power Boat - means a boat, canoe or yacht powered by electric, gasoline, oil, steam or other mechanical means, but does not include a boat powered manually nor a boat with an outboard motor provided the motor is tilted or otherwise disengaged so as not to be ready for immediate use.

Raptor - means a bird of the order Falconiformes known as vultures, eagles, falcons and hawks or of the order Strigiformes known as owls and includes the eggs of these birds.

Road Allowance - see definition, page 13.

Shot means a cartridge manufactured so that it contains 8 or more roughly spherical projectiles.

Small Game - includes fox, raccoon, coyote, skunk, snowshoe hare and game birds.

Snowmobile - means a vehicle designed primarily for travel on snow or ice, having one or more steering skis, self propelled and using one or more endless belts or tracks driven in contact with the ground.

Spike Buck - means a male deer having antlers that are composed of a main beam from which there are no bony projections greater than 2.5 cm in length.

Tine or "Point" - means a branch of an antler which is longer than its breadth and is at least 2.5 cm in length, and for the purpose of determining the length of a tine

(a) the breadth of the tine is measured (if extending from a palmation of an antler; then in the plane of the palm) at a location at least 2.5 cm from the tip of the tine, and

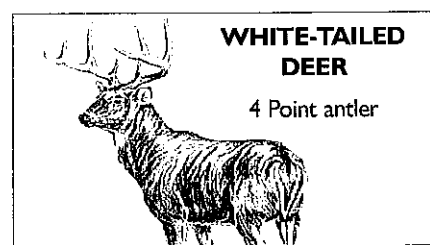
(b) the length of the tine is measured from its tip end, following the midline of the profile of the tine, and following the natural curvature of the tine, to the midpoint of the straight line along which the breadth is measured. (See How to Measure a Tine diagram below)

Traffic or Trafficking - means to buy, sell, trade or distribute for gain or consideration or to offer to do so.

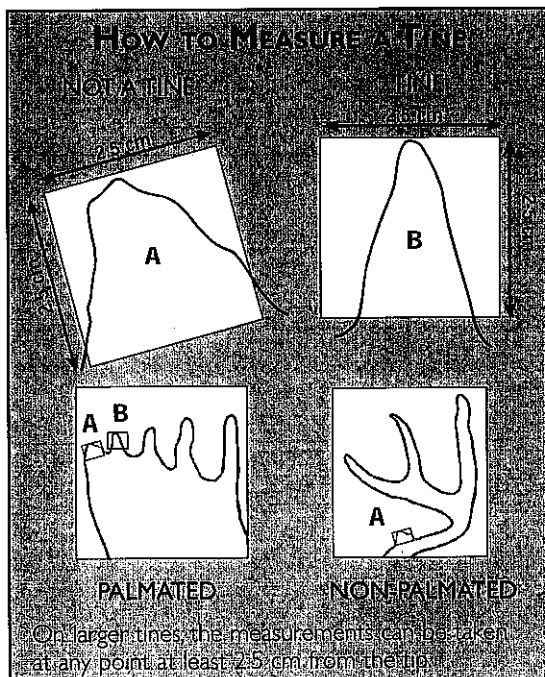
Upland Game Bird - includes the gallinaceous birds, such as wild turkey, grouse, partridge, ptarmigan, pheasant, and quail.

Vehicle - means a wheeled or tracked device in, on or by which a person or thing is or may be transported or drawn on a highway.

White-tailed Deer - Four Points or Greater Buck - means any buck having at least four tines, including the brow tine, on one antler.



Wildlife - means raptors, threatened species, endangered species, game and other species of vertebrates prescribed as wildlife by regulation.



NOTICE!
TO HUNTERS

To enter, hunt over or trap in cultivated land, posted land or private property without the owner's permission is committing an offence. It is the responsibility of the hunter or trapper to be aware of the status of the land they hunt and to get permission from the land owner before accessing private land.

HUNTER EDUCATION

▶ Since 1974, Conservation and Outdoor Recreation Education (CORE) has been an educational program designed to ensure that prospective new hunters meet acceptable standards of knowledge and skill for safe and ethical participation in hunting. As of March 1, 1998, the BC Wildlife Federation (BCWF) accepted the responsibility for the delivery of the program and graduate record keeping. CORE graduates who are not a BCWF or affiliated club member are entitled to apply for a BCWF direct membership at half-price, including the Out-door Edge magazine and liability insurance.

▶ Although not compulsory, classroom instruction in CORE is recommended and may be obtained through courses in adult education, community colleges, rod and gun clubs or course advertisements. The written examination is based on: Outdoor Ethics, Firearm Handling, Hunting Regulations, Animal

and Bird Identification, Outdoor Survival, First Aid and Safety, and Hunter Heritage, Conservation and Wildlife Management chapters found in the CORE manual. There is a \$10.00 fee for each of the practical firearms handling and written examinations. There is also a graduate fee of \$30.00 payable to BCWF at the time of program completion used for CORE program delivery support.

▶ The course requires about 21 hours of self study and firearm handling practice based upon the CORE manual. Information on how to obtain the CORE manual and a list of certified CORE examiners is available from Access Centre offices, MoE, the BCWF office in Burnaby, at 1-888-881-2293, the MoE website at www.env.gov.bc.ca/fw/wildlife/hunting/resident/education.html, or the BCWF website at www.bcwf.bc.ca

▶ For a Bowhunter Education Program course recognized throughout North America, contact: BC Archery Association, www.archeryassociation.bc.ca

▶ If the holder of a hunter number card changes his or her legal name, residential address or ceases to be a resident, he or she within 30 days of the address or name change or date at which they cease to be a resident, must notify the Director of the F&W Branch of the address change, provide a document evidencing the legal name change or on ceasing to be a resident, surrender their hunter number card to the Director of the F&W Branch. If a person who holds a BC resident hunter number card ceases to be a BC resident, the hunter number card is suspended as long as the person is not a resident. For correspondence, please inform us of changes by writing, quoting your Resident Hunter Number, at F&W Branch, MoE, PO Box 9374, Stn Prov Govt, Victoria BC V8W 9M4. See p. 40 for name/address change form.

OPEN SEASONS

▶ There is NO OPEN SEASON FOR ANY WILDLIFE – except as indicated in this Synopsis. It is unlawful to hunt at any time during the year except within the open season, or by authority of a permit issued under the *Wildlife Act*.

▶ To define open seasons for big game, small game and game birds, the province is divided into Management Units (MUs). Hunting seasons are shown in regional schedules on the following pages. All season dates shown are inclusive.

▶ Where an open season does not apply to the entire Management Unit, a reference is given to maps showing the area and describing the applicable regulation.

▶ Published seasons in this Synopsis cease to be in effect in any area closed by the Ministry of Forests and Range and are in effect for the duration of the forest closure order.

▶ Hunting season dates may only be changed in season by order of the Minister. Such changes will be given local publicity. Check www.env.gov.bc.ca/fw for updates before your hunt.

BC RESIDENT HUNTER NUMBER

▶ A BC resident (see Definitions section) may only have and use one hunter number. If you lose your hunter number card, contact a Service BC in your area or the F&W Branch, Victoria to obtain a duplicate. DO NOT obtain a new hunter number, as this violates the *Wildlife Act* Regulations.

▶ It is important that the F&W Branch maintains accurate records of hunter addresses and hunter numbers particularly as they relate to Limited Entry Hunting, wildlife harvest and hunter effort data requested from hunters through reporting, inspection and surveys.

▶ A member of the Canadian Armed Forces enrolled in continuing full-time military service is eligible to obtain a HUNTER NUMBER after making his/her permanent residence in BC for 30 days immediately before applying for the licence/HUNTER Number. Proof of hunter safety training is a pre-requisite.

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WATERFOWLER HERITAGE DAYS

▶ Waterfowler Heritage Days (WHDs) for the hunting of ducks and geese continue in Regions 1 to 6 and 8. Only young hunters at least 10 years of age and less than 18 years of age who have met all provincial requirements are permitted to hunt, and they must be accompanied by a licensed adult hunter. The adult hunter can accompany a maximum of 2 youth hunters. The adult hunter can guide and advise the young hunter but is not permitted to hunt. See individual regions for season dates. General open seasons in the affected regions may be reduced by 2 (or 1) days so that the overall number of hunting days for migratory game birds remains unchanged. Federal regulations have been amended to exempt young hunters from having to purchase the federal Migratory Game Bird Hunting Permit when participating in WHDs. Provincial regulations have been amended to exempt young hunters from having to purchase the provincial hunting licence or the junior hunting licence when participating in WHDs. In addition, youth at least 10 years of age and less than 18 years of age are exempt from the requirement to complete hunter safety training (CORE) prior to participating in WHDs. NOTE: Youth who wish to hunt ducks and geese outside of designated WHDs or who wish to hunt for any other species of game, must purchase the appropriate licence and, if 14 years of age or older, must complete CORE.

ABORIGINAL HUNTING

▶ The first priority of the Ministry of Environment is to ensure the long-term conservation of wildlife populations and their habitats. The Ministry also recognizes that Indian people have aboriginal rights to harvest wildlife for sustenance (food, social and ceremonial purposes) in their traditional areas. Such uses of wildlife must be sustainable, and harvesting methods must not jeopardize safety or the use and enjoyment of property. Any hunting of wildlife species for sale or barter, in whole or in part, is not legal, except as authorized by regulation or where there is a demonstrated aboriginal or treaty right to do so.

▶ Under the *Wildlife Act* 'Indian' means a person who is defined as a status Indian under the *Indian Act* (Canada).

▶ Indians who are residents of British Columbia are not required to obtain any type of hunting licence under the *Wildlife Act*. Indians who are residents of BC and are exercising an aboriginal right to hunt for sustenance purposes within a traditionally-used area are required to comply with hunting regulations related to public health and public safety. In situations where conservation of a particular species is of concern and compliance with hunting regulations is required by Indians belonging to a First Nation group, there will be prior consultation with the affected First Nation in accordance with Ministry policy and procedures. These restrictions may include the requirement for Limited Entry Hunting (LEH) authorizations. Prior to undertaking any hunting activity, individuals should inquire with their appropriate First Nation officials or with the MoE regional office with respect to any specific requirements that may apply to them.

▶ Indians who are residents of BC and wish to hunt outside their traditionally-used areas must do so in accordance with the Hunting Regulations. This includes making application for a LEH authorization via the LEH draw. If an individual is in doubt regarding a traditional hunting area or practice, they should be in contact with the appropriate First Nations officials and the regional Wildlife Program staff to discuss specific situations

Métis Hunters

A reminder that all Métis individuals intending to hunt in the upcoming season are required, under the *Wildlife Act*, to hold a valid hunting licence and comply with all appropriate hunting regulations. This includes obtaining appropriate species licences and complying with Limited Entry Hunting Regulations.

LIMITED ENTRY HUNTING

▶ Limited Entry Hunting (LEH) seasons are open only to hunters who have drawn the appropriate LEH authorization. LEH seasons and open seasons may coincide for some species in some management units if: a) the class of animal (sex, age, etc.) is different, or b) a portion of the management unit is available for LEH only.

▶ Species licences are required in addition to an LEH authorization.

▶ Maps showing LEH zones for seasons that coincide with open seasons are included in this Synopsis for reference. Hunters should refer to the Limited Entry Hunting Synopsis published each spring for specific LEH maps.

▶ For information regarding Limited Entry Hunting please contact (250) 356-5142.

LICENCE REQUIREMENTS

▶ In order to purchase a hunting licence, a BC resident 14 years of age or older must show their valid Hunter Number card (see BC Resident Hunter Number section page 6).

▶ You may be asked to produce photo identification when purchasing a hunting licence.

▶ BC Resident Hunter Number Cards are available only at Service BC offices, or the F&W Branch (2975 Jutland Rd, Victoria).

1. A Hunter Number Card may only be obtained by an applicant who produces a document issued by a province or state evidencing the successful completion of the CORE (Conservation and Outdoor Recreation Education) examinations in BC or another North American government sponsored hunter safety training program completed while a resident in that state or province.
2. A person 14 years of age or older and under 18 must apply for a hunting licence in person in the presence of a parent or guardian, who must sign an "Acknowledgement of Responsibility" for his/her son, daughter or

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Case Name:

**Friends of the Oldman River Society v. Canada (Minister
of Transport)**

**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.**

[1992] S.C.J. No. 1

[1992] A.C.S. no 1

[1992] 1 S.C.R. 3

[1992] 1 R.C.S. 3

88 D.L.R. (4th) 1

132 N.R. 321

[1992] 2 W.W.R. 193

J.E. 92-180

84 Alta. L.R. (2d) 129

3 Admin. L.R. (2d) 1

7 C.E.L.R. (N.S.) 1

31 A.C.W.S. (3d) 250

File No.: 21890.

Supreme Court of Canada

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 (136 paras.)

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 emasculatation 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.

Cases Cited

By La Forest J.

Referred to: Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), [1989] 3 F.C. 309 (T.D.), aff'd (1989), 99 N.R. 72; Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225; Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373; Martineau v. Matsqui Institution Inmate Disciplinary Board, [1978] 1 S.C.R. 118; Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2; R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Belanger v. The King (1916), 54 S.C.R. 265; R. & W. Paul, Ltd. v. Wheat Commission, [1937] A.C. 139; Re George Edwin Gray (1918), 57 S.C.R. 150; Daniels v. White, [1968] S.C.R. 517; Smith v. The Queen, [1960] S.C.R. 776; Environmental Defense Fund, Inc. v. Mathews, 410 F.Supp. 336 (1976); Angus v. Canada, [1990] 3 F.C. 410; Province of Bombay v. Municipal Corporation of Bombay, [1947] A.C. 58; Sparling v. Quebec (Caisse de dépôt et placement du Québec), [1988] 2 S.C.R. 1015; R. v. Eldorado Nuclear Ltd., [1983] 2 S.C.R. 551; Her Majesty in right of Alberta v. Canadian 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)

Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 2 S.C.R. 225; Province of Bombay v. 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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 Constitution Act, 1867, ss. 91 "preamble", 91(10), (29), 92(10)(a), 92A.
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APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 18, 68 D.L.R. (4th) 375, [1991] 1 W.W.R. 352, 108 N.R. 241, 76 Alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, reversing a judgment of the Trial Division, [1990] 1 F.C. 248, [1990] 2 W.W.R. 150, 30 F.T.R. 108, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137. 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.

D.R. Thomas, Q.C., T.W. Wakeling and G.D. Chipeur, for the appellant, Her Majesty the Queen in right of Alberta.

E.R. Sojonky, Q.C., B.J. Saunders and J. de Pencier, for the appellants, the Minister of Transport and the Minister of Fisheries and Oceans.

B.A. Crane, Q.C., for the respondent.

J.-K. Samson and A. Gingras, for the intervener, the Attorney General of Quebec.

P.H. Blanchet, for the intervener, the Attorney General for New Brunswick.

G.E. Hannon, for the intervener, the Attorney General of Manitoba.

G.H. Copley, for the intervener, the Attorney General of British Columbia.

R.G. Richards, for the intervener, the Attorney General for Saskatchewan.

B.G. Welsh, for the intervener, the Attorney General of Newfoundland.

R.A. Kasting and J. Donihee, for the intervener, the Minister of Justice of the Northwest Territories.

P.W. Hutchins, D.H. Soroka and F.S. Gertler, for the intervener, the National Indian Brotherhood/Assembly of First Nations.

J.J. Gill, for the interveners, the Dene Nation and the Metis Association of the Northwest Territories, and the Native Council of Canada (Alberta).

G.J. McDade and J.B. Hanebury, for the interveners, the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada) and the Friends of the Earth.

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

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

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

1 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.

2 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.

3 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.

4 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

5 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.

6 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.

7 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.

8 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.

9 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.

10 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.

11 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.

12 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.

13 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.

14 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.

15 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.

16 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

17 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.

18 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

19 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.

20 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.

21 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.

22 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.

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

Court of Appeal

24 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.

25 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.

26 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.

27 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.

28 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.

29 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

30 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

31 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?

32 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.

33 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.

34 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).

35 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.

36 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.

37 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.

38 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.

39 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.

40 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

41 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.

42 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.

43 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.

44 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.

45 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.

46 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.

47 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

48 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

49 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 undue

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

50 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.

51 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.]

52 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.]

53 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.

54 In *Angus v. Canada*, [1990] 3 F.C. 410 (C.A.), Dé Cary 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 Dé Cary 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.

55 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.

56 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.

57 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".

58 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.]

59 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

60 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.

61 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.

62 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".

63 The Privy Council agreed that the rule of Crown immunity admitted of at least one exception, necessary implication. Lord du Parc 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.

64 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.

65 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.

66 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.

67 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.

68 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.

69 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.

70 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, 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. [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.

71 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.

72 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.

73 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).

74 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.

75 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.

76 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.

77 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.

78 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.

79 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.

80 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.

81 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

82 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.

83 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.

84 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.

85 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.

86 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).

87 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.

88 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.

89 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.

90 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.

91 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.

92 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.

93 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.

94 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.

95 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.

96 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.

97 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.

98 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.

99 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.

100 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)).

101 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.

102 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

103 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.

104 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.]

105 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.

106 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).

107 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.

108 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.

109 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.

110 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

111 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.

The following are the reasons delivered by

112 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.

113 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

114 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.

115 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.

116 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.

117 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).

118 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.

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

120 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.

121 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

122 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.

123 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.

124 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.

125 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.)

126 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-dumping Tribunal's decision. [Emphasis added.]

127 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 that 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".

128 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.

129 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.

130 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.

131 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.

132 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.

133 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.

134 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

135 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

136 I would allow the appeal with costs.

Solicitors for the appellant, Her Majesty the Queen in right of Alberta: Milner & Steer, Edmonton.
Solicitor for the appellants, the Minister of Transport and the Minister of Fisheries and Oceans: John C. Tait, Ottawa.

Solicitors for the respondent: Gowling, Strathy & Henderson, Ottawa.

Solicitors for the intervener, the Attorney General of Quebec: Jean-K. Samson, Alain Gingras and Denis Lemieux, Ste-Foy.

Solicitor for the intervener, the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener, the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener, the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitor for the intervener, the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina.

Solicitor for the intervener, the Attorney General of Newfoundland: Paul D. Dicks, St. John's.

Solicitor for the intervener, the Minister of Justice of the Northwest Territories: The Department of Justice, Yellowknife.

Solicitors for the intervener, National Brotherhood/Assembly of First Nations: Hutchins, Soroka & Dionne, Montréal.

Solicitors for the intervener, the Dene Nation and the Metis Association of the Northwest

Territories: McCuaig Desrochers, Edmonton.

Solicitors for the intervener, the Native Council of Canada (Alberta): McCuaig Desrochers, Edmonton.

Solicitors for the interveners, the Sierra Legal Defence Fund, the Canadian Environmental Law Association, the Sierra Club of Western Canada, the Cultural Survival (Canada) and the Friends of the Earth: Gregory J. McDade, Vancouver; Judith B. Hanebury, Calgary.

Solicitor for the intervener, the Alberta Wilderness Association: Martin W. Mason, Ottawa.

Case Name:

**Kwikwetlem First Nation v. British Columbia (Utilities
Commission)**

**IN THE MATTER OF the Utilities Commission Act,
R.S.B.C. 1996, c. 473 and the Application by the
British Columbia Transmission Corporation for a
Certificate of Public Convenience and Necessity for
the Interior to Lower Mainland Project**

Between

**The Kwikwetlem First Nation, Appellant
(Applicant/Intervenor), and
British Columbia Transmission Corporation, British
Columbia Hydro and Power Authority, and British
Columbia Utilities Commission, Respondents**

And between

**Nlaka'pamux Nation Tribal Council, Okanagan Nation
Alliance and Upper Nicola Indian Band, Appellants
(Applicants/Intervenors), and
British Columbia Utilities Commission, British
Columbia Transmission Corporation, and British
Columbia Hydro and Power Authority, Respondents**

[2009] B.C.J. No. 260

2009 BCCA 68

Dockets: CA035864 and CA035928

British Columbia Court of Appeal
Vancouver, British Columbia

I.T. Donald, C.M. Huddart and R.J. Bauman JJ.A.

Heard: November 26 and 27, 2008.

Judgment: February 18, 2009.

(71 paras.)

Aboriginal law -- Aboriginal status and rights -- Duties of the Crown -- Fair dealing and reconciliation -- Consultation and accommodation -- Honour of the Crown -- Constitutional issues -- Recognition of existing aboriginal and treaty rights -- Appeal by intervenor First Nations from British Columbia Utilities Commission's determination that it was not required to consider adequacy of Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity required proposed extension of province's electric transmission system allowed -- Commission had jurisdiction and capacity to decide constitutional question of whether the duty to consult existed and if so, whether that duty had been met with regard to the subject matter before it -- Commission unreasonably refused to include consultation issue in scope of proceeding.

Environmental law -- Jurisdictional and constitutional issues -- Aboriginal lands -- Duty to consult -- Appeal by intervenor First Nations from British Columbia Utilities Commission's determination that it was not required to consider adequacy of Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity required proposed extension of province's electric transmission system allowed -- Commission had jurisdiction and capacity to decide constitutional question of whether the duty to consult existed and if so, whether that duty had been met with regard to the subject matter before it -- Commission unreasonably refused to include consultation issue in scope of proceeding.

Natural resources law -- Public utilities -- Regulatory tribunals -- Practice and procedure -- Intervenors -- Provincial boards, tribunals and commissions -- British Columbia -- Electricity -- Generation -- Hydro -- Appeal by intervenor First Nations from British Columbia Utilities Commission's determination that it was not required to consider adequacy of Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity required proposed extension of province's electric transmission system allowed -- Commission had jurisdiction and capacity to decide constitutional question of whether the duty to consult existed and if so, whether that duty had been met with regard to the subject matter before it -- Commission unreasonably refused to include consultation issue in scope of proceeding.

Appeal by the intervenor First Nations from the British Columbia Utilities Commission's determination that it was not required to consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity required the proposed extension of the province's transmission system. The British Columbia Transmission Corporation (BCTC) applied for a certificate of public convenience and necessity (CPCN) for a hydro transmission line project. The proposed line originated, terminated, or passed through the traditional territory of four First Nations bands. The First Nations registered with the Commission as intervenors on BCTC's application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the project. The Commission decided to defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the project had been fulfilled to the ministers with power to decide

whether to issue an environmental assessment certificate under the Environmental Assessment Act. On appeal, the First Nations argued that the Commission's refusal to permit them to lead evidence about the consultation process effectively precluded consideration of alternatives to the project as a solution to the lower mainland's anticipated energy shortage.

HELD: Appeal allowed and decision remitted to the Commission for reconsideration. The effect of the CPCN was suspended for the purpose of determining whether the Crown's duty to consult and accommodate the First Nations had been met. As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission had the jurisdiction and capacity to decide the constitutional question of whether the duty to consult existed and if so, whether that duty has been met with regard to the subject matter before it. The Crown's obligation to First Nations required interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that had the potential to affect their Aboriginal interests. Once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the First Nations' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

Statutes, Regulations and Rules Cited:

Business Corporations Act, SBC 2002, CHAPTER 57,

Environmental Assessment Act, SBC 2002, CHAPTER 43, s. 9, s. 10(1)(c), s. 11, s. 16, s. 17, s. 30

Hydro and Power Authority Act, RSBC 1996, CHAPTER 212,

Transmission Corporation Act, SBC 2003, CHAPTER 44,

Utilities Commission Act, RSBC 1996, CHAPTER 473, s. 45, s. 45(3), s. 99, s. 101, s. 101(5)

Counsel:

G.J. McDade, Q.C.: Counsel for the Appellant, the Kwikwetlem First Nation.

T. Howard and B.C. Stadfeld: Counsel for the Appellants, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band.

K.B. Bergner and A. Bespflug: Counsel for the Respondent, British Columbia Hydro and Power Authority.

A.W. Carpenter: Counsel for the Respondent, British Columbia Transmission Corporation.

Reasons for Judgment

The judgment of the Court was delivered by

1 C.M. HUDDART J.A.:-- This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

2 The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

3 The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title, requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

4 The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, consists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

5 The appellants all registered with the Commission as intervenors on BCTC's s. 45 application

and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

6 The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *Re British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, First Nations Scoping Issue, B.C.U.C Letter Decision No. L-6-08, 5 March 2008 (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

7 The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("VITR") and *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07 ("Revelstoke"). It is the reasoning in VITR, amplified in Revelstoke and the scoping decision, this Court is asked to review.

8 As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

9 The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106,

36 Admin L.R. (2d) 249, at paras. 46 and 48.)

10 BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

The Issues

11 It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

12 In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Utilities Commission*, 2008 BCCA 208. It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

13 The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had

fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

14 As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the EAC application. In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

15 I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

The Relevant Statutory Regimes

The CPCN Process

Utilities Commission Act

45.(1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

...

- (3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

...

- (6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.
- (7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.
- (8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.
- (9) In giving its approval, the commission

- (a) must grant a certificate of public convenience and necessity, and
- (b) may impose conditions about

- (i) the duration and termination of the privilege, concession or franchise, or

- (ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

46.(1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

...

- (3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

- (3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider
- (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
 - (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.
- (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
- ...
99. The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.
- ...
- 101.(1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.
- ...
- (5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

16 The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.

CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

2. Project Description:

...

- (iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;

...

3. Project Justification

...

- (ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;
- (iii) a statement identifying any significant risks to successful completion of the project;

...

4. Public Consultation

- (i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.

...

6. Other Applications and Approvals

- (i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and
- (ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

The EAC Process

Environmental Assessment Act

8.(1) Despite any other enactment, a person must not

- (a) undertake or carry on any activity that is a reviewable project,

...

unless

- (c) the person first obtains an environmental assessment certificate for the project, or

...

9.(1) Despite any other enactment, a minister who administers another enactment or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

- (a) undertake or carry on an activity that is a reviewable project,

...

unless satisfied that

- (c) the person has a valid environmental assessment certificate for the reviewable project, or

...

- (2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10.(1) The executive director by order

...

- (c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that

- (i) an environmental assessment certificate is required for the project, and
- (ii) the proponent may not proceed with the project without an assessment.

...

11.(1) If the executive director makes a determination set out in section 10(1)(c) for a reviewable project, the executive director must also determine by order

- (a) the scope of the required assessment of the reviewable project, and
- (b) the procedures and methods for conducting the assessment, including for

conducting a review of the proponent's application under section 16, as part of the assessment.

- (2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

...

- (f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;
- (g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;

- (3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

...

16.(1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10(1)(c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

- (2) An application for an environmental assessment certificate must contain the information that the executive director requires.
- (3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

...

17.(1) On completion of an assessment of a reviewable project ... the executive director ... must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).

- (2) A referral under subsection (1) must be accompanied by
 - (a) an assessment report prepared by the executive director ...,
 - (b) the recommendations, if any, of the executive director, ..., and
 - (c) reasons for the recommendations, if any, of the executive director,

- (3) On receipt of a referral under subsection (1), the ministers
 - (a) must consider the assessment report and any recommendations accompanying the assessment report,
 - (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and
 - (c) must
 - (i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,
 - (ii) refuse to issue the certificate to the proponent, or
 - (iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

- (4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

...

30.(1) At any time during the assessment of a reviewable project under this Act, and before a decision under section 17(3) about the proponent's application for an

environmental assessment certificate ..., the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that

- (a) is being or will be conducted by any of the following or any combination of the following:
 - (i) the government of British Columbia, including any agency, board or commission of British Columbia;
 - (ii) the government of Canada;
 - (iii) a municipality or regional district in British Columbia;
 - (iv) a jurisdiction bordering on British Columbia;
 - (v) another organization, and
 - (b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.
- (2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

17 The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office ("EAO") outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16), he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18, "Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

18 The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province

has fulfilled its legal obligations to First Nations.

19 The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

20 The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

Relevant Background

21 This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

22 BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

23 Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

24 In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In

March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

25 In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

4.1 The scope of assessment for the Project will include consideration of the potential for:

4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,

4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

26 In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

27 The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

28 The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his

preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

29 On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

30 In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

31 On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

32 At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

33 Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

34 On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March

2008.

The Scoping Decision

35 The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

36 The Commission Secretary explained (at p. 2-3):

In both the *VITR* Decision and the *Revelstoke* Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the *VITR* Decision:

The government has legislated regulatory approvals that must be obtained before *VITR* proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for *VITR*. Given the Section 11 Procedural Order and the Terms of Reference for *VITR*, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of *VITR*, the EAO approval, if granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).

In the *Revelstoke* Unit 5 Decision, the Commission Panel said:

The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before *Revelstoke* Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).

In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project.

BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order ... and the draft Terms of Reference ... the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.

Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

37 In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 51 (also quoted at p. 47 of the *VITR* decision):

It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

38 To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitksan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on

Aboriginal rights and title.

39 The Commission summarized its analysis (at p. 5):

... The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

40 The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

41 After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *In the Matter of British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, B.C.U.C. Decision, 5 August 2008, Commission Order No. C-4-08 (the "CPCN decision"). At page 96 of those reasons, it concluded:

The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

42 The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

... although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

43 From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

44 On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget, and no sufficient ability to alter the project to meet the Crown's accommodation duties.

Discussion

45 The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

46 The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *VITR, In the Matter of BC Gas Utility Ltd. Southern Crossing Pipeline Project Application for a Certificate of Public Convenience and Necessity*, B.C.U.C. Decision, 21 May 1999, Commission Order No. G-51-99). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

47 At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking, BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C.Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

48 BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

49 On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified project could have no effect on Aboriginal interests until it received an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

50 The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

51 Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

52 BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

53 The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

54 It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

55 As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

56 Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

57 The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project

to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects on the appellants' asserted Aboriginal rights and title are undoubtedly included, although not identified in the current *Act*.

58 Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

59 By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

60 In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

61 This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

62 The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those

efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

63 The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

64 If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

65 Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

Summary

66 BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

67 When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices - accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746, at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to

have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

68 Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida*, at paras. 46-47.

69 The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

70 If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

71 For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

C.M. HUDDART J.A.

I.T. DONALD J.A.:-- I agree.

R.J. BAUMAN J.A.:-- I agree.

cp/e/ln/qlaxs/qlaxw

Case Name:

**Pembina Institute for Appropriate Development v. Canada
(Attorney General)**

Between

**Pembina Institute for Appropriate Development, Prairie
Acid Rain Coalition, Sierra Club of Canada, and Toxics
Watch Society of Alberta, Applicants, and
Attorney General of Canada, Minister of Fisheries and
Oceans, Minister of Environment, and Imperial Oil
Resources Ventures Limited, Respondents**

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2008 FC 302

35 C.E.L.R. (3d) 254

2008 CarswellNat 508

165 A.C.W.S. (3d) 857

323 F.T.R. 297

80 Admin. L.R. (4th) 74

Docket T-535-07

Federal Court
Edmonton, Alberta

Tremblay-Lamer J.

Heard: January 14, 2008.

Judgment: March 5, 2008.

(81 paras.)

Assessment Act -- Judicial review -- Application by the Pembina Institute for Appropriate Development et al. for judicial review pursuant to ss. 18 and 18.1 of the Federal Courts Act respecting a report by the Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada concerning an environmental impact assessment of the Kearl Oil Sands Project -- Application allowed in part -- Matter was remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures would reduce the potentially adverse effects of the Project's greenhouse gas emissions.

Application by the Pembina Institute for Appropriate Development et al. for judicial review pursuant to ss. 18 and 18.1 of the Federal Courts Act respecting a report dated February 27, 2007 by the Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada concerning an environmental impact assessment of the Kearl Oil Sands Project. The Panel recommended to the responsible federal authority, the Department of Fisheries and Oceans ("DFO"), that the Project receive authorization. The applicants, various non-profit organizations, submitted that the environmental assessment conducted by the Panel did not comply with the mandatory steps in the Canadian Environmental Assessment Act and in the Panel's Terms of Reference.

HELD: Application for judicial review allowed in part. The matter was remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures would reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance. While it was agreed that the Panel was not required to comment specifically on each and every detail of the Project, given the amount of greenhouse gases that would be emitted into the atmosphere and given the evidence that the intensity based targets would not address the problem of greenhouse gas emissions, it was incumbent upon the Panel to provide a justification for its recommendation on that particular issue.

Statutes, Regulations and Rules Cited:

Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 4(2), s. 16(1)(d), s. 16(2), s. 34(c)(i), s. 25, s. 40

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18, s. 18.1

Fisheries Act, R.S.C. 1985, c. F-14, s. 35(2)

Counsel:

Sean Nixon and Devon Page, for the Applicants.

James Shaw, for the Respondents.

REASONS FOR JUDGMENT AND JUDGMENT

1 TREMBLAY-LAMER J.:-- This is an application for judicial review brought by the applicants pursuant to ss. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, respecting a report dated February 27, 2007 by the Joint Review Panel Established by the Alberta Energy and Utilities Board and the Government of Canada (the "Panel") concerning an environmental impact assessment of the Kearl Oil Sands Project (the "Kearl Project" or the "Project"), wherein the Panel recommended to the responsible federal authority, the Department of Fisheries and Oceans ("DFO"), that the Project receive authorization.

2 The applicants, various non-profit organizations concerned about the environmental effects of the Kearl Project, submit that the environmental assessment conducted by the Panel did not comply with the mandatory steps in the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 ("CEAA") and in the Panel's Terms of Reference.

BACKGROUND

3 Imperial Oil wishes to construct and operate the Kearl Project, an oil sands mine, in northern Alberta. This project includes the design, construction, operation and reclamation of four open pit truck and shovel mines and three trains of ore preparation and bitumen extraction facilities, as well as tailings management facilities and other supporting infrastructure. It will be capable of producing over 48,000 cubic metres of bitumen per day at full production in 2018, and will terminate mining operations in 2060.

4 The Kearl Project will be located approximately 70 kilometres north of Fort McMurray. Further, it is situated in the upper Muskeg River Watershed, a tributary of the Athabasca River, which flows through Wood Buffalo National Park to the Mackenzie River drainage basin in the Northwest Territories.

5 The Kearl Project requires an authorization from the federal Minister of Fisheries and Oceans under section 35(2) of the *Fisheries Act*, R.S.C., 1985, c. F-14. Before any federal approval can be given, an environmental assessment under the CEAA is required.

6 Pursuant to the Canada-Alberta Agreement for Environmental Assessment Cooperation, the Canadian Environmental Assessment Agency notified Alberta that it wished to participate with Alberta in a cooperative environmental assessment of the Kearl Project. Federally, the Canadian

Environmental Assessment Agency confirmed it would carry out the role of Federal Environmental Assessment coordinator, and DFO would be the responsible authority, with Environment Canada (EC), Health Canada (HC) and Natural Resources Canada (NRCan) providing DFO with specialist advice.

7 Imperial Oil filed its Environmental Impact Assessment (EIA) relating to the Kearl Project in July 2005. Representatives of DFO, EC, HC and NRCan assessed the information provided by Imperial Oil as part of the joint environmental assessment with Alberta.

8 On January 18, 2006, DFO recommended to the Minister of the Environment that the Kearl Project be referred to a review panel due to the potential for the proposed project to cause significant adverse environmental effects, including cumulative effects, over large areas and on a number of valued ecosystem components. Canada entered into an agreement with the government of Alberta to conduct a joint review panel. The Joint Panel would render a project approval *decision* on behalf of Alberta authorities and make an approval *recommendation* to the responsible federal authority.

9 The Panel held 16 days of public hearings in November 2006. In addition to the EIA report filed by Imperial Oil, 20 parties filed submissions with the Panel, a number of which also gave oral evidence and were cross-examined at the hearing.

The Panel Report

10 On February 27, 2007, the Panel issued its report, setting out its decision for the Alberta authorities and making recommendations to DFO regarding project authorization.

11 The Panel reviewed the project as well as its purpose, need, project alternatives, and alternative means of implementation. The Panel reviewed the views of various stakeholder groups and summarized issues relating to social and economic effects, mine plan and resource conservation, tailings management, reclamation, air emissions, surface water, aquatic resources, Cumulative Environmental Management Association (CEMA) (a voluntary partnership of stakeholders charged with identifying environmental thresholds before irreversible damage occurs from oil sands development), traditional land use and traditional ecological knowledge, the need for follow-up, and human health.

12 The Panel recommended that DFO approve the Project given its view that provided proposed mitigation measures and recommendations were implemented, the Project was not likely to cause significant adverse environmental effects.

LEGISLATIVE CONTEXT

13 The law governing Environmental Impact Assessments is set out by the provisions of the CEAA as interpreted in the jurisprudence of the Federal Court, Federal Court of Appeal, and the

Supreme Court of Canada.

14 The CEAA establishes a two-step decision-making process. The first step is an environmental assessment where potentially adverse environmental effects of a project are analysed (s. 5). The second step involves decision-making and follow-up where a federal authority decides, taking into consideration that assessment, if a particular project should be authorized and what follow-up measures, if any, are required to verify the accuracy of the assessment and the effectiveness of mitigation measures (ss. 37 and 38).

15 The purpose of environmental assessment was described by the Supreme Court of Canada in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 (QL), at para. 95. While the case involved assessment under the *Environmental Assessment and Review Process Guidelines Order*, S.O.R./84-467 (the "EARPGO", predecessor to the current CEAA), I find the general principles espoused to be particularly instructive:

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 First Step: Environmental Assessment

16 With respect to the first step, the CEAA contemplates three "levels" of assessment: screening (ss. 18-20), comprehensive study (ss. 21-24), and mediation and panel reviews (ss. 29-36).

17 Mediation and panel reviews are the most stringent level of assessment and are to be carried out upon a referral to the Minister by the responsible authority *after consideration of a screening report and any comments filed* where: 1) the responsible authority is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects; 2) the responsible authority is of the opinion that, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects; or 3) public concerns warrant a reference to this type of procedure (s. 20).

18 Further, s. 25 of the CEEA indicates that the responsible authority may also refer the project to the Minister for a panel review *at any time* where it is of the opinion that the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or where public concerns warrant a reference to this type of procedure.

19 Pursuant to s. 40 of the CEEA, joint review panels involving federal and provincial authorities may be constituted by agreement or arrangement. This agreement or arrangement shall provide that the "environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement" (s. 41). Further, s. 41(c) indicates that "the Minister shall fix or approve the terms of reference for the panel." The "terms of reference" shall determine the scope of certain factors to be taken into consideration by a review panel in its assessment (s. 16(3)(b)). These terms of reference may significantly increase the obligations incumbent upon the Panel (see *Alberta Wilderness Assn. v. Cardinal River Coals (T.D.)* [1999] 3 F.C. 425, [1999] F.C.J. No. 441 (QL)).

20 Specifically, the general duties that a review panel is mandated to fulfill are four-fold (s. 34). First, it must ensure that the information required for an assessment is obtained and made available to the public (s. 34(a)). Second, the panel is required to hold hearings in a manner that offers the public an opportunity to participate in the assessment (s. 34(b)). Third, the panel is charged with fulfilling a reporting function whereby it must prepare a report setting out "the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program" as well as a summary of public comments received (s. 34(c)). Finally, it must submit that report to the Minister and the responsible authority (s. 34(d)).

21 Within the ambit of these general duties, a review panel shall include a consideration of the various specific factors enumerated in ss. 16(1) and (2). These factors include the environmental effects of a project including effects of accidents and malfunctions, cumulative environmental effects, the significance of environmental and cumulative effects, public comments, technically and economically feasible mitigation measures, and any other matter relevant to a review panel assessment that the Minister, after consulting with the responsible authority, may require to be

considered (s. 16(1)). Furthermore, the purpose of the project, alternative means of carrying it out, the need for and requirement of any follow-up programs, and the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future are also to be considered (s. 16(2)).

22 With respect to assessing the significance of environmental effects, the jurisprudence reveals that this assessment is not a wholly objective exercise but rather contains "a large measure of opinion and judgement." The Federal Court of Appeal has asserted that "[r]easonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results [...]" (*Alberta Wilderness Assn. v. Express Pipelines Ltd.*, [1996] F.C.J. No. 1016 (QL), at para. 10).

23 The adequacy and completeness of the evidence must be evaluated in light of the preliminary nature of a review panel's assessment. In *Express Pipelines, supra*, at para. 14, Hugessen J.A. discussed the predictive and preliminary nature of the panel's role:

The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

This view was echoed in *Inverhuron & District Ratepayers' Association v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (QL), at para. 55, by Sexton J.A. Therefore, given the predictive function of an environmental assessment and the existence of follow-up mechanisms envisioned by the CEAA, the Panel's assessment of significance does not extend to the elimination of uncertainty surrounding project effects.

24 Similarly, it is evident that the assessment of environmental effects, including mitigation measures, is not to be conceptualized as a single, discrete event. Instructively, in *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 F.C. 325, [1996] F.C.J. No. 1373 (QL), Mackay J. indicated, at para. 32 that he was not persuaded that the CEAA requires that all the details of mitigating measures be resolved before the acceptance of a screening report. He further asserted that the nature of the process of assessment was "ongoing and dynamic" with continuing dialogue between the proponent, the responsible authorities and interested community groups.

25 Moreover, jurisprudence relating to the EARPGO is also instructive as to the content of the legal duty to consider mitigation measures. In *Tetzlaff v. Canada (Minister of the Environment (F.C.A.))*, [1991] 1 F.C. 641, at p. 657, Iacobucci C.J.A. described the assessment of mitigation measures in s. 12(c) of the EARPGO in the following terms: "If the initial assessment procedure reveals that the potentially adverse environmental effects that may be caused by the proposal "are

insignificant or mitigable with known technologies" the proposal [...] may proceed or proceed with mitigation, as the case may be." In the case of *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1990), 31 F.T.R. 1, at p. 12, the decision which was upheld by the Court in *Tetzlaff*, Muldoon J. analysed s. 12(c) of the EARPGO and asserted that "since the Minister did not identify any known technologies but only vague hopes for future technology, it is not possible to consider that the recited adverse water quality effects are mitigable". Thus, in the context of a panel assessment, the possibilities of future research and development do not constitute mitigation measures.

26 I note also that s. 16(1)(d) of the CEAA (the equivalent of s. 12(c) of the EARPGO), the provision mandating consideration of mitigation measures, adds the proviso that mitigation measures must be technically *and economically* feasible as opposed to solely technically feasible ("known technologies" in the wording of the EARPGO). This second condition, in effect, imposes an additional requirement for measures to be classified as mitigating under the CEAA: under the current Act mitigation measures must also be economically feasible in order to qualify as such.

The Second Step: Decision and Follow-up

27 Once the panel report is completed, the federal authority responsible for the decision must take the report into consideration, and shall take a course of action that is in conformity with the approval of the Governor in Council (s. 37(1.1)). The responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part, either where the project is not likely to cause significant adverse environmental effects, or where it is likely to cause significant adverse environmental effects that can be justified in the circumstances (s. 37(1)).

28 Where a federal authority decides to authorize a project following a panel review, it is mandated to design a follow-up program for the project and ensure its implementation (s. 38(2)). The results of the follow-up program may be used to implement adaptive management measures or to improve the quality of future environmental assessments (s. 38(5)).

Guiding Tenets

29 The powers associated with the administration of the CEAA are to be exercised "in a manner that protects the environment and human health and applies the precautionary principle" (s. 4(2)).

30 In recent amendments to the CEAA, acting in a manner consistent with the precautionary principle was specifically introduced in s. 4 as a duty bearing upon "the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities" in the administration of the CEAA.

31 In the case of *114957 Canada Lteé (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42 (QL), at para. 31, the Supreme Court of Canada cited the

definition of the precautionary principle from the Bergen Ministerial Declaration on Sustainable Development (1990):

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

32 An approach that has developed in conjunction with the precautionary principle is that of "adaptive management". In *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] F.C.J. No. 703, at para. 24, Evans J.A. stated that "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge" and indicated that adaptive management counters the potentially paralyzing effects of the precautionary principle. Thus, in my opinion, adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.

33 Accordingly, the scope of the duties incumbent upon a panel must be viewed through the prism of these guiding tenets: the precautionary principle and adaptive management. As an early planning tool, environmental assessment is tasked with the management of future risk, thus a review panel has a duty to gather the information required to fulfill this charge.

34 In sum, the CEAA represents a sophisticated legislative system for addressing the uncertainty surrounding environmental effects. To this end, it mandates early assessment of adverse environmental consequences as well as mitigation measures, coupled with the flexibility of follow-up processes capable of adapting to new information and changed circumstances. The dynamic and fluid nature of the process means that perfect certainty regarding environmental effects is not required.

ISSUES

35 This application involves the determination of whether the Panel committed reviewable errors by failing to consider the factors enumerated in ss. 16(1) and 16(2) of the CEAA, more particularly by relying on mitigation measures that were not technically and economically feasible and by failing to comply with the requirement to provide a rationale for its recommendations pursuant to s. 34(c)(i) of the CEAA.

36 The applicants focus on these reviewable errors in relation to the following three issues:

A) Cumulative Effects Management Association (CEMA), Watershed

- Management and Landscape Reclamation;
- B) Endangered Species; and
- C) Greenhouse Gas Emissions

STANDARD OF REVIEW

37 All parties agree that to the extent that the issues posed involve the interpretation of the CEAA, as questions of law, they are reviewable on a standard of correctness (*Friends of West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000] 2 F.C. 263, [1999] F.C.J. No. 1515 (QL), at para. 10; *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, [2001] F.C.J. No. 18 (QL), at para. 55). However, issues relating to weighing the significance of the evidence and conclusions drawn from that evidence including the significance of an environmental effect are reviewed on the standard of reasonableness *simpliciter* (*Bow Valley, supra*, at para. 55; *Inverhuron, supra*, at paras. 39-40).

38 The crux of the standard of review determination in the present case involves the *characterization* of the alleged errors. According to the applicants, the Panel report contains numerous legal errors relating to the interpretation of the CEAA that are reviewable on the standard of correctness. However, the respondents indicate that these alleged errors are in fact errors relating to the conclusions drawn from the evidence before the Panel and therefore are reviewable on the standard of reasonableness.

39 As noted by Campbell J. in *Cardinal River Coals Ltd., supra*, at para. 24, "it is important to appropriately characterize a perceived failure to comply [with the requirements of the CEAA] as a question of law or merely an attack on the "quality" of the evidence and, therefore the "correctness" of the conclusions drawn on that evidence" (see also *Express Pipelines Ltd., supra*, at para. 10).

40 With respect to the arguments relating to the Panel's reliance on mitigation measures that were not technically and economically feasible, there is no indication in the Report that the Panel misunderstood the legal interpretation of technically and economically feasible mitigation measures. In essence, what the applicants are challenging is the underlying completeness or quality of the evidence which in their view was not sufficient to allow the Panel to conclude as it did given the uncertainties that still remained regarding the Project. Thus, this question is reviewable on the standard of reasonableness *simpliciter*.

41 With respect to the question of providing a "rationale" for the conclusions and recommendations of the Panel, this question relates to the interpretation of the requirements of s. 34(c)(i) of CEAA. The applicants do not attack the rationale provided but rather question whether any rationale at all was put forth by the Panel. Whether or not the Panel has provided a rationale for its conclusions and recommendations is question of law, reviewable on a standard of correctness.

ANALYSIS

A) CEMA, Watershed Management and Landscape Reclamation

i. CEMA

42 The applicants submit that while the Panel recognized that CEMA was vital in addressing the cumulative impacts of oil sands development and had the responsibility to address most of the critical cumulative effects challenges in the Athabasca oil sands region, it also expressed deep concern at the inability of CEMA "to establish and maintain priority for critical items such as the Water Management Framework for the Athabasca River, the Muskeg River Watershed Integrated Management Plan, and the Regional Terrestrial and Wildlife Management Framework" and cited specific examples of CEMA failing to meet timelines and complete its work.

43 The respondent, Imperial Oil, argues that the applicants' assertion is based on a narrow reading of the Report restricted to that portion dealing solely with integrated watershed planning which is only one of the many issues addressed by the Panel. I agree.

44 The Panel's discussion of CEMA was tied closely to regional watershed management planning. As a regional association comprised of industry and government representatives as well as community and civil society stakeholders, CEMA is expected to address the objectives of watershed management planning. Given this important role in regional effects management, it was therefore appropriate for the Panel to raise concerns regarding CEMA's functioning. Based on the Report, I could not conclude that the Panel considered CEMA as a mitigation measure, but rather as the proper vehicle for the development of environmental management frameworks.

45 While the Panel discussed CEMA extensively and highlighted the numerous problems associated with its functioning, it also made detailed recommendations regarding its operation in order to ensure that CEMA would function properly in years to come, and to provide the ultimate decision-maker with a concrete evaluation of this key stakeholder association. I note also the Panel's comments with respect to regulatory backstopping by Alberta Environment ("AENV") in the event that CEMA is unable to meet its timelines for management frameworks. I find this to be consistent with the precautionary principle in that if CEMA is unable to complete a management plan by March 2008, the regulator should be engaged to prevent potentially adverse environmental consequences.

ii. Watershed Management

46 With respect to Watershed Management, I am satisfied that the Panel took into consideration mitigation measures that were both technically and economically feasible. A fair reading of the Report shows that the Panel addressed the issue of surface water extensively. In fact, the Panel considered the issue under three distinct subheadings: in-stream flow needs, integrated watershed planning, and water quality, and additionally under fish and fish habitat.

47 Contrary to the applicants' assertion that there was no evidence or the scantest evidence upon

which to evaluate the existence, nature and effectiveness of the mitigation measures, the Panel's recommendations on the issue of water quality refer to mitigation measures contained in Imperial Oil's EIA as well as the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "EPEA") approval conditions. The Panel concludes:

[...] the Joint Panel believes that by implementing a comprehensive monitoring plan, the suggested *EPEA* approval conditions, the Joint Panel's recommendation, and the mitigations identified by Imperial Oil in its EIA, the KOS [Kearl Oil Sands] Project is unlikely to result in significant adverse environmental effects on water quality. [Emphasis added] (p. 83 of the Report)

Further, as pertains to aquatic resources, the Panel concluded:

[...] The Joint Panel concludes that with the implementation of Imperial Oil's mitigation measures, the completion of an NNLP [No Net Loss Plan] satisfactory to DFO, and the Joint Panel's recommendations, the KOS Project is unlikely to result in significant adverse environmental effects on aquatic resources. [Emphasis added] (p. 86 of the Report)

48 Specifically, the mitigation measures identified by Imperial Oil in its EIA for managing groundwater include the following:

- (a) Recycling of process-affected waters and runoff within the Kearl Project footprint in a closed-circuit system during operations;
- (b) Directing Muskeg drainage and overburden waters to polishing ponds equipped with oil separation capability, if required;
- (c) Diverting natural headwater flow around construction and mining areas and discharging it into receiving streams without contact with oil sands or process-affected waters;
- (d) Using a perimeter ditch and pumping system to capture seepage and runoff from the external tailings area and pumping back into the process during operations;
- (e) Using a drainage system to capture and direct seepage and runoff from the external tailings area to wetlands and terminal lakes with sufficient residence time after reclaiming the external tailings area;
- (f) Using wetlands and pit lakes during and after closure to provide biological remediation and settling of particulate materials in reclamation waters prior to discharge;
- (g) Designing pit lakes with sufficient residence time to enhance settling and biological remediation of reclamation waters;
- (h) Using reclamation waters that collect in the pit as process water until the start of the closure management system;

- (i) Placing of tailings only in the central pit lake which has a large volume and long residence time;
- (j) Maintaining naturally occurring, low permeability material between Kearl Lake and its surrounding mine pits to minimize seepage into the lake.

_ EIA, Volume 6, at p. 5-38 and 5-39 [Imperial's Record, Vol 2, Tab 4(b) at pp. 312 and 313]

49 Further, with respect to aquatic resources, Imperial Oil identified mitigation measures in its EIA which included the following:

- a) Compensation habitat will be provided by the development of new habitat area in accordance with requirements and guidance through the appropriate regulators, such as DFO;
- b) Potential changes in flow sections of the Muskeg River downstream of the Project development area will be minimized during the operational phases of the Project by flow augmentation;
- c) Permanent diversion channels and drainage systems will be designed to facilitate development of sustainable aquatic ecosystems in order to mitigate losses of natural water courses habitats;
- d) Drainage patterns in Wapasu Creek will be designed to mitigate flows that could change channel regime or increase downstream sedimentation or total suspended solids; and
- e) The Kearl Project will include a system of environmental management protocols and construction practices designed to minimize possible effects to the aquatic environment.

_ EIA, Volume 6, at p. 6-36 to 6-38 [Imperial's Record, Vol. 2, Tab 4(c) at pp. 314 to 316]

50 Thus, contrary to the applicants' submissions, I am satisfied that there was evidence upon which the Panel could reasonably assess technically and economically feasible measures that would mitigate any significant adverse environmental effects arising from the Project on the Muskeg watershed and fish and fish habitat.

51 When pressed at the hearing to provide specific cases of mitigation measures considered by the Panel that were not technically and economically feasible, the applicants pointed to the consolidated tailings technology and end pit lakes as two such examples.

52 First, with respect to consolidated tailings, the applicants contend that the Panel found this

measure to be technically viable but not economically feasible; nevertheless, it proceeded to rely on this technology in its assessment, in contravention of the CEAA.

53 However, as explained by Imperial Oil's counsel, Mr. Ignasiak, and as indicated by a fair reading of the hearing transcript, it is clear that the Panel was concerned not by the tailings technology, but by one of the enhancements, a tailings thickener, proposed by Imperial Oil in order to improve on the existing technology that is used at other facilities. It is this tailings thickener, not the underlying consolidated tailings technology that has not been commercially demonstrated. The Panel then concluded that by implementing the tailings technology, of which a thickener was but a proposed enhancement, significant adverse environmental effects were unlikely to occur.

54 Thus, I disagree with the applicants that the Panel was relying on a technology that was yet to be developed. As the respondent, Imperial Oil, aptly pointed out, if the applicants' arguments are to be accepted, it would mean that under the CEAA process, proponents must provide the Panel with only those technologies that have been used in the past. In my view this would stifle innovation in the field, which could potentially result in future benefits to the environment.

55 Second, with respect to end pit lakes, the applicants submit that by recommending further testing of modelling predictions, the Panel erred in determining that this mitigation measure was technically and economically feasible. I cannot accept this argument. In my view, the Panel took a precautionary approach by demanding that an operator validate modelling predictions by testing end pit lake technology.

56 Indeed, this approach is broadly consistent with the principles of adaptive management. As Evans J.A asserted in *Canadian Parks and Wilderness Society, supra*, at para. 24, "[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge." The same holds true for the assessment of mitigation measures. While there does exist some uncertainty with respect to end pit lake technology, the existing level of uncertainty is not such that it should paralyze the entire project.

57 Thus, based on the information that was before it, including the modelling predictions, the Panel accepted the measure as technically and economically feasible. The fact that uncertainty remained regarding end pit lakes in the oil sands region is understandable given that they will only become operational upon mine site closures. Thus, the Panel recommended the validation of modelling results, including a physical test case and continued research, well in advance of the slated closure date in 60 years.

58 In my opinion, the Panel is permitted and indeed mandated to make these kinds of recommendations regarding the proposed Project, which should include recommendations for continued study of potential impacts on valued environmental components and the development of further mitigation strategies. This is consistent with the ongoing and dynamic nature of environmental assessment referred to above and ensures that new information is obtained which

facilitates the adaptation of project implementation as required.

iii. Reclamation

59 The applicants further submit that the mitigation of certain aspects of oil sands mining, e.g., reclamation of peatlands, is not even known in general terms. Follow-up programs are not intended to replace mitigation measures under the CEAA or to be treated as vehicles for designing future mitigation measures. The applicants find support in the case of *Union of Nova Scotia Indians, supra*. In that particular case, mitigation measures were generally known, but the details of the specific measures had yet to be determined. For the applicants, relying on adaptive management to address uncertainty and future risk requires at least some general understanding initially of the mitigation system in play.

60 The respondents submit that the dynamic nature of follow-up measures and adaptive management will resolve initial uncertainties. Further, sufficient information was available to the Panel which enabled it to reasonably conclude as it did. I agree. The recommendations are not necessarily flawed because the evidence was insufficient to eliminate all uncertainty. The Panel had before it information indicating that while the reclamation of peat-accumulating wetlands remained uncertain, there is considerable experience with respect to wetland and marsh reconstruction and that Imperial Oil's closure plan called for the reconstruction of approximately 900 hectares of marsh. This type of replacement is consistent with s. 2(1) of the CEAA which defines mitigation as including "restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means".

61 Again, I note that the Federal Court of Appeal explained in *Express Pipelines Ltd., supra*, that as the nature of the Panel's task is predictive, finality and certainty in environmental assessment can never be achieved. Hugessen J. stated at para. 10:

No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did, a high degree of expertise in environmental matters. In addition, the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

And further at para. 14, he states:

Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing

reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.

It would be impossible for a review panel to conduct the environmental assessment early in the planning stages of a project if the Panel was required to eliminate all uncertainty and precluded from commenting on follow-up activities.

62 Thus, while uncertainties with respect to reclamation of peat-accumulating wetlands remained, they could be addressed through adaptive management given the existence of generally known replacement measures contained in Imperial Oil's mine closure plan. Indeed, it is worth noting that the Panel cited with approval the reclamation milestones from Imperial Oil's Project Application in its Report.

B) Endangered Species

63 The applicants argue that the Panel failed to consider the significance of adverse environmental effects on endangered species, particularly the Yellow Rail (listed in the *Species at Risk Act*, S.C. 2002, c.29 ("SARA")), failed to provide the responsible authority with the requisite information in this regard, failed to consider mitigation measures that were technically and economically feasible, and failed to provide a rationale for its conclusion.

64 The applicants reference the Federal Government's written submission to the Kearn Panel wherein it indicated that:

There are 1093 [hectares] of graminoid fen within the Kearn Project area that could provide suitable habitat for Yellow Rails. It is not known how large or widely distributed the local population is, and therefore it is difficult to draw conclusions on potential impacts to the species, or to make recommendations for mitigation actions.

Based on the information before it, the Panel recommended that Alberta conduct a regional review of cumulative impacts on Yellow Rail within the next two years.

65 For the applicants s. 79 of the SARA imposes requirements, in addition to those contained in the CEAA, on authorities mandated to ensure that an environmental assessment is conducted to

"identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, [to] ensure that measures are taken to avoid or lessen those effects and to monitor them."

66 The federal respondent submits that the Panel clearly set out its concerns regarding the Yellow Rail and made recommendations for a regional review of cumulative impacts to determine mitigation options as well as the implementation of predevelopment surveys by Imperial Oil. Given the ongoing and dynamic nature of the environmental assessment process, complete details need not be provided at this stage: the Panel raised concerns, provided information, and made recommendations, and the final decision rested with DFO. Imperial Oil echoes the federal respondent and indicates that based on the evidence, the Panel's conclusions and recommendations were informed and rational.

67 While I note that the Panel could have included more information regarding Environment Canada's concerns with respect to the Yellow Rail, particularly, that suitable habitat for the Yellow Rail is found in localized patches throughout the region and that this habitat cannot be reclaimed with current technology, I find the assessment of the significance of environmental effects in the Panel report to be reasonable. In my view, the Panel met its duty in the present case by acknowledging that Environment Canada expressed concern regarding the effect on the Yellow Rail due to the intensity of regional development. It made no further assessment as the information upon which such assessment could be based was not before it.

68 The Panel recommended that in the next two years AENV in collaboration with Environment Canada, coordinate a regional review of the cumulative impacts on the Yellow Rail in the oil sands region, using appropriate regional nocturnal surveys in areas of potentially suitable habitat and that this initiative should determine the mitigation options to minimize impacts on the Yellow Rail. The Panel went on to recommend that AENV establish requirements within any *EPEA* approval to implement the findings of the Yellow Rail initiative for surveys, determination of effects, and mitigation strategies where appropriate. The Panel expressed its expectation that Imperial Oil would implement effective Yellow Rail predevelopment surveys and habitat mitigation strategies in its reclamation plans, unless these matters were dealt with on a regional basis. Finally, the Panel recommended that AENV require Imperial Oil to avoid land clearing during the period of April 1 to August 30 of each year due to potential impacts on migratory bird species.

69 Thus, while I agree with the applicants' assertion that further studies of the Yellow Rail population do not constitute mitigation measures, I do not believe that the Panel's recommendation was meant to be a mitigation measure. The Panel adopted an approach that was consistent with the dynamic nature of the assessment process; it highlighted concerns and made recommendations consistent with the information before it. I find the approach employed to manage the existing uncertainty to be reasonable.

C) Greenhouse Gas Emissions

70 The applicants submit that the Panel erred by failing to provide a cogent rationale for its conclusion that the adverse environmental effects of the greenhouse gas emissions of the Project would be insignificant, and by failing to comment on the effectiveness of intensity-based "mitigation". According to Imperial Oil's EIA, the Project will be responsible for average emissions of 3.7 million tonnes of carbon dioxide equivalent per year, which equals the annual greenhouse gas emissions of 800,000 passenger vehicles in Canada, and will contribute 0.51% and 1.7% respectively, of Canada and Alberta's annual greenhouse gas emissions (based on 2002 data).

71 The respondent, Imperial Oil, argues that the EIA that was before the Panel set out the annual greenhouse gas emissions, as well as the intensity of greenhouse gas emissions on a per barrel basis for the Project during the operating period. Further, the Project Application sets out Imperial Oil's approach to greenhouse gas management including the requirement that the most energy efficient, commercially proven and economic technology be selected to minimize emissions. There is no evidence to suggest that the Panel failed to consider all the evidence that was before it, and while it did not comment specifically on the effects of the greenhouse gas emissions, pursuant to *Cantwell v. Canada (Minister of the Environment)*, [1991] F.C.J. No. 27, the EARPGO (predecessor to the CEAA) does not specify a particular form for the report and thus, it is not the role of this Court to insist on a particular form in the present case. At the hearing, Imperial Oil's counsel added that for the Panel to comment on the proposed intensity based mitigation measures would shift its role into the realm of policy recommendation.

72 While I agree that the Panel is not to engage in policy recommendation, nevertheless, it is tasked with conducting a science and fact-based assessment of the potential adverse environmental effects of a proposed project. In the absence of this fact-based approach, the political determinations made by final decision-makers are left to occur in a vacuum.

73 I recognize that placing an administrative burden on the Panel to provide an in-depth explanation of the scientific data for all of its conclusions and recommendations would be disproportionately high. However, given that the Report is to serve as an objective basis for a final decision, the Panel must, in my opinion, explain in a general way why the potential environmental effects, either with or without the implementation of mitigation measures, will be insignificant.

74 Should the Panel determine that the proposed mitigation measures are incapable of reducing the potential adverse environmental effects of a project to insignificance, it has a duty to say so as well. The assessment of the environmental effects of a project and of the proposed mitigation measures occur outside the realm of government policy debate, which by its very nature must take into account a wide array of viewpoints and additional factors that are necessarily excluded by the Panel's focus on project related environmental impacts. In contrast, the responsible authority is authorized, pursuant to s. 37(1)(a)(ii), to permit the project to be carried out in whole or in part even where the project is likely to cause significant adverse environmental effects if those effects "can be justified in the circumstances". Therefore, it is the final decision-maker that is mandated to take into account the wider public policy factors in granting project approval.

75 I am fully aware of the level of expertise possessed by the Panel. The record shows that they had ample material before them relating to the issue of greenhouse gas emissions and climate change, and thus any articulated conclusions drawn from the evidence should be accorded a high measure of deference. However, this deference to expertise is only triggered when those conclusions are articulated. Instructively, in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116 (QL), at para. 62, Iacobucci J. cited with approval the following excerpt from Kerans, R. P., *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994), p. 17 which dealt with deference to "expertise":

Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. [Emphasis added]

Thus, deference to expertise is based on the cogent articulation of the rationale basis for conclusions reached.

76 In the present case, the Panel indicated its expectation that Imperial Oil would follow through on its commitment to:

- reduce NOx emissions through combustion controls using low-NOx burners for stationary sources,
- purchase and operate low-NOx mine equipment as soon as it is commercially available, and
- participate in AENV's BATEA [Best Available Technology Economically Available] study and implement its findings. (p. 58 of the Report)

Further, the Panel agreed with EC and encouraged Imperial Oil to implement the use of ultra-low-sulphur diesel fuel for all of its construction and mining activities ahead of any mandatory requirements (p. 59 of the Report).

77 Finally, the Panel supported Alberta developing appropriate *EPEA* approval requirements to address greenhouse gas emission intensity targets:

The Joint Panel supports Alberta developing appropriate *EPEA* approval

requirements to address:

- fugitive emissions control (LDAR [leak detection and repair] program),
- continuous benzene and acrolein monitoring,
- VOC [volatile organic compounds] emissions monitoring,
- participation in CEMA and WBEA [Wood Buffalo Environmental Association] work to address trace air contaminants, including but not limited to benzene and acrolein,
- participation in regional acid deposition and eutrophication monitoring programs, and
- GHG [greenhouse gas] emission intensity targets.

The Panel then concluded that:

The KOS Project is not likely to result in significant adverse environmental effects to air quality, provided that the mitigation measures and recommendations proposed are implemented. (p. 60 of the Report)

78 The evidence shows that intensity-based targets place limits on the amount of greenhouse gas emissions per barrel of bitumen produced. The absolute amount of greenhouse gas pollution from oil sands development will continue to rise under intensity-based targets because of the planned increase in total production of bitumen. The Panel dismissed as insignificant the greenhouse gas emissions without any rationale as to why the intensity-based mitigation would be effective to reduce the greenhouse gas emissions, equivalent to 800,000 passenger vehicles, to a level of insignificance. Without this vital link, the clear and cogent articulation of the reasons behind the Panel's conclusion, the deference accorded to its expertise is not triggered.

79 While I agree that the Panel is not required to comment specifically on each and every detail of the Project, given the amount of greenhouse gases that will be emitted to the atmosphere and given the evidence presented that the intensity based targets will not address the problem of greenhouse gas emissions, it was incumbent upon the Panel to provide a justification for its recommendation on this particular issue. By its silence, the Panel short circuits the two step decision making process envisioned by the CEAA which calls for an *informed decision* by a responsible authority. For the decision to be informed it must be nourished by a robust understanding of Project

effects. Accordingly, given the absence of an explanation or rationale, I am of the view that the Panel erred in law by failing to provide reasoned basis for its conclusion as mandated by s. 34(c)(i) of the CEAA.

80 As this error relates solely to one of the many issues that the Panel was mandated to consider, I find that it would be inappropriate and ineffective to require the entire Panel review to be conducted a second time (*Nanda v. Canada (Public Service Commission Appeal Board)*, [1972] F.C. 277, at para. 55). Accordingly, the application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

81 As it was agreed upon at the hearing, the parties shall make representations in writing on the issue of costs. The applicants should file and serve their representation within 15 days from the date of this judgement. The respondents should file and serve their representations within 15 days from the date of service of the applicants' representations.

JUDGMENT

THIS COURT ORDERS that

The application for judicial review is allowed in part. The matter is remitted back to the same Panel with the direction to provide a rationale for its conclusion that the proposed mitigation measures will reduce the potentially adverse effects of the Project's greenhouse gas emissions to a level of insignificance.

TREMBLAY-LAMER J.

* * * * *

Annex

Canadian Environmental Assessment Act, S.C. 1992, c.37

[...]

PURPOSES

Purposes

4. (1) The purposes of this Act are

(a) to ensure that projects are considered in a careful and precautionary

manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects;

(b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

(b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;

(b.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;

(b.3) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental assessment;

(c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and

(d) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

Duties of the Government of Canada

- (2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

1992, c. 37, s. 4; 1993, c. 34, s. 19(F); 1994, c. 46, s. 1; 2003, c. 9, s. 2.

Projects requiring environmental assessment

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority

(a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;

(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or

(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

Projects requiring approval of Governor in Council

- (2) Notwithstanding any other provision of this Act,

(a) an environmental assessment of a project is required before the

Governor in Council, under a provision prescribed pursuant to regulations made under paragraph 59(g), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part; and

(b) the federal authority that, directly or through a Minister of the Crown in right of Canada, recommends that the Governor in Council take an action referred to in paragraph (a) in relation to that project

- (i) shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made,
- (ii) is, for the purposes of this Act and the regulations, except subsection 11(2) and sections 20 and 37, the responsible authority in relation to the project,
- (iii) shall consider the applicable reports and comments referred to in sections 20 and 37, and
- (iv) where applicable, shall perform the duties of the responsible authority in relation to the project under section 38 as if it were the responsible authority in relation to the project for the purposes of paragraphs 20(1)(a) and 37(1)(a).

[...]

Factors to be considered

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

Additional factors

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

(a) the purpose of the project;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Determination of factors

- (3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a),

(b) and (d) and (2)(b),
(c) and (d) shall be determined

(a) by the responsible authority; or

(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

[...]

Decision of responsible authority following a screening

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):

(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or

(c) where

(i) it is uncertain whether the project, taking into account the

- implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,
- (ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or
 - (iii) public concerns warrant a reference to a mediator or a review panel, the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

[...]

Referral to Minister

25. Subject to paragraphs 20(1)(b) and (c), where at any time a responsible authority is of the opinion that

(a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or

(b) public concerns warrant a reference to a mediator or a review panel, the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29.

[...]

Assessment by review panel

34. A review panel shall, in accordance with any regulations made for that purpose and with its term of reference,

(a) ensure that the information required for an assessment by a review panel is obtained and made available to the public;

(b) hold hearings in a manner that offers the public an opportunity to participate in the assessment;

(c) prepare a report setting out

- (i) the rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project, including any mitigation measures and follow-up program, and
- (ii) a summary of any comments received from the public; and

(d) submit the report to the Minister and the responsible authority.

Powers of review panel

35. (1) A review panel has the power of summoning any person to appear as a witness before the panel and of ordering the witness to

(a) give evidence, orally or in writing; and

(b) produce such documents and things as the panel considers necessary for conducting its assessment of the project.

Enforcement powers

(2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and other things as is vested in a court of record.

[...]

Decision of responsible authority

37. (1) Subject to subsections (1.1) to (1.3), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(1), the comprehensive study report:

(a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,

- (i) the project is not likely to cause significant adverse environmental effects, or
- (ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part; or

(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

Approval of Governor in Council

(1.1) Where a report is submitted by a mediator or review panel,

(a) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;

(b) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarify any of the recommendations set out in the report; and

(c) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (a).

[...]

Follow-up Program

Consideration of follow-up -- decision under paragraph 20(1)(a)

38. (1) Where a responsible authority takes a course of action under paragraph 20(1)(a), it shall consider whether a follow-up program for the project is appropriate in the circumstances and, if so, shall design a follow-up program and ensure its implementation.

Mandatory follow-up -- decision under paragraph 37(1)(a)

- (2) Where a responsible authority takes a course of action under paragraph 37(1)(a), it shall design a follow-up program for the project and ensure its implementation.

[...]

Joint Review Panels

Definition of "jurisdiction"

40. (1) For the purposes of this section and sections 41 and 42, "jurisdiction" includes

(a) a federal authority;

(b) the government of a province;

(c) any other agency or body established pursuant to an Act of Parliament or the legislature of a province and having powers, duties or functions in relation to an assessment of the environmental effects of a project;

(d) any body established pursuant to a land claims agreement referred to in section 35 of the Constitution Act, 1982 and having powers, duties or functions in relation to an assessment of the environmental effects of a project;

(e) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and

- (f) an international organization of states or any institution of such an organization.

Review panels established jointly with another jurisdiction

- (2) Subject to section 41, where the referral of a project to a review panel is required or permitted by this Act, the Minister

(a) may enter into an agreement or arrangement with a jurisdiction referred to in paragraph (1)(a), (b), (c) or (d) that has powers, duties or functions in relation to the assessment of the environmental effects of the project, respecting the joint establishment of a review panel and the manner in which the environmental assessment of the project is to be conducted by the review panel; and

(b) shall, in the case of a jurisdiction within the meaning of subsection 12(5) that has a responsibility or an authority to conduct an assessment of the environmental effects of the project or any part of it, offer to consult and cooperate with that other jurisdiction respecting the environmental assessment of the project.

[...]

Conditions

- 41. An agreement or arrangement entered into pursuant to subsection 40(2) or (3), and any document establishing a review panel under subsection 40(2.1), shall provide that the environmental assessment of the project shall include a consideration of the factors required to be considered under subsections 16(1) and (2) and be conducted in accordance with any additional requirements and procedures set out in the agreement and shall provide that

(a) the Minister shall appoint or approve the appointment of the chairperson or appoint a co-chairperson, and shall appoint at least one other member of the panel;

(b) the members of the panel are to be unbiased and free from any conflict

of interest relative to the project and are to have knowledge or experience relevant to the anticipated environmental effects of the project;

(c) the Minister shall fix or approve the terms of reference for the panel;

(d) the review panel is to have the powers and immunities provided for in section 35;

(e) the public will be given an opportunity to participate in the assessment conducted by the panel;

(f) on completion of the assessment, the report of the panel will be submitted to the Minister; and

(g) the panel's report will be published.

1992, c. 37, s. 41; 1993, c. 34, s. 32(F); 1998, c. 25, s. 164; 2003, c. 9, s. 20.

[...]

* * *

Loi canadienne sur l'évaluation environnementale, 1992, ch. 37

[...]

OBJET

Objet

4. (1) La présente loi a pour objet :

a) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;

b) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;

b.1) de faire en sorte que les autorités responsables s'acquittent de leurs obligations afin d'éviter tout double emploi dans le processus d'évaluation environnementale;

b.2) de promouvoir la collaboration des gouvernements fédéral et provinciaux, et la coordination de leurs activités, dans le cadre du processus d'évaluation environnementale de projets;

b.3) de promouvoir la communication et la collaboration entre les autorités responsables et les peuples autochtones en matière d'évaluation environnementale;

c) de faire en sorte que les éventuels effets environnementaux négatifs importants des projets devant être réalisés dans les limites du Canada ou du territoire domanial ne débordent pas ces limites;

d) de veiller à ce que le public ait la possibilité de participer de façon significative et en temps opportun au processus de l'évaluation environnementale.

Mission du gouvernement du Canada

- (2) Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence et les organismes assujettis aux dispositions de celle-ci, y compris les autorités fédérales et les autorités responsables, doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de la prudence.

1992, ch. 37, art. 4; 1993, ch. 34, art. 19(F); 1994, ch. 46, art. 1; 2003, ch. 9, art. 2.

Projets visés

5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes :

a) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;

b) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en oeuvre le projet en tout ou en partie un financement, une garantie d'emprunt ou toute autre aide financière, sauf si l'aide financière est accordée sous forme d'allègement -- notamment réduction, évitement, report, remboursement, annulation ou remise -- d'une taxe ou d'un impôt qui est prévu sous le régime d'une loi fédérale, à moins que cette aide soit accordée en vue de permettre la mise en oeuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement;

c) une autorité fédérale administre le territoire domanial et en autorise la cession, notamment par vente ou cession à bail, ou celle de tout droit foncier relatif à celui-ci ou en transfère à Sa Majesté du chef d'une province l'administration et le contrôle, en vue de la mise en oeuvre du projet en tout ou en partie;

d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.

Projets nécessitant l'approbation du gouverneur en conseil

(2) Par dérogation à toute autre disposition de la présente loi :

a) l'évaluation environnementale d'un projet est obligatoire, avant que le gouverneur en conseil, en vertu d'une disposition désignée par règlement

aux termes de l'alinéa 59g), prenne une mesure, notamment délivre un permis ou une licence ou accorde une approbation, autorisant la réalisation du projet en tout ou en partie;

b) l'autorité fédérale qui, directement ou par l'intermédiaire d'un ministre fédéral, recommande au gouverneur en conseil la prise d'une mesure visée à l'alinéa a) à l'égard du projet :

- (i) est tenue de veiller à ce que l'évaluation environnementale du projet soit effectuée le plus tôt possible au stade de la planification de celui-ci, avant la prise d'une décision irrévocable,
- (ii) est l'autorité responsable à l'égard du projet pour l'application de la présente loi -- à l'exception du paragraphe 11(2) et des articles 20 et 37 -- et de ses règlements,
- (iii) est tenue de prendre en compte les rapports et observations pertinents visés aux articles 20 et 37,
- (iv) le cas échéant, est tenue d'exercer à l'égard du projet les attributions de l'autorité responsable prévues à l'article 38 comme si celle-ci était l'autorité responsable à l'égard du projet pour l'application des alinéas 20(1)*a*) et 37(1)*a*).

[...]

Éléments à examiner

16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants :

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;

- b)* l'importance des effets visés à l'alinéa a);
- c)* les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;
- d)* les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;
- e)* tout autre élément utile à l'examen préalable, à l'étude approfondie, à la

médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, -- dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

Éléments supplémentaires

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants :

a) les raisons d'être du projet;

b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

c) la nécessité d'un programme de suivi du projet, ainsi que ses modalités;

d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

Obligations

(3) L'évaluation de la portée des éléments visés aux alinéas (1)*a)*, *b)* et *d)* et (2)*b)*, *c)* et *d)* incombe :

a) à l'autorité responsable;

b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

[...]

Décision de l'autorité responsable

20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) :

a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en oeuvre totale ou partielle du projet;

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants qui ne peuvent être justifiés dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient lui permettre la mise en oeuvre du projet en tout ou en partie;

c) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29 :

- (i) s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,
- (ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,
- (iii) si les préoccupations du public le justifient.

[...]

Examen par une commission

25. Sous réserve des alinéas 20(1)*b)* et *c)*, à tout moment, si elle estime soit que le projet, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, peut entraîner des effets environnementaux négatifs importants, soit

que les préoccupations du public justifient une médiation ou un examen par une commission, l'autorité responsable peut demander au ministre d'y faire procéder conformément à l'article 29.

[...]

Commission d'évaluation environnementale

34. La commission, conformément à son mandat et aux règlements pris à cette fin :

a) veille à l'obtention des renseignements nécessaires à l'évaluation environnementale d'un projet et veille à ce que le public y ait accès;

b) tient des audiences de façon à donner au public la possibilité de participer à l'évaluation environnementale du projet;

c) établit un rapport assorti de sa justification, de ses conclusions et recommandations relativement à l'évaluation environnementale du projet, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public;

d) présente son rapport au ministre et à l'autorité responsable.

Pouvoirs de la commission

35. (1) La commission a le pouvoir d'assigner devant elle des témoins et de leur ordonner de :

a) déposer oralement ou par écrit;

b) produire les documents et autres pièces qu'elle juge nécessaires en vue de procéder à l'examen dont elle est chargée.

Pouvoirs de contrainte

- (2) La commission a, pour contraindre les témoins à comparaître, à déposer et à produire des pièces, les pouvoirs d'une cour d'archives.

[...]

Autorité responsable

37. (1) Sous réserve des paragraphes (1.1) à

(1.3), l'autorité responsable, après avoir pris en compte le rapport du médiateur ou de la commission ou, si le projet lui est renvoyé aux termes du paragraphe 23(1), le rapport d'étude approfondie, prend l'une des décisions suivantes :

a) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou est susceptible d'en entraîner qui sont justifiables dans les circonstances, exercer ses attributions afin de permettre la mise en oeuvre totale ou partielle du projet;

b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux qui ne sont pas justifiables dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient permettre la mise en oeuvre du projet en tout ou en partie.

Agrément du gouverneur en conseil

- (1.1) Une fois pris en compte le rapport du médiateur ou de la commission, l'autorité responsable est tenue d'y donner suite avec l'agrément du gouverneur en conseil, qui peut demander des précisions sur l'une ou l'autre de ses conclusions; l'autorité responsable prend alors la décision visée au titre du paragraphe (1) conformément à l'agrément.

[...]

Programme de suivi

Décision au titre de l'al. 20(1)a) : suivi 38. (1) Si elle décide de la mise en oeuvre

conformément à l'alinéa 20(1)a), l'autorité responsable examine l'opportunité d'un programme de suivi dans les circonstances; le cas échéant, elle procède à l'élaboration d'un tel programme et veille à son application.

Décision au titre de l'al. 37(1)a) : suivi

- (2) Si elle décide de la mise en oeuvre conformément à l'alinéa 37(1)a), l'autorité responsable élabore un programme de suivi et veille à son application.

[...]

Examen conjoint

Définition d'"instance"

40. (1) Pour l'application du présent article et des articles 41 et 42, "instance" s'entend notamment :

- a) d'une autorité fédérale;
- b) du gouvernement d'une province;

c) de tout autre organisme établi sous le régime d'une loi provinciale ou fédérale ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet;

d) de tout organisme, constitué aux termes d'un accord sur des revendications territoriales visé à l'article 35 de la Loi constitutionnelle de 1982, ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet;

e) du gouvernement d'un État étranger, d'une subdivision politique d'un État étranger ou de l'un de leurs organismes;

- f) d'une organisation internationale d'États ou de l'un de ses organismes.

Examen conjoint

- (2) Sous réserve de l'article 41, dans le cas où il estime qu'un examen par une commission est nécessaire ou possible, le ministre :

a) peut conclure avec l'instance visée à l'alinéa (1)a), b), c) ou d) exerçant des attributions relatives à l'évaluation des effets environnementaux du projet un accord relatif à la constitution conjointe d'une commission et aux modalités de l'évaluation environnementale du projet par celle-ci;

b) est tenu, dans le cas d'une instance, au sens du paragraphe 12(5), qui a la responsabilité ou le pouvoir d'entreprendre l'évaluation des effets environnementaux de tout ou partie du projet, d'offrir de consulter et de coopérer avec celle-ci à l'égard de l'évaluation environnementale du projet.

[...]

Conditions de l'examen conjoint

41. Les accords conclus aux termes des paragraphes 40(2) ou (3) et les documents visés au paragraphe 40(2.1) contiennent une disposition selon laquelle l'évaluation environnementale du projet prend en compte les éléments prévus aux paragraphes 16(1) et
- (2) et est effectuée conformément aux exigences et modalités supplémentaires qui y sont contenues ainsi que les conditions suivantes :

a) le ministre nomme le président, ou approuve sa nomination, ou nomme le coprésident et nomme au moins un autre membre de la commission;

b) les membres de la commission sont impartiaux, non en conflit d'intérêts avec le projet et pourvus des connaissances et de l'expérience voulues touchant les effets environnementaux prévus du projet;

c) le ministre fixe ou approuve le mandat de la commission;

d) les pouvoirs et immunités prévus à l'article 35 sont conférés à la commission;

e) le public aura la possibilité de participer à l'examen;

f) dès l'achèvement de l'examen, la commission lui présentera un rapport;

g) le rapport sera publié.

1992, ch. 37, art. 41; 1993, ch. 34, art. 32(F); 1998, ch. 25, art. 164; 2003, ch. 9, art. 20.

[...]

cp/e/ln/qlaim/qltxp/qlcas/qlcxm/qlhcs/qlhcs/qlhcs

Indexed as:

R. v. Alphonse (B.C.C.A.)

Between

Her Majesty The Queen, Respondent, and
 William Alphonse, Appellant, and
 Carrier Sekani Tribal Council, The Attorney General of Canada,
 Delgamuukw et al., Musqueam Indian Band and Okanagan Tribal
 Council, Intervenors

[1993] B.C.J. No. 1402
 Vancouver Registry No. CA010153

British Columbia Court of Appeal
Vancouver, British Columbia
Taggart, Lambert, Hutcheon, Macfarlane and Wallace JJ.A.

Heard: November 12, 13, 14, 15, 18, 19 20, 21, 22, 1991
 Judgment: June 25, 1993
 (48 pp.)

Criminal law — Indians — Aboriginal hunting rights — Wildlife Act — Mistake of fact.

Appeal from conviction and sentence under the Wildlife Act for hunting out of season. At issue was the constitutionality of the offence provision regarding Indians, and the ambit, and effect (if any) of the accused's aboriginal hunting rights. In particular, the accused argued the judge below had erred in failing to hold that the provision could only validly apply if made applicable under section 88 of the Indian Act; that section 88 was invalid as contrary to section 35 of the Constitution Act, 1982; and that the provision itself was invalid for the same reason. The Crown argued the accused had failed to establish he was exercising an aboriginal right; the provision was valid provincial legislation; section 88 was not inconsistent with section 35; the test for hunting rights was not the same as for fishing rights; and the provision of a closed season for all did not fail the test.

HELD: Appeal allowed. The judge below did not have the benefit of the analysis by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In deciding that paragraph 27(1)(c) of the Wildlife Act did not contravene section 35 of the Constitution Act, 1982, he had regard to the public interest test; although a conservation test was applied, it did not have regard to the factors mentioned and the analysis provided by the Supreme Court of Canada. The accused had established a prima facie infringement of aboriginal rights not justified by the Crown. The accused was exercising an unextinguished aboriginal right. The land was not enclosed land under the Trespass Act. The Wildlife Act was a law of general application and was reverentially incorporated by section 88. Section 88 was not inconsistent with section 35. Paragraph 27(1)(c) was of no force and effect with respect to aboriginal persons.

STATUTES, REGULATIONS AND RULES CITED:

Constitution Act, 1867, s. 91(24).
 Constitution Act, 1982, ss. 35, 35(1), 52, 52(1).
 Game and Fisheries Act, R.S.M. 1954, c. 94, s. 76(1), 76(4).
 Income Tax Act, S.C. 1970-71-72, c. 63.
 Indian Act, R.S.C. 1985, c. I-5, ss. 2, 4, 88.
 Trespass Act, R.S.B.C. 1979, c. 411, ss. 1, 4(1).
 Wildlife Act, S.S. 1979, c. W-13.1.

Wildlife Act, S.B.C. 1982, c. 57, ss. 2, 27(1)(c), 34(2), 40.
Wildlife Act Regulations, B.C. Reg. 337/82, s. 110.

Appellant's Counsel: Lewis F. Harvey George Coutlee

Supporting Intervenors:

Delgamuukw	Stuart Rush, Q.C. Louise Mandell
Carrier-Sekani Tribal Council	Arthur Pape
Musqueam Indian Band	Marvin R.V. Storrow, Q.C.
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Respondent's Counsel: Christopher Harvey, Q.C. Charles F. Willms Norman J. Prelypchan P.
Geoffrey Plant

Supporting Intervenors:

Attorney General of Canada Ivan G. Whitehall, Q.C. Cheryl J. Tobias

Reasons for judgment delivered by Macfarlane J.A., concurred in by Taggart, Hutcheon and Wallace JJ.A., allowing the appeal. Lambert J.A. delivered separate and concurring reasons for judgment.

MACFARLANE J.A.:—

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I. INTRODUCTION

¶ 1 This appeal concerns aboriginal hunting rights, and whether the provisions of the Wildlife Act, S.B.C. 1982, c. 57 are inconsistent with the provisions of s. 35(1) of the Constitution Act, 1982.

¶ 2 The appellant, a Shuswap Indian, was acquitted of charges laid under the Wildlife Act. He was charged in Count 1 with a violation of s.27(1)(c) for hunting at a time not within the open season, and, in Count 2, with the violation of s.34(2) of the Act for having dead wildlife in his possession, without having a license or permit. He was acquitted on both charges by His Honour, Judge Barnett, of the Provincial Court of British Columbia (the "trial judge"). That decision is reported at [1988] B.C.J. No. 3134, [1988] 3 C.N.L.R. 92.

¶ 3 The Province appealed to the County Court, and His Honour, Judge Hamilton (as he then was) (the "County Court judge"), allowed the appeal on Count 1, dismissed the appeal on Count 2, and found the appellant guilty of a violation of s. 27(1)(c) of the Wildlife Act. That decision is reported at [1988] B.C.J. No. 3135, [1989] 1 C.N.L.R. 121.

¶ 4 On June 25, 1989, I granted leave to appeal against conviction and sentence. The Crown now concedes that the sentence was unlawful, so the sentence appeal must be allowed.

¶ 5 The facts may be briefly stated. The appellant, William Alphonse, is a Shuswap Indian and a member of the Williams Lake Band. He resides on the Sugar Cane Reserve near Williams Lake. On April 3, 1985, the appellant shot and killed a male mule deer. He did so at a place within the traditional hunting grounds of the Shuswap people on a date during the closed season. He had no permit to hunt. He shot the deer on private land registered in the name of Onward Cattle Co. Ltd.

¶ 6 The trial judge made these findings of fact, at pp. 94-95 of his reasons:

1. The Shuswap people have a history as an organized society going back long before the coming of the white man.
2. The hunting of deer was an integral part of the life of the Shuswap people and continues to be so to this day.
3. Deer have both cultural and material importance to the Shuswap people who have traditionally regarded them with great respect which resulted in effective conservation of the species.
4. Mr. Alphonse's hunting of the deer in this case was done with proper regard for the traditions of the Shuswap people and within the traditional territory of the

- Shuswap people.
5. Mr. Alphonse killed a deer on land which was Crown granted by the Province of British Columbia in 1890 or 1896, and remains privately owned.
 6. The land where the deer was killed was not fenced, posted, built upon, cultivated, or occupied by livestock. Mr. Alphonse did not know the land was privately owned and there was nothing which should have made that fact apparent to him.
 7. Mr. Alphonse was not concerned to know if he was hunting on privately or publicly owned lands. He believes that his right to hunt deer in the traditional territory of the Shuswap people cannot be restricted by laws enacted in the legislature of the Province of British Columbia.
 8. Mr. Alphonse killed the deer within an area which has been designated as MU 5-2 by the Fish and Wildlife Branch. The deer populations within this area are stable and healthy. During the open season the previous fall, licensed hunters killed about 1,175 deer within MU 5-2. Conservation officers assume that the actual kill in any given year will be about double the number they consider to be legally killed.
 9. There are official policies which allow regional managers within the Fish and Wildlife Branch to grant special permission to persons to hunt deer during the closed season. The permits granted are known as sustenance permits.
 10. Mr. Alphonse never considered applying for a sustenance permit.

No contrary findings were made in the County Court.

II. THE TRIAL JUDGMENT

¶ 7 The trial judge dealt with three questions:

1. Whether the appellant was exercising an unextinguished aboriginal right when he shot the deer.

He held, at p.106:

I hold that when British Columbia entered Confederation in 1871 the Shuswap people continued to enjoy aboriginal hunting rights, Trutch's policies notwithstanding. The place where Mr. Alphonse killed a deer on April 1, 1985, was unoccupied Crown land in 1871 and Shuswap people had the right to hunt there.

The Parliament of Canada has never purported to extinguish the aboriginal hunting rights of British Columbia Indians. The legislature of British Columbia was not competent to extinguish aboriginal rights after 1871; such authority was reserved to Ottawa. And since April 17, 1982, no government is competent to extinguish the aboriginal rights of Canadian Indians. Such rights are now protected by s.35 of the Constitution Act, 1982.

- ¶ 8 2. Whether, given the circumstances, the aboriginal right could be exercised on unoccupied private land.

He did not find it necessary to decide whether aboriginal rights can only be exercised upon unoccupied Crown lands, and whether the bare act of transfer to private ownership extinguishes aboriginal rights. Instead he held, at p. 108:

In my opinion the material issue in the present case is essentially similar to that considered by the British Columbia Court of Appeal in *R. v. Bartleman* (1984), 12 D.L.R. (4th) 73, 13 C.C.C. (3d) 488 at 506-507, [1984] 3 C.N.L.R. 114 at 131-132. Mr. Bartleman was a member of the Tsartlip Indian band on Vancouver

Island. His band enjoys the benefit of a treaty which, the Court held, had confirmed the right of Saanich people to hunt upon unoccupied lands within their traditional territory. Mr. Bartleman had hunted and killed a deer upon privately owned bush land. The Court considered the "private lands issue" and observed:

In my opinion, the restrictions placed by the Treaty on the hunting rights of the Indians entitled to exercise the Treaty rights are, first, that the hunting must take place within the geographical area of the traditional hunting grounds of the Saanich people, and, in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land

by the owner or occupier

... The land where Mr. Bartleman was hunting was uncultivated bush, it was not occupied by livestock, it was not surrounded by a fence or by a natural boundary, and it was not posted with signs prohibiting trespass. As such, hunting on the land was lawful under the Wildlife Act and the Trespass Act, R.S.B.C. 1979, c. 411 ...

... I think, as a matter of law, that if anyone can lawfully hunt on the land during the hunting season, then hunting my (sic) take place there under the treaty.

¶ 9 3. Whether the regulation made pursuant to the Wildlife Act, requiring a sustenance permit to hunt out of season, is inconsistent with the provisions of s. 35(1) of the Constitution Act, 1982.

The regulation in question is B.C. Reg. 337/82, and it is authorized by s. 110 of the Act. It provides that a Regional Manager may issue sustenance permits, with certain limitations. The trial judge referred to the limitations in this way at pp. 113-4:

... There are many limitations; the most salient of which are:

1. Sustenance permit hunting cannot continue after February 15.
2. Sustenance permit hunting is limited to a maximum of 5% of the total available harvest. Thus, during the 1984-85 period, only 45 deer permits were available within MU 5-2.
3. Sustenance permits are "issued on a first come first served basis."
4. Sustenance permits are only issued to persons in "actual need" of food. Only persons who are unemployed and receiving social assistance can be considered to have an "actual need", and then only when other sources of food are "insufficient".
5. A person can kill only one deer or moose on a sustenance permit basis during an annual period.
6. A person must use the meat from a sustenance permit kill to feed himself and his or her lawful dependents. The definition of "lawful dependents" is drawn from the Income Tax Act, S.C. 1970-71-72, c. 63; it speaks in terms of nuclear families, not extended families.

In administering the Wildlife Act it is the policy of the government of British Columbia to ignore the fact that some Indian people have the rights which other persons cannot claim. The policies adopted by government preserve the privileges of persons who hunt for sport over the rights of Indians who hunt for food. The bureaucrats who prepared the policies did not seek the input of Indian people. The policies may serve some conservation purposes, but such purposes could be served equally well if the aboriginal rights of Indian people were recognized. If conservation

is the real issue, the solution is obvious.

In Sparrow's case the Court of Appeal held that in allocating the salmon to be taken from the Fraser River, Fisheries Officers must give priority to the aboriginal rights of Indian people over the interests of other user groups. The fishing rights of Indian people can be regulated, but such regulations must be reasonably justified as being necessary for the proper management and conservation of the resource: see *R. v. Sparrow*, supra, pp. 95-96 C.C.C. [177-78 C.N.L.R.]. I hold that the government of British Columbia must follow precisely the same principles when it seeks to regulate the aboriginal hunting rights of Indian people.

The sustenance permit policy is meant to benefit a few particularly poor but motivated welfare recipients. It accords no recognition to the rights of Indians and is not meant to benefit them. It insults them.

¶ 10 In dismissing the charge under Count 1, the trial judge said, at pp. 114-115:

In count 1 Mr. Alphonse is charged under s. 27(1)(c) of the Wildlife Act which makes it an offence for a person to hunt or kill wildlife at a time not within the open season. To the extent that this law (and the application of it) does not recognize the aboriginal rights of Indian persons, it is inconsistent with s. 35 of the Constitution Act, 1982 and therefore of no force or effect. Indian persons who act in the exercise of their aboriginal rights cannot be found to have offended this law.

III. THE COUNTY COURT JUDGMENT

¶ 11 The County Court judge found it unnecessary to decide whether the appellant's aboriginal right to hunt was extinguished, either before or after Confederation, or whether any such right extended to hunting on private property.

¶ 12 Referring to *R. v. Sparrow* (1987), 36 D.L.R. (4th) 246 at 276, 32 C.C.C. 64 at 95, a decision of the British Columbia Court of Appeal, he stated the issue in this way:

In my view the threshold question that arises from Sparrow is whether the regulation of deer hunting by means of open and closed seasons "is reasonably justified as being necessary for the proper management and conservation of deer or in the public interest"? If it is so justified then Indians, along with everyone else are bound by that regulation.

The respondent concedes that one of the matters included in the phrase "in the public interest" is the question of safety. Some regulations contained in the Wildlife Act, such as the prohibitions against shooting across a public highway, are safety measures not conservation measures. Such public interest measures take precedence over aboriginal rights: *Myran v. The Queen* (1975), 58 D.L.R. (3d) 1, 23 C.C.C. (2d) 73 (S.C.C.), *R. v. Napoleon* (1985), 21 C.C.C. (3d) 522, [1986] 1 C.N.L.R. 86 (B.C.C.A.)

I find therefore that when the Court in Sparrow (supra) makes aboriginal rights subject to both public interest and conservation measures, the Court was in proper circumstances giving priority to conservation measures over Indian rights.

Is closing the season "reasonably justified"? The learned trial judge finds that closing the season to Indians is not reasonably justified when you have available the alternative conservation measure of closing the season to sport hunters. I do not think that is the test.

¶ 13 I pause to note that the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 held that the public interest was not a relevant consideration.

¶ 14 The County Court judge then referred to what had been said in *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104, and in particular the words of Dickson J. at pp. 111-2. Turning again to the decision of the Court of Appeal in *Sparrow* he said:

In *Sparrow* the Court said at [p. 266 D.L.R.]:

... Kruger established that an Indian's right to hunt in British Columbia is subject to regulation by the provincial Wildlife Act insofar as it is a "law of general application". Mr. Kruger therefore could be convicted of hunting without a permit required by that Act even if he was hunting on land which was the traditional hunting ground of his band.

The issue in *Sparrow* was whether the coming into force on 17 April 1982 of s. 35(1) of the Constitution Act had the effect of limiting the province's power to regulate the Indian fishery by laws of general application. For the purposes of this appeal there is no distinction between the right to fish and the right to hunt.

Section 35(1) of the Constitution Act provides:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Sparrow has now defined the limit of provincial power by saying that regulations which infringe the aboriginal right to hunt deer by reducing the number of deer available to a level below that required for reasonable food and societal needs will only be valid if they can be reasonably justified as being necessary for the proper management and conservation of the resource.

He concluded, at p. 127:

It is clear from the evidence on this appeal that a regulation which closes the hunting season is necessary for the proper management and conservation of the resource. Section 27(1)(c) and the regulations specifying open and closed seasons are therefore valid notwithstanding their effect on aboriginal hunting rights. Section 35 (1) of the Constitution Act does not afford the respondent a defence to the charge of hunting when the season is closed. The appeal from the respondent's acquittal on count 1 is allowed and the respondent is convicted on the offence under s. 27(1)(c) of the Wildlife Act ...

IV. THE ISSUES ON APPEAL TO THIS COURT ON THE CONVICTION APPEAL

¶ 15 As stated by the appellant:

1. The County Court Judge erred in failing to hold that s. 27(1)(c) of the Wildlife Act could only validly apply to restrictively regulate the aboriginal hunting rights of the Appellant if each of the following three conditions are satisfied:
 - (a) s. 27(1)(c) is made applicable by the Parliament of Canada enacting legislation to referentially incorporate s. 27(1)(c) into federal law, the only possible legislation of this kind being s. 88 of the Indian Act, R.S.C. 1985, c. I-5;
 - (b) s. 88 of the Indian Act is not inconsistent with s. 35(1) of the Constitution Act, 1982; and
 - (c) s. 27(1)(c) of the Wildlife Act is not inconsistent with s. 35(1) of the Constitution Act, 1982.
2. The County Court Judge erred in failing to hold that neither of condition (b) or condition (c) is satisfied, and accordingly he erred in convicting the Appellant.

¶ 16 As stated by the Province:

- I. The aboriginal right to hunt in traditional tribal territories has been extinguished and has been replaced by a right, subject to the general laws of the Province, to enter unoccupied or vacant Crown land anywhere in the Province and to take game for sustenance (the "sustenance right").
- II. Section 88 of the Indian Act, R.S.C. 1985, c. I-5, is valid legislation.
- III. If aboriginal rights exist, sections 27(1)(c) and 34(2) of the Wildlife Act are valid and applicable to the Appellants, pursuant to s. 88 of the Indian Act, notwithstanding section 35 of the Constitution Act, 1982.

¶ 17 The appeal was argued on that basis, but the Province has now amended its position. In effect, it no longer asserts that aboriginal hunting rights have been extinguished, but submits that the Wildlife Act, other than s. 2, is regulatory only. It continues to assert ownership of all wildlife in the Province, relying on s. 2 of the Wildlife Act, and to say that s. 2 has extinguished any ownership right in wildlife which the appellants may claim.

¶ 18 The short answer to the extinguishment aspect of the new argument is that neither the Wildlife Act nor s. 88 of the Indian Act, which is said to referentially incorporate the Wildlife Act as federal law, reflect a clear and plain intention to extinguish aboriginal hunting rights. There is no inconsistency between ownership of wildlife by the Crown, and the continued existence of aboriginal hunting rights. S. 2 of the Wildlife Act provides, in part, as follows:

Property in wildlife

2. (1) Subject to subsection (2), the property in all wildlife within the Province is vested in the Crown in right of the Province.
- (2) A person who lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations acquires the right of property in that wildlife.

¶ 19 Thus an Indian, exercising his aboriginal right to hunt on unoccupied Crown land, or lawfully on other lands, who complies with the Act and valid regulations thereunder, can do so, despite the fact that the Crown is the owner of all wildlife within the Province. In short, it is possible that the aboriginal right to hunt can co-exist with the ownership by the Crown of all wildlife. Therefore, it is not extinguished but is subject to valid regulation. The exercise of the aboriginal right is protected and preserved against invalid regulation by s. 35(1) of the Constitution Act, 1982, as interpreted in Sparrow.

¶ 20 The amended position of the Province may be summarized in this way:

1. The Province submits that the appellant failed to establish that he was exercising an aboriginal right when he shot a deer on private lands on April 3, 1985.
2. S. 27(1)(c) of the Wildlife Act is valid provincial legislation which is not inconsistent with s. 35(1) of the Constitution Act, 1982.
3. S. 88 of the Indian Act is not inconsistent with s. 35(1) of the Constitution Act, 1982.
4. The test applied by the Supreme Court of Canada in Sparrow with respect to fishing rights is not appropriate in the case of a hunting right; and, if it is, the statutory provision of a closed season for all hunters for conservation purposes does not fail that test.

¶ 21 I propose to deal with the issues in this order:

- (a) The private lands issue.

- (b) Questions raised with respect to s. 88 of the Indian Act, R.S.C. 1985, c. I-5, and its relationship to s. 35(1) of the Constitution Act, 1982.
- (c) Whether s. 27(1)(c) of the Wildlife Act is inconsistent with s. 35(1) of the Constitution Act, 1982.

(a) The private lands issue.

¶ 22 The question is whether, in the circumstances, Mr. Alphonse's defence that he was exercising an aboriginal right is defeated because he was hunting on private land.

(i) Mistake of fact.

¶ 23 The trial judge found as a fact that the land where the deer was killed was not fenced, posted, built upon, cultivated, or occupied by livestock. He found that Mr. Alphonse did not know the land was privately owned and there was nothing which should have made that fact apparent to him. He concluded:

It is apparent from Mr. Alphonse's testimony that he did know that other land in the same area was privately owned ranchland. But he says that he did not know that this land was privately owned. I believed him and I further find that there was nothing upon the land which would have caused a reasonable person to believe that it was probably privately owned.

Mr. Alphonse's ancestors have hunted at this place since time immemorial and Mr. Alphonse has himself hunted there for 10 years. There is absolutely nothing in the evidence to suggest that any owner of the land has ever objected to this. Whatever uses may be made of the land, Mr. Alphonse's hunting did not impose upon the owner.

¶ 24 The trial judge found that the place where the deer was killed was part of the traditional hunting grounds of the Shuswap people. If the place had not been private property then Mr. Alphonse would have had the right, subject to valid regulation, to exercise his aboriginal right in that place. There was evidence upon which the trial judge could conclude that Mr. Alphonse honestly and reasonably believed that he was entitled to exercise his aboriginal right in that place. Thus, the fact that the place was private property is not fatal to the appellant's defence.

(ii) Was it Unlawful to Hunt on those Lands?

¶ 25 The trial judge rested his decision on what was said by this Court in *R. v. Bartleman* (1984), 12 D.L.R. (4th) 73. In that case the Court held that Mr. Bartleman had a treaty right to hunt over unoccupied lands, even though they were private lands. The passage in that judgment upon which the trial judge relied is found in the judgment of Mr. Justice Lambert, who said, at p. 92:

... The land where Mr. Bartleman was hunting was uncultivated bush, it was not occupied by livestock, it was not surrounded by a fence or by a natural boundary, and it was not posted with signs prohibiting trespass. As such, hunting on the land was lawful under the Wildlife Act and the Trespass Act, R.S.B.C. 1979, c. 411. ...

¶ 26 I understand that the references to the two statutes are these:-

Wildlife Act

Agricultural and cleared land

40. (1) A person who, without the consent of the owner, lessee or occupier of land,

- (a) hunts over or traps in or on cultivated land, or
- (b) hunts over Crown land which is subject to a grazing lease while the land is occupied by livestock

commits an offence.

(2) This section does not affect the Trespass Act.

The land on which Mr. Alphonse was hunting was not cultivated land. It was not subject to a Crown granted grazing lease, and it was not occupied by livestock.

Trespass Act, R.S.B.C. 1979, c. 411

Interpretation

1. In this Act

"enclosed land" includes land that is

- (a) surrounded by a lawful fence defined by or under this Act;
- (b) surrounded by a lawful fence and a natural boundary or by a natural boundary alone; or
- (c) posted with signs prohibiting trespass in accordance with section 4.1;

Definition of trespasser

4. (1) A person found inside enclosed land without the consent of its owner, lessee or occupier shall be deemed a trespasser.

I pause to note that the land in question was not "enclosed land".

¶ 27 When those statutory provisions are read together and applied to the facts in *Bartleman* the result was to find that Mr. *Bartleman* was not prohibited from hunting on the private lands in question. Similarly, Mr. *Alphonse* was not prohibited from hunting on the private lands in question.

¶ 28 But the Crown submits, on the basis of *R. v. Horse*, [1988] 1 S.C.R. 187, and *R. v. Mousseau*, [1980] 2 S.C.R. 89 which is dealt with by Mr. Justice *Estey* in *Horse*, that persons who do not have the consent of the owner of private land do not have a right of access to hunt on such land. Those decisions depend upon agreements and legislation in Manitoba and Saskatchewan referred to by *Estey J.* at pp. 191-196.

¶ 29 In *Horse* the appellants were charged with an offence under the Saskatchewan Wildlife Act, S.S. 1979, c. W-13.1. Their defence was that they were exercising a treaty right. The land upon which the hunting took place was privately owned. The lands were farm lands sown to hay and grain. The appellants did not have permission or authority from the owners or occupants of the lands to hunt there.

¶ 30 Mr. Justice *Estey* said, at p. 191:

To succeed, the appellants must demonstrate a right in law to hunt on these privately owned lands and to do so notwithstanding the regulation of hunting under the provincial statute.

¶ 31 The judgment referred to a number of Manitoba cases and to another Saskatchewan case. It is unnecessary to describe those cases; they are discussed fully in the judgment of Mr. Justice *Estey*. Each of the

cases, however, concern legislation prohibiting hunting in certain circumstances. A provision in the Game and Fisheries Act, R.S.M. 1954, c. 94, was discussed in the judgment. The provision is set out at p. 194 of the reasons of Mr. Justice Estey, as follows:

76(1) No person shall hunt any bird or any animal mentioned in this Part if it is upon or over any land with regard to which notice has been given under this Part, without having obtained the consent of the owner or lawful occupant thereof.

...

76(4) Nothing in this section limits or affects the remedy at common law of any such owner or occupant for trespass.

¶ 32 In distinguishing a decision of the Saskatchewan Court of Appeal in *R.v. Tobacco*, [1981] 1 W.W.R. 545, Mr. Justice Estey, at p. 195, said:

... That case, however, was predicated upon the then Saskatchewan Wildlife Act which did not include the above-mentioned provision in the Manitoba Wildlife Act dealing with the rights of an owner at common law or by statute for trespass in respect of his land.

¶ 33 It is to be noted that the saving provision in the Wildlife Act in this Province preserves rights under the Trespass Act but not common law rights.

¶ 34 Applying the Trespass Act to the circumstances of this case, there was no prohibition with respect to hunting on the lands in question. That being so, it was not unlawful to hunt on those lands. Thus, it was not unlawful to exercise an aboriginal right on those lands.

¶ 35 I would not give effect to the submissions of the Province that the appellant was not entitled to exercise an aboriginal right in that place under those circumstances.

(b) Questions raised with respect to s. 88 of the Indian Act, R.S.C. c. I-5, and its relationship to s. 35(1) of the Constitution Act, 1982.

¶ 36 S. 88 provides:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation, or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. R.S., c. I-5, s. 88.

¶ 37 Questions to be discussed include:

- (i) The application of s. 88.
- (ii) Is the Wildlife Act a law of general application?
- (iii) Is the Wildlife Act any less a law of general application because it may affect the exercise of an aboriginal right?
- (iv) Is s. 88 of the Indian Act inconsistent with s. 35(1) of the Constitution Act, 1982?
- (i) The application of s. 88 of the Indian Act

¶ 38 The leading cases with respect to the application of s. 88 of the Indian Act are Kruger and Manuel and Dick v. The Queen, [1985] 2 S.C.R. 309.

¶ 39 In my opinion these propositions flow from those judgments:

1. Provincial laws of general application which apply throughout the province to all residents, and which do not affect "Indians in their Indianness", "Indians qua Indians", or "Indians in relation to the core values of their society" or "the status and capacities of Indians" apply to Indians by their own force as valid provincial laws. They do not rely upon s. 88 of the Indian Act for their application to Indians.
2. Provincial laws of general application which do affect Indians in the ways listed above will not apply to Indians by their own force. Such laws depend upon s. 88 of the Indian Act, which gives them the force of federal law for their effectiveness in relation to Indians. Such federal incorporation is required because of the exclusive federal power over Indians which I have described in Delgamuukw.

¶ 40 In Kruger and Manuel the Court had to consider whether the Wildlife Act was a law of general application, and whether s. 88 referentially incorporates the Wildlife Act. In affirming the judgment of Robertson J.A. in the British Columbia Court of Appeal, Dickson J. (later C.J.C.), held that the Wildlife Act was a law of general application. He said, at p. 112:

... Section 88 of the Indian Act appears to be plain in purpose and effect. In the absence of treaty protection or statutory protection Indians are brought within provincial regulatory legislation.

¶ 41 In dealing with the question of referential incorporation he said, at p. 116:

... If the provisions of the Wildlife Act are referentially incorporated by s. 88 of the Indian Act, appellants, in order to succeed, would have the burden of demonstrating inconsistency or duplication with the Indian Act or any order, rule, regulation or by-law made thereunder. That burden has not been discharged and, having regard to the terms of the Wildlife Act, manifestly could not have been discharged. Accordingly, such provisions take effect as federal legislation in accordance with their terms.

¶ 42 The object of s. 88 of the Indian Act was examined further in Dick. Mr. Justice Beetz, said, at pp. 325-6:

It has already been held in Kruger that on its face, and in form, the Wildlife Act is a law of general application. In the previous chapter, I have assumed that its application to appellant would have the effect of regulating the latter qua Indian. However, it has not been demonstrated, in my view, that this particular impact has been intended by the provincial legislator. While it is assumed that the Wildlife Act impairs the status or capacity of appellant, it has not been established that the legislative policy of the Wildlife Act singles out Indians for special treatment or discriminates against them in any way.

(My emphasis)

at p. 326:

I accordingly conclude that the Wildlife Act is a law of general application within the meaning of s. 88 of the Indian Act.

It remains to decide (sic) whether the Wildlife Act has been referentially incorporated to federal laws by s. 88 of the Indian Act.

...
 I believe that a distinction should be drawn between two categories of provincial laws. There are, on the one hand, provincial laws which can be applied to Indians without touching their Indianness, like traffic legislation; there are on the other hand, provincial laws which cannot apply to Indians without regulating them qua Indians.

Laws of the first category, in my opinion, continue to apply to Indians *ex proprio vigore* as they always did before the enactment of s.88 in 1951 - ...

...
 at p.327:

I have come to the view that it is to the laws of the second category that s. 88 refers. I agree with what Laskin C.J. wrote in *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751 at p. 763:

When s. 88 refers to "all laws of general application from time to time in force in any province" it cannot be assumed to have legislated a nullity but, rather, to have in mind provincial legislation which, per se, would not apply to Indians under the Indian Act unless given force by federal reference.

...
 at p. 328:

I accordingly conclude that, in view of s. 88 of the Indian Act, the Wildlife Act applies to appellant even if, as I have assumed, it has the effect of regulating him qua Indian.

(ii) Is the Wildlife Act a law of general application?

¶ 43 The question of whether the Wildlife Act is a law of general application was considered in both *Kruger and Manuel* and in *Dick*. As Beetz J. remarked in *Dick* at p. 325: "It has already been held in *Kruger* that on its face, and in form, the Wildlife Act is a law of general application." Beetz J. confirmed in *Dick* at p. 326 that the Act was a law of general application.

¶ 44 I would conclude on the evidence that in this case the Wildlife Act affects Alphonse qua Indian. That is not to say the intended impact of the Act was to derogate from his rights as an Indian. Nothing in the Act shows that its policy was to single out Indian people for special or peculiar treatment. Accordingly, I think *Dick* decides the question and find that the Wildlife Act is a law of general application, within s. 88.

(iii) Is the Wildlife Act any less a law of general application because it may affect the exercise of an aboriginal right?

¶ 45 I turn now to a discussion which arises only because the decisions in *Kruger and Manuel* and in *Dick* did not rest upon the assertion of an aboriginal right. Rather, these decisions concerned the operation of the provincial Wildlife Act in the face of the division of powers established by the Constitution Act, 1867, and in particular the federal power to legislate with respect to Indians and lands reserved for the Indians under s. 91 (24).

¶ 46 In *Dick*, Mr. Justice Beetz referred to the aboriginal rights issue at p. 315:

One issue that does not arise is that of Aboriginal Title or Rights. In its factum,

the appellant expressly states that he has "not sought to prove or rely on the Aboriginal Title or Rights in the case at bar". As in the Kruger case, the issue will accordingly not be dealt with any more than the related or included question whether the Indians' right to hunt is a personal right or, as has been suggested by some learned authors, is a right in the nature of a profit à prendre or some other interest in land covered by the expression "Lands reserved for the Indians", rather than the word "Indians" in s.91(24) of the Constitution Act, 1867. (See Kenneth Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967), 45 Can. Bar Rev. 513, at pp. 518-519, Anthony Jordan, "Government, Two-Indians, One" (1978), 16 Osgoode Hall L.J. 709, at p. 719). No submission was made on this last point and in this Court, as well apparently as in the courts below, the case has been argued as if the Indians' right to hunt were a personal one.

¶ 47 Nothing in this case turns on the distinction between "Indians" and "Lands reserved for Indians".

¶ 48 Similarly, in Kruger and Manuel Dickson J. (later C.J.C.) set aside the question of aboriginal hunting rights at p.108:

The British Columbia Court of Appeal was not asked to decide, nor did it decide, as I read its judgment, whether aboriginal hunting rights were or could be expropriated without compensation. It is argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The Wildlife Act illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place, and manner of hunting game. It is not directed to the acquisition of property.

... the important constitutional issue as to the nature of aboriginal title, if any, in respect of land in British Columbia ... will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue.

¶ 49 In short, Kruger and Manuel and Dick only decided that the Wildlife Act, inasmuch as it affected the "core values of Indians", could not have any force unless it was incorporated as federal law because of the limitation on provincial legislative competence. The question remains, now taking the view that aboriginal rights are affected, whether the Wildlife Act can still properly be viewed as a law of general application.

¶ 50 My conclusion is that a law can be considered no less a law of general application merely because it is aboriginal rights, rather than the status and capacity of Indians, which are said to be affected by it. An acknowledgment that aboriginal rights are at stake does not change the legislative competence required for the Legislature to enact the Wildlife Act. Aboriginal rights are necessarily elemental to the Indianness or the core values of Indian society, and the status and capacity of Indians. This relationship is recognized in the description of an aboriginal right as "an integral part of their distinctive culture": Sparrow (S.C.C.), at p. 1099.

¶ 51 In light of this relationship, it is clear that no new division of powers problem arises for a provincial law of general application that is seen to touch aboriginal hunting rights rather than an Indian engaged in hunting. That is not to say that the effect of an incorporated law upon aboriginal rights will go unchecked. Any infringement of aboriginal rights must withstand scrutiny under s. 35 of the Constitution Act, 1982. If incorporated legislation unjustifiably interferes with aboriginal rights, it will have no force or effect by reason of s. 52 of the Constitution Act, 1982. However, that analysis stands as a separate and subsequent review, which is properly done after division of powers issues have been resolved. This, in my opinion, brings any infringement of aboriginal rights sharply into focus.

¶ 52 This approach takes proper account of the difference between a review of legislation from a division of

powers point of view and the review of an alleged infringement of rights. Characterizing laws, such as the Wildlife Act, in relation to the legislative competence which is required to enact them is an entirely different exercise, having a profoundly different significance, from the examination of the effect of a law on protected Charter or aboriginal rights. Under the first analysis, the impugned effects of valid laws may amount to an encroachment on another legislature's competing jurisdiction. This may be permissible; indeed, it may even be accommodated by doctrines such as "the doctrine of necessary incidental effect". On the other hand, transgressions of constitutionally-protected rights by the effects of legislation are much more rigorously scrutinized. Charter and aboriginal rights must be jealously guarded from unjustified interference. This is in keeping with their significance and the primacy given to them by the Constitution.

¶ 53 In summary, the Wildlife Act is a law of general application. The reasoning in *Kruger and Manuel* and in *Dick* applies to the exercise of an aboriginal right. Provincial legislation may affect aboriginal rights so long as the policy or intended impact of the legislation is not to derogate from Indian rights. By reason of s. 88 of the Indian Act the Wildlife Act is given the same force as a federal law. But whether it can have any force and effect depends upon whether it can survive a Sparrow type analysis under s. 35 of the Constitution Act, 1982.

¶ 54 I pause to make a general observation. S. 88 of the Indian Act applies to Indians as defined in s.2 of the Act. Such an Indian is commonly referred to as a "status Indian", as distinct from a "non-status Indian". As Hogg points out in *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 27-3 - 27-4:

But there are also many persons of Indian blood and culture who are outside the statutory definition. These "non-status Indians" are also undoubtedly "Indians" within the meaning of s. 91(24), although they are not governed by the Indian Act. The Métis people ... were excluded from the charter group from whom Indian status devolved. However, they are probably "Indians" within the meaning of s. 91(24).

¶ 55 The Eskimos or Inuit people have been held to be within the meaning of "Indians" in s. 91(24) in *Re Eskimos*, [1939] S.C.R. 104, but are specifically excluded from the operation of the Indian Act by section 4:

4. (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

¶ 56 S. 88 applies to laws applicable to "Indians in the province". Thus, s. 88 applies only to status Indians and excludes non-status Indians, Inuit and Métis. The aborigines affected by s. 88 of the Indian Act are fewer in number than those over whom the federal authority extends by virtue of s. 91(24). It follows that there are Indians (in a s. 91(24) sense) who remain immune from provincial laws of general application affecting their Indianness. A provision similar to s. 88, but applying to all aboriginal groups would be required to entirely eliminate the federal immunity which operates in relation to Métis, Inuit, and non-status Indians. As Hogg remarks at p. 27-4:

Parliament is, of course, under no obligation to legislate to the full limit of its authority, and, with respect to Indians, it has certainly not done so.

¶ 57 In my opinion the fact that some residual federal immunity remains outside the ambit of s. 88 does not alter the character of provincial laws to which that section refers. Provincial laws which purport to apply to everyone in the Province, and which do not single out Indians for special treatment are laws of general application within the meaning of s. 88. The extent to which they may be referentially incorporated as federal laws, and to whom they apply under the federal law, are different questions from whether provincial laws are intended to have general application.

(iv) Is s. 88 of the Indian Act inconsistent with s. 35(1) of the Constitution Act, 1982?

¶ 58 The appellant submits that, on its face, s. 88 reflects non-recognition and denial of aboriginal rights. By way of example, the appellant says that s. 88 protects treaty rights but not aboriginal rights. He asserts that s. 88 has no purpose other than to derogate from Indian rights. In general, it is submitted that s. 88 permits the incorporation into federal law of provisions which infringe s. 35(1) of the Constitution Act, 1982.

¶ 59 The Province submits:

- (a) section 88 is valid federal legislation the object of which is to accommodate the division of powers in Canada's federal system of government. Section 88 does not, in and of itself, interfere with aboriginal rights; and
- (b) the possibility that terms of incorporated provincial legislation may be found to interfere with a specific aboriginal right does not support the proposition that section 88 itself is unconstitutional. Aboriginal rights are not absolute. Interference with the exercise of an aboriginal right may be justified. *R. v. Sparrow*, supra, at 1075.

¶ 60 I am not persuaded that s. 88 is unconstitutional.

¶ 61 It is obvious that in 1951, when what is now contained in s. 88 was enacted, Parliament sought to use the legislative powers given it by s. 91(24) to give force to provincial laws of general application that otherwise would not have applied to Indians. At the same time, Parliament limited this power of incorporation to guard against provincial interference with Indian treaty rights. Such incorporation may give to Indians benefits extended by provincial legislation; or it may work to regulate, and occasionally interfere with aboriginal rights. I cannot accept the appellant's contention that the sole purpose of s. 88 was to derogate from Indian rights. S. 88 was simply intended to permit the provinces to legislate with respect to all of its residents even though there was an effect upon Indians qua Indians. So long as the policy or intended impact of provincial legislation was not to derogate from Indian rights, such legislation could be referentially incorporated as federal law by reason of s. 88.

¶ 62 The submission that the effect upon Indian rights permitted by s. 88 is unconstitutional must rest on the premise that aboriginal rights are absolute. *Sparrow* has held that aboriginal rights are not absolute and that they may be impaired or restricted by valid regulations. Thus, a provincial law of general application, incorporated as federal law by s. 88, may have the effect of interfering with the exercise of aboriginal rights without being unconstitutional.

¶ 63 Of course, there is nothing in s. 88 that indicates that Parliament intended to give (nor could it give) unconstitutional provincial laws the force of federal law. In *Kruger and Manuel*, at p. 110, Dickson J. (later C.J.C.) identified provincial laws that would not be incorporated by s. 88:

The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in effect paralyses the status and capacity of a federal company; see *Great West Saddlery Co. v. The King* [1921] 2 A.C. 91. Such an act is "no law of general application." See also *Cunningham v. Tommy Homma* [1903] A.C. 151.

He added, at p. 112:

It would have to be shown that the policy of such an Act was to impair the status and capacities of

Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians.

(My emphasis)

¶ 64 The views expressed by Dickson J. in Kruger and Manuel were considered by Beetz J. in Dick at pp. 323-324. The reference is to a dissenting judgment by Lambert J.A. in the appeal to this Court:

The second passage of Kruger quoted by Lambert J.A. is at p. 112 of the Supreme Court Reports:

Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter - to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill* (1953), 8 W.W.R. (N.S.) 247 - it might very well be concluded that the effect of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume.

Lambert J.A. then emphasized the importance of the effect of the legislation as opposed to its purpose. At page 489 of his reasons he wrote:

... evidence about the motives of individual members of the Legislature or even about the more abstract "intention of the legislature" or "legislative purpose of the enactment" is not relevant. What is relevant is evidence about the effect of the legislation. In fact, evidence about its "application".

With all due deference, it seems to me that the correct view is the reverse one and that what Dickson J., as he then was, referred to in Kruger when he mentioned laws which had crossed the line of general application were laws which, either overtly or colourably, single out Indians for special treatment and impair their status as Indians. Effect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored; they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application. This in my view is what Dickson J. meant when in the above quoted passage, he wrote:

It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians.

¶ 65 In sum, s. 88 does not have as its only function the incorporation of derogations from aboriginal rights. Even if it did, some interference with aboriginal rights by the effect of provincial law in combination with s. 88 could be justified. It is true that the incorporation of provincial laws by s. 88 could produce a result which is inconsistent with s. 35 of the Constitution Act, 1982; however, it is the incorporated law which must be examined and, if necessary, read down to eliminate the unconstitutional effect.

- (c) Whether s. 27(1)(c) of the Wildlife Act is inconsistent with s. 35(1) of the Constitution Act, 1982?

¶ 66 S. 27(1)(c) of the Wildlife Act provides:

27. (1) A person commits an offence where he hunts, takes, traps, wounds or kills wildlife

(c) at a time not within the open season,

S. 35(1) of the Constitution Act, 1982 provides:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

¶ 67 In Sparrow the Supreme Court of Canada explored for the first time the scope of s. 35(1). At p. 1105 the Court said:

... Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

¶ 68 The analysis required by Sparrow with respect to the application of s. 35(1) is revealed by these passages:

at p. 1111:

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake.

¶ 69 at p. 1112:

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.

...

To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Secondly, does the regulation impose undue hardship? Thirdly, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.

¶ 70 at p. 1113:

If a prima facie interference is found, the analysis moves to the issue of

justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

The Court of Appeal below held, at p. 96, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest" (emphasis added). We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

The justification of conservation and resource management, on the other hand, is surely uncontroversial.

¶ 71 at pp. 1114-5:

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified

The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J. in *Jack v The Queen*, supra, for such guidelines.

¶ 72 at pp. 1115-6:

We therefore repeat the following passage from Jack, at p. 313:

Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.

I agree with the general tenor of this argument ... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international

waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

...

... While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established.

¶ 73 at p. 1119:

We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown.

...

... The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering over-all conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

¶ 74 The Province asserts that it should not be assumed that the same tests apply to fishing as to hunting.

¶ 75 The County Court judge said there is no distinction in this case between the right to fish and the right to hunt (p. 126). In *Kruger and Manuel* hunting and fishing rights were treated alike. (p. 111) In my view, the *Sparrow* analysis is equally applicable to fishing, hunting, or to any other aboriginal right, except perhaps when it comes to a detailed allocation of resources. At that stage the task of scrutinising a conservation plan to assess priorities "must be left to those having expertise in the area". (*Sparrow*, p. 1116). Competing interests have to be balanced. The claims of the aboriginal peoples must be taken seriously. Consultation is necessary. The plan may differ depending upon the resource in question, the steps which must be taken to conserve it, and other factors. *Sparrow* does not set out an exhaustive list of those factors (p. 1119). They may vary from case to case and from resource to resource.

¶ 76 The first step in the *Sparrow* analysis is to ask whether the legislation in question has the effect of interfering with an existing aboriginal right. In this case both judges below held that the aboriginal rights of Mr. Alphonse had been infringed. But the Province submits that the evidence does not support a finding that Mr.

Alphonse was exercising an aboriginal right because the traditional preference of the Shuswap people was to hunt in the Fall, to hunt when food was needed, and not to kill deer of the species which Mr. Alphonse shot. The Province asserts that, therefore, the first step in the Sparrow analysis was not established.

¶ 77 But the findings of the trial judge, listed earlier, were supported by the County Court judge and, in my view, were ones which a judge, properly instructed, could reasonably have made: *R. v. Yebe*, [1987] 2 S.C.R. 168 at 185-6.

¶ 78 The appellant makes this submission with respect to prima facie infringement, in paragraphs 14-15 of his factum:

14. It is respectfully submitted that, having regard to those findings of fact, an application of the foregoing principles justifies the conclusion that s. 27(1)(c) of the Wildlife Act constitutes a prima facie infringement of s. 35(1):
 - (a) The closed season, coupled with the low bag limits, prevents subsistence hunters from obtaining sufficient venison for their food needs.
 - (b) The closed season prevents the Indian practice of hunting game for food throughout the year.
 - (c) The closed season and bag limits impact negatively upon the traditional practice whereby the Indian subsistence hunter shares the bounty of his hunt with members of his extended families and band elders.
 - (d) The subsistence permit policy does nothing to alleviate against the prima facie infringement of s. 35. Indeed, as the Provincial Court Judge ruled, it adds insult to infringement.

15. Sensitivity to the aboriginal perspective is especially important in this analysis. That perspective should inform the Court's assessment of the "undueness" of hardship caused by s. 27(1)(c), and of its "unreasonableness". In this regard, useful reference may be made to the testimony of the Indian witnesses quoted by Barnett, P.C.J., at pp. 22-25 of his Reasons for Judgment. These witnesses make clear that, for them, far more is involved than just a source of protein, their way of life and distinctive cultural identity is at stake. In the words of Chief Alice Abbey:

"... it's our gift, it's a nourishment for us, a total nourishment."

¶ 79 I think the judges below were correct in proceeding on the basis that the provisions of the Wildlife Act interfered with the aboriginal rights of Mr. Alphonse.

¶ 80 The County Court judge reached his conclusion that s. 27(1)(c) of the Wildlife Act did not contravene s. 35(1) without having the advantage of the analysis by the Supreme Court of Canada in *Sparrow*. Thus the appropriate legal tests were not applied in this case.

¶ 81 Instead the County Court judge had regard to the public interest test prescribed by the Court of Appeal, which was later rejected by the Supreme Court of Canada. Although a conservation test was applied, it did not have regard to the factors mentioned and the analysis provided by the Supreme Court of Canada judgment in *Sparrow*. Accordingly, I think the appeal must be allowed.

¶ 82 The Province submits there should be a new trial so the Crown may have an opportunity to adduce evidence on the questions raised by *Sparrow*.

¶ 83 In my opinion this is not a case where it would be appropriate to grant a new trial. Instead, I would

allow the appeal and acquit the appellant on the basis that he has established a prima facie infringement of his aboriginal rights. That infringement has not been justified by the Crown. This conclusion should come as no surprise to the Province, which suggested earlier that such a course be followed. The appeal went ahead, however, because the appellant wished to fully argue his case before this Court.

¶ 84 Whether, in another case, the Crown can justify the closed season provision in the Wildlife Act is another matter. But the Crown will have to demonstrate, amongst other things, that it is justified in giving no priority in the Wildlife Act or its regulations to the Indians, despite the fact that they have an unextinguished aboriginal right to hunt.

V. SUMMARY

¶ 85 1. Mr. Alphonse was exercising an unextinguished aboriginal right when he shot a deer on unoccupied, unfenced, uncultivated private land, which was not "enclosed land" as defined by the Trespass Act.

¶ 86 2. The Wildlife Act is a law of general application within the meaning of s. 88 of the Indian Act, and is referentially incorporated as federal law pursuant to s. 88.

¶ 87 3. S. 88 is not inconsistent with s. 35(1) of the Constitution Act, 1982.

¶ 88 4. S. 27(1)(c) of the Wildlife Act constitutes a prima facie infringement of aboriginal rights which has not been justified on the evidence before the court and thus it is inconsistent with s. 35(1) of the Constitution Act, 1982. Accordingly, applying s. 52(1) of the Constitution Act, 1982, s. 27(1)(c) is of no force or effect with respect to aboriginal persons.

¶ 89 I would allow the appeal against conviction and sentence, and would acquit the appellant.

MACFARLANE J.A.

TAGGART J.A.:— I agree.

HUTCHEON J.A.:— I agree.

WALLACE J.A.:— I agree.

The following is the judgment of

LAMBERT J.A.:--

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PART I

THE PROCEEDINGS

¶ 90 On 3 April, 1985, William Alphonse shot and killed an antlerless male mule deer. He was charged on these two counts:

Count 1 William ALPHONSE, on or about the 3rd day of April, A.D. 1985, at or near 150 Mile House in the Province of British Columbia, did kill wild life, to wit: a mule deer, at a time not within the open season,
CONTRARY TO SECTION 27(1)(c) OF THE WILDLIFE ACT OF BRITISH COLUMBIA

Count 2 William ALPHONSE, on or about the 3rd day of April, A.D. 1985, at or near 150 Mile House in the Province of British Columbia, did have in his possession dead wild life, to wit: a mule deer, without being the holder of a licence or permit as provided by regulation,
CONTRARY TO SECTION 34(2) OF THE WILDLIFE ACT OF BRITISH COLUMBIA

¶ 91 Mr. Alphonse is a Shuswap Indian. He is a member of the Williams Lake Indian Band. He lives on the Sugar Cane Reserve near 150 Mile House. He killed the deer for food for himself, his family, and other Band members. He shot the deer with a rifle on land held in fee simple by the Onward Cattle Co. Ltd. about seven miles south of the Sugar Cane Reserve. His defence to both counts was that he killed the deer and kept its carcass in the exercise of his aboriginal rights.

¶ 92 After a thirteen day trial in 1987 and 1988, His Honour Judge Barnett of the Provincial Court of British Columbia acquitted Mr. Alphonse on both counts. Judge Barnett decided that when Mr. Alphonse killed the deer and kept its carcass he was exercising his aboriginal rights; that those rights had not been extinguished; that they could be exercised on the private land where the deer was shot; and that ss. 27(1)(c) and 34(2) of the Wildlife Act, the sections under which Mr. Alphonse was charged, were, in their application to this case, inconsistent with s. 35 of the Constitution Act, 1982 which recognizes, affirms and guarantees aboriginal rights and gives them constitutional protection. Judge Barnett's reasons are reported at [1988] B.C.J. No. 3134, [1988] 3 C.N.L.R. 92.

¶ 93 In relation to the facts, Judge Barnett said this, at pp. 94-95:

The evidence in this case supports the following propositions:

1. The Shuswap people have a history as an organized society going back long before the coming of the white man.
2. The hunting of deer was an integral part of the life of the Shuswap people and continues to be so to this day.
3. Deer have both cultural and material importance to the Shuswap people who have

traditionally regarded them with great respect which resulted in effective conservation of the species.

4. Mr. Alphonse's hunting of the deer in this case was done with proper regard for the traditions of the Shuswap people and within the traditional territory of the Shuswap people.
5. Mr. Alphonse killed a deer on land which was Crown granted by the Province of British Columbia in 1890 or 1896, and remains privately owned.
6. The land where the deer was killed was not fenced, posted, built upon, cultivated, or occupied by livestock. Mr. Alphonse did not know the land was privately owned and there was nothing which should have made that fact apparent to him.
7. Mr. Alphonse was not concerned to know if he was hunting on privately or publicly owned lands. He believes that his right to hunt deer in the traditional territory of the Shuswap people cannot be restricted by laws enacted in the legislature of the Province of British Columbia.
8. Mr. Alphonse killed the deer within an area which has been designated as MU 5-2 by the Fish & Wildlife Branch. The deer populations within this area are stable and healthy. During the open season the previous fall, licensed hunters killed about 1,175 deer within MU 5-2. Conservation officers assume that the actual kill in any given year will be about double the number they consider to be legally killed.
9. There are official policies which allow regional managers within the Fish & Wildlife Branch to grant special permission to persons to hunt deer during the closed season. The permits granted are known as sustenance permits.
10. Mr. Alphonse never considered applying for a sustenance permit.

¶ 94 The Crown appealed to the Summary Conviction Appeal Court and the appeal was heard by His Honour Judge Hamilton of the County Court of British Columbia. Judge Hamilton's reasons are reported at [1989] 1 C.N.L.R. 121. Judge Hamilton summarized some of the evidence in these two paragraphs, at p. 123:

According to the evidence of Herbert Langin, a wildlife biologist employed by the Ministry of the Environment and Parks, the length of open season is fixed on estimates of the deer population and the number of deer that will likely be taken during any particular week of open season. The preliminary management plan involves as its first priority the distributions of the number of deer, the second priority is to provide for hunting opportunities and the third priority is to provide for viewing opportunities. Langin said that if the open season is extended to where more than 25-30 percent of the deer are harvested then the deer population would decline. The severity of previous winters and other environmental factors are also considered. Some specific problems relating to time and place are also considered. Langin gave an example of where one year the open season was reduced by twelve days in one area because some of the lower elevation resident deer were being harvested at too high a level, while in the same year the season was opened earlier in some areas where the non-migrating deer spend the early part of the fall. One of the reasons for having the open season in the fall is that the deer are not in such concentrated groups as they are found in the spring and are less vulnerable than they are in the spring.

According to the evidence of Roy Slavens, the Conservation Officer who found the respondent with the dead deer, in 1984 the open season for antlered deer was from September 10 to November 17 but the open season for antlerless deer was only two days, October 17 and 18, 1984. Slavens says the deer the respondent shot was a male antlerless fawn which would have been born in about June 1984 and was therefore ten months old when killed. The evidence was that male deer that young would not have been involved in the reproduction process that year. Historically the Indians did not hunt all year round. They hunted primarily in the fall, dried their meat to preserve it and hunted at other times when food was required. The respondent says he hunted whenever he needed food for his family and killed about fifteen deer per year.

Then, relying on that evidence, he concluded his reasons in this way, at pp. 126-7:

Sparrow has now defined the limit of provincial power by saying that regulations which infringe the aboriginal right to hunt deer by reducing the number of deer available to a level below that required for reasonable food and societal needs will only be valid if they can be reasonably justified as being necessary for the proper management and conservation of the resource.

It is clear from the evidence on this appeal that a regulation which closes the hunting season is necessary for the proper management and conservation of the resource. Section 27(1)(c) and the regulations specifying open and closed seasons are therefore valid notwithstanding their effect on aboriginal hunting rights. Section 35(1) of the Constitution Act does not afford the respondent a defence to the charge of hunting when the season is closed.

¶ 95 The Sparrow decision referred to by Judge Hamilton was the decision of this Court, reported at (1986), 36 D.L.R. (4th) 246 (B.C.C.A.). The test for permissible infringement of aboriginal rights propounded in this Court was substantially modified by the Supreme Court of Canada in its decision reported at [1990] 1 S.C.R. 1075, some time after Judge Hamilton had given his judgment in this summary conviction appeal.

¶ 96 Judge Hamilton entered a conviction on Count 1. He dismissed the Crown's appeal from the acquittal on Count 2 on the basis of the rule against multiple convictions.

¶ 97 This appeal is brought by Mr. Alphonse from the conviction entered on Count 1. There is no appeal by the Crown from the acquittal on Count 2.

PART II

THE ISSUES

¶ 98 This appeal was argued at the same time as the appeal in *R. v. Dick*, on which judgment is being given at the same time as judgment in this appeal. The issues raised in both appeals were argued together. The appellants in each appeal were granted intervenor status in the other appeal, and the intervenors in both appeals, including the federal Crown, were the same. The Province, as respondent in both appeals, filed a single factum. The issue which I regard as decisive in both appeals was stated by the appellant in *Dick* in these terms:

1. The Learned County Court Judge erred in law in holding the Wildlife Act, S.B.C. 1982, c. 57 is an Act of general application and so will apply to the Appellant.

I regard that issue as being properly before the Court in both appeals. It was certainly argued in both appeals.

¶ 99 Some months after the two appeals were argued, the same division of the Court heard the argument in *Delgamuukw v. The Queen*, another case in which judgment is being given at the same time as judgment in this appeal. By then the Province had changed its position on a number of issues and, at the conclusion of the argument in *Delgamuukw*, counsel for the Province delivered to the Court an "Amended Provincial Position Re: *Dick* and *Alphonse Appeals*". According to that statement of position the Province was no longer arguing that aboriginal title and aboriginal rights throughout British Columbia had been comprehensively extinguished between 1858 and 1871, and the Province was no longer arguing that the right to hunt deer for food and ceremonial purposes, in the exercise of the rights encompassed by aboriginal title or in the exercise of aboriginal sustenance rights, was specifically extinguished by colonial game legislation between 1858 and 1871. However, the Province retained one particular extinguishment argument which it put in these terms:

3. Insofar as the Appellants in the *Dick* and *Alphonse* appeals allege that they "owned" the wildlife, the Province submits that those ownership rights over wildlife have been extinguished by virtue of the provisions of Section 2 of the Wildlife Act, first enacted

as S.B.C. 1971, c. 69, s. 28.

¶ 100 In September 1992, a letter was written by the Registrar to all counsel in this appeal and to all counsel in the Dick appeal indicating that the Court had received the Amended Provincial Position, and informing them that the Court did not consider it necessary to hear further argument as a result of that change of position. Perhaps understandably, no counsel responded to the contrary. Indeed no counsel responded at all. Accordingly, the Court has decided that it is not necessary to deal with the issues which the Province has now abandoned, although, since they were fully argued, it would not be improper to deal with them. Since I have dealt with the origin and nature of aboriginal rights and with comprehensive extinguishment in my reasons in *Delgamuukw I* do not propose to deal with them here. Since the game legislation in the Colonial period lacked the clear and plain intention necessary to extinguish aboriginal rights, and since the argument about specific extinguishment through the Game ordinances has been abandoned, I do not propose to deal with it either.

¶ 101 Judge Barnett found as a fact that the Shuswap people have a history as an organized society going back long before the arrival of Europeans; that hunting deer for food and other purposes was a tradition of the Shuswap people and formed an integral part of their lives; and that when Mr. Alphonse killed the deer and kept its carcass he did so in accordance with the traditions of the Shuswap people and within their traditional territory.

¶ 102 On the basis of those findings of fact, Judge Barnett concluded that when Mr. Alphonse killed the deer and kept its carcass he was exercising his aboriginal rights. It was not necessary for Judge Barnett to decide whether the rights being exercised were rights derived from aboriginal title or were separate aboriginal hunting rights, and it is not necessary for me to consider that question either. I will sometimes refer in these reasons to rights derived from either source as being aboriginal hunting rights. Subject only to the two remaining questions about extinguishment, Judge Barnett's conclusion that when Mr. Alphonse killed the deer he was exercising his aboriginal hunting rights must stand.

¶ 103 The two remaining questions about extinguishment are the question about ownership of wildlife and the question about hunting over land held by a private owner in fee simple. The latter question also includes issues about regulation of hunting in particular areas. I propose to consider those two remaining questions about extinguishment in the next two Parts of these reasons, namely Parts III and IV. Then, in Part V, I will come to what I regard as the decisive issue, namely, whether the prohibition against hunting in the closed season contained in s. 27(1)(c) of the Wildlife Act is a law of general application. If it is not, then in my opinion it did not apply to Mr. Alphonse when he shot the deer.

PART III

EXTINGUISHMENT OF ABORIGINAL RIGHTS: CROWN OWNERSHIP OF WILDLIFE

¶ 104 For convenience, I will set out again the Province's position from its statement of Amended Provincial Position on the question of extinguishment of ownership rights in wildlife:

3. Insofar as the Appellants in the Dick and Alphonse appeals allege that they "owned" the wildlife, the Province submits that those ownership rights over wildlife have been extinguished by virtue of the provisions of Section 2 of the Wildlife Act, first enacted as S.B.C. 1971, c. 69, s. 28.

¶ 105 The relevant provisions are s-s. 2(1) and 2(2) which read:

2. (1) Subject to subsection (2), the property in all wildlife within the Province is vested in the Crown in right of the Province.

(2) A person who lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations acquires the right of property in that wildlife.

I do not understand that it is any part of Mr. Alphonse's case that he "owned" the male mule deer which he shot, before he shot it. My understanding of Mr. Alphonse's case is that he had a right to hunt and kill the deer, derived either from the aboriginal title of the Shuswap people to possession, occupation, use and enjoyment of their traditional lands and to the resources of those lands, including the wildlife resources, or, alternatively, from the aboriginal hunting rights of the Shuswap people over their traditional ancestral lands. I do not understand that the Shuswap people considered that they "owned" the wildlife in their traditional ancestral lands. The concept of ownership of wildlife is, in my opinion, entirely a common law concept.

¶ 106 By the same token, I do not understand that it is any part of Mr. Alphonse's case that he "owned" the carcass of the deer after it was dead. He had an aboriginal interest in the carcass based on the communal right which he exercised when he killed the deer, and based on the aboriginal rights of self-government and self-regulation of the Shuswap people to deal with the carcass in accordance with the customs, traditions and practices of the Shuswap people which formed and continue to form an integral part of their distinctive culture.

¶ 107 So, to return to the Province's Amended Position, I do not understand that the appellant Alphonse alleges that he "owned" the deer. That is enough to conclude this point.

¶ 108 However, I should add that, in my opinion, the Province did not have the power in 1971 to extinguish any aspect of an aboriginal hunting right. Such a right relates to the core of Indianness and as such comes within the exclusively federal nature of the legislative power held by the Parliament of Canada under head 91 (24) of the Constitution Act, 1867: "Indians and lands reserved for the Indians". The only argument which could be made that s. 2 of the Wildlife Act has been referentially incorporated as federal legislation must rest on s. 88 of the Indian Act. But in my opinion, s. 88 cannot bring about an extinguishment of aboriginal rights through referential incorporation of Provincial legislation because, whatever the intention of the Provincial legislature, s. 88 does not contain any clear and plain intention of the Sovereign power acting legislatively in Parliament to bring about an extinguishment, and such an indication of intention is necessary before an extinguishment can occur. I do not propose to say any more on this point. It has been dealt with more fully in Part IV Division 2, Subdivision (c) of my reasons in *Delgamuukw*.

PART IV

EXTINGUISHMENT AND REGULATION OF ABORIGINAL RIGHTS: CROWN GRANT IN FEE SIMPLE

¶ 109 I now come to the question about hunting over land that was owned by the Onward Cattle Co. Ltd. in fee simple. There are two aspects of this question.

¶ 110 The first aspect of this question relates to whether extinguishment may have arisen either from the passing of the legislation authorizing the issuance of the first fee simple title over the land in question (which, in my reasons in *Delgamuukw*, I have called "implied extinguishment") or from the issuance of the fee simple title itself (which I have called "extinguishment by adverse dominion"). In my opinion neither type of extinguishment occurred in this case. If the authorizing legislation was passed before 1871, it lacked the clear and plain intention to extinguish either through the passage of the legislation or through the issuance of fee simple title under the legislation. If the legislation was passed after 1871 then the Province lacked the legislative capacity to extinguish aboriginal title or hunting rights because that title and those rights lie at the core of Indianness and so come within the exclusively federal nature of head 91(24) of the Constitution Act, 1867. I do not propose to deal more fully with this aspect of this question. It is dealt with in Part IV of my reasons in *Delgamuukw*, particularly in Subdivisions (e) and (f) of Division 1 and in Division 2.

¶ 111 The second aspect of this question relates to whether the exercise by Mr. Alphonse of a hunting right incidental to his aboriginal title or of a separate hunting right over the traditional ancestral lands of the Shuswap people may have been regulated in such a way as to preclude that exercise on land owned by the Onward Cattle Co. Ltd. in fee simple. In my opinion there is nothing in the Wildlife Act, the Trespass Act, or any other Provincial legislation which, by referential incorporation as Federal legislation or otherwise, might be thought to have precluded the exercise by Mr. Alphonse of a right to shoot the mule deer on this private land. The land was uncultivated bush; it was not occupied by livestock; it was not surrounded by a fence or a natural boundary; and it was not posted with signs prohibiting trespass. Just as in *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (B.C.C.A.), where such land was available for the exercise of treaty hunting rights over unoccupied lands, so in this case it was available for the exercise of aboriginal hunting rights. That is not to say that it would not have been available if it had been occupied by livestock or surrounded by a fence. Such a supposition raises a number of questions which it is not necessary to resolve in this appeal.

¶ 112 I conclude that the fact that the land where the deer was shot was owned in fee simple by the Onward Cattle Co. Ltd. did not preclude Mr. Alphonse from exercising his aboriginal right to kill the deer on that spot.

PART V

DID THE WILDLIFE ACT APPLY TO MR. ALPHONSE: IS IT A LAW OF GENERAL APPLICATION?

¶ 113 So I now come to what I regard as the decisive question in this appeal. It is whether s. 27(1)(c) of the Wildlife Act is a law of general application for the purposes of s. 88 of the Indian Act. If it is, then it might be said to have been referentially incorporated through s. 88 of the Indian Act as Federal legislation so as to have become potentially applicable to Mr. Alphonse when he exercised his aboriginal hunting rights. If it is not, then it could not have been incorporated as Federal legislation under the terms of s. 88, and would not apply to Mr. Alphonse. In that case, of course, he could not be convicted under s. 27(1)(c) because, in my opinion, that section could not apply to Mr. Alphonse from its own Provincial vigour when he was exercising aboriginal rights lying at the core of his Indianness.

¶ 114 I propose to address this question, first, by discussing briefly the wording and judicial history of s. 88; then by referring to the leading cases of *Kruger and Manuel v. The Queen*, [1978] 1 S.C.R. 104 and *Dick v. The Queen*, [1985] 2 S.C.R. 309 in their jurisprudential context; and, finally, by indicating the two reasons which have led me to conclude that s. 27(1)(c) of the Wildlife Act is not a law of general application for the purposes of s. 88.

¶ 115 Section 88 reads in this way:

Section 88:

Subject to the terms of any treaty and any other Act of Parliament all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

This section was introduced into the Indian Act, as s. 87, when the Act was revised in 1951. At that time there was a substantial body of judicial opinion in support of what was called the enclave theory. That theory was that Provincial laws, or at least many Provincial laws, did not extend to Indians on reserve lands, and that those lands constituted enclaves beyond the reach of Provincial legislative capacity and amenable only to Federal legislation. (See, for example: *Surrey (District) v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.) and *Rex v. Jim* (1915), 22 B.C.R. 106 (B.C.S.C.))

¶ 116 It seems to me that the legislative purpose of s. 88, when it was enacted, was to overcome the enclave

theory with respect to laws that were broadly general in their application and so to extend to Indians the benefits of social and commercial legislation which were being extended to all other people in the Province in enactments dealing with such things as credit, insurance, the family, and the acquisition of goods.

¶ 117 It was more than twenty years after s. 88 was first enacted that the enclave theory was laid to rest by the decision of the Supreme Court of Canada in *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695. That case involved the application of the Alberta Wildlife Act. I should note also that, at p. 710, Mr. Justice Martland, for the majority, said that it was not necessary, for the purposes of that case, to determine the meaning and effect of s. 88.

¶ 118 That brings me to *Kruger and Manuel* in 1978, the first case in the Supreme Court of Canada to examine the concept of what constitutes a law of general application for the purposes of s. 88 of the Indian Act.

¶ 119 It is significant that the case was argued throughout on an agreed statement of facts. Mr. Kruger and Mr. Manuel were members of the Penticton Indian Band. They shot four deer for food for themselves, their families, and other band members on unoccupied Crown land during the closed season established under the Wildlife Act. They were charged under the then equivalent to what is now s. 27(1)(c). They were convicted by the Provincial Court Judge, acquitted by the Summary Conviction Appeal Court Judge, convicted again by the Court of Appeal and had their conviction upheld by the Supreme Court of Canada. Mr. Justice Dickson gave the judgment of the Supreme Court of Canada. He started off by saying that aboriginal title, including, as I have said, aboriginal hunting rights as an incident of aboriginal title, was not in issue in the appeal. This is how he put it, at pp. 108-109:

Before considering the two other grounds of appeal, I should say that the important constitutional issue as to the nature of aboriginal title, if any, in respect of land in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763 - issues discussed in *Calder v. Attorney General of British Columbia* - will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. Counsel were advised during argument, and indeed seemed to concede, that the issues raised in the present appeal could be resolved without determining the broader questions I have mentioned.

(my emphasis)

¶ 120 Mr. Justice Dickson then went on to the two principal issues in the case, which he called "Laws of General Application" and "Referential Incorporation". It must be remembered that there was an agreed statement of facts which did not extend to the fundamental facts necessary to establish aboriginal title or aboriginal hunting rights.

¶ 121 On the question of what constitutes a law of general application and what does not, Mr. Justice Dickson said this, at pp. 110-112:

There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the **intention** and **effects** of the enactment need to be considered. The law must not be "in relation to" one class of citizens in **object** and **purpose**. **But the fact that a law**

may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group. The analogy may be made to a law which in its effect paralyzes the status and capacities of a federal company; see Great West Saddlery Co. v. The King. Such an act is no "law of general application." See also *Cunningham v. Tomey Homma*.

...

Game conservation laws have as their **policy** the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former. If, of course, it can be shown in future litigation that the Province has acted in such a way as to oppose conservation and Indian claims to the detriment of the latter - to "preserve moose before Indians" in the words of Gordon J.A. in *R. v. Strongquill* - it might very well be concluded that the **effect** of the legislation is to cross the line demarking laws of general application from other enactments. It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians. Were that so, s. 88 would not operate to make the Act applicable to Indians. But that has not been done here and in the absence of clear evidence the Court cannot so presume.

(my emphasis)

¶ 122 I have underlined the words "intention", "effect", "object", "purpose", and "policy". In my opinion they are not being used to create precise distinctions, but more or less interchangeably to indicate the point at which the Provincial legislation would cease to be a law of general application.

¶ 123 The main point in the *Kruger* case, in my opinion, is that if an enactment impairs the status and capacities of Indians then it is not a law of general application and s. 88 does not apply. That is plainly said in the last two sentences I have underlined. But there was no evidence in that case that the *Wildlife Act* impaired the status and capacities of Indians, and it is crucial to note that questions of aboriginal title, including aboriginal hunting rights, were expressly not considered.

¶ 124 Mr. Justice Dickson found it unnecessary to resolve any question about referential incorporation because he considered that the *Wildlife Act* was a law of general application which applied, from its own Provincial force, to Mr. *Kruger* and Mr. *Manuel*.

¶ 125 The next case is *Dick v. The Queen*, [1985] 2 S.C.R. 309. Mr. *Dick* and some companions, all from the Alkali Lake Band of the Shuswap people, went fishing on 4 May, 1980. On the way, Mr. *Dick* shot a deer. May is the closed season for deer. He was charged under the then equivalent of s. 27(1)(c) of the *Wildlife Act*. At his trial, extensive evidence was led about the sustenance practices of the Shuswap people and how important hunting for deer for food was to the Shuswap people. Mr. *Dick* was convicted. His conviction was upheld by the Summary Conviction Appeal Court; by this Court (with one dissent); and unanimously by a five judge panel of the Supreme Court of Canada.

¶ 126 The judgment of The Supreme Court of Canada was given by Mr. Justice *Beetz*. Again he started off by explaining, at p. 315, that he was not considering the questions in the appeal as they would arise if Mr. *Dick* were to be regarded as exercising an aboriginal hunting right. Mr. Justice *Beetz* said this:

One issue that does not arise is that of Aboriginal Title or Rights. In its factum, the appellant expressly states that he has "not sought to prove or rely on the Aboriginal Title or Rights in the case at bar". As in the Kruger case, the issue will accordingly not be dealt with

....

¶ 127 Mr. Justice Beetz dealt with two principal issues. The first was whether hunting deer for food was such a central part of the life of Mr. Dick and other Shuswap Indians of the Alkali Lake Band that it lay at the core of their Indianness. Mr. Justice Beetz said that he was prepared to assume that was so, in a passage, at pp. 320-321, that seems to accept that it was so, although the point was not decided. As a result of that assumption, it would follow that the Wildlife Act did not apply to Mr. Dick from its own Provincial vigour. Mr. Justice Beetz framed that issue, in his own words, in terms of status and capacity, but he did not answer it in those terms. Instead he answered it in terms of whether the Wildlife Act impaired the Indianness of the Alkali Lake Band.

¶ 128 The second principal issue dealt with whether the Wildlife Act was a law of general application and so became referentially incorporated as federal law applicable to Indians by s. 88 of the Indian Act. On that issue, Mr. Justice Beetz said this, at pp. 323-324:

... [W]hat Dickson J., as he then was, referred to in Kruger when he mentioned laws which had crossed the line of general application were laws which, either overtly or colourably, single out Indians for special treatment and impair their status as Indians. Effect and intent are both relevant. Effect can evidence intent. But in order to determine whether a law is not one of general application, the intent, purpose or policy of the legislation can certainly not be ignored: they form an essential ingredient of a law which discriminates between various classes of persons, as opposed to a law of general application. This in my view is what Dickson J. meant when in the above-quoted passage, he wrote:

It would have to be shown that the policy of such an Act was to impair the status and capacities of Indians.

(my emphasis)

At pp. 325-328, Mr. Justice Beetz said this:

It has already been held in Kruger that on its face, and in form, the Wildlife Act is a law of general application. In the previous chapter, I have assumed that its application to appellant would have the effect of regulating the latter qua Indian. However, it has not been demonstrated, in my view, that this particular impact has been intended by the provincial legislator. While it is assumed that the Wildlife Act impairs the status or capacity of appellant, it has not been established that the legislative policy of the Wildlife Act singles out Indians for special treatment or discriminates against them in any way.

I accordingly conclude that the Wildlife Act is a law of general application within the meaning of s. 88 of the Indian Act. . . .

I accordingly conclude that, in view of s. 88 of the Indian Act, the Wildlife Act applies to appellant even if, as I have assumed, it has the effect of regulating him qua Indian.

(my emphasis)

¶ 129 This case now raises the question that was specifically excluded from consideration in Kruger and Manuel and in Dick, namely, does the fact that the Wildlife Act prohibits the exercise of aboriginal hunting rights in accordance with aboriginal customs, traditions, and practices that were and are an integral part of the distinctive culture of the holders of the rights, make the Wildlife Act no longer a law of general application but rather an Act that "singles out Indians for special treatment or discriminates against them in any way," to use the words of Mr. Justice Beetz, for the Supreme Court of Canada, in Dick.

¶ 130 In my opinion there are two reasons why s. 27(1)(c) of the Wildlife Act singles out Indians for special treatment and discriminates against them. But before coming to the two reasons, I propose to say a word about the terms that were used in Kruger and Manuel and in Dick to describe the legislative circumstance that may make an Act unconstitutional. The words were "object", "purpose", "effect", "intent" and "policy". Since the time when Kruger and Manuel and Dick were decided, we have had the benefit of the Supreme Court of Canada decisions in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 and *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 which established, respectively at pp. 331-332 and pp. 972-977, that either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. I regard that as a general rule about constitutionality, applicable not only to Charter cases but also to other constitutional cases including cases about the distribution of legislative powers. But, however that may be, I have no doubt that when the test to be applied is whether an Act "singles out Indians for special treatment or discriminates against them in any way" the Act will not be an Act of general application unless both the purpose and effect of the Act pass the test of not singling out Indians for special treatment or discriminating against them.

¶ 131 Accordingly, in dealing with the two reasons why I consider that s. 27(1)(c) of the Wildlife Act discriminates against Indians, I propose to concentrate on its effect, which I can anticipate and understand, rather than on its purpose, which I find more difficult to discern. But, since the question that is being addressed is whether s. 27(1)(c) is a law of general application, surely the very word "application" must direct us to the question of whether the effect is a general one or a discriminatory one.

¶ 132 Each of the reasons on which I rely depends on the fact that the right that Mr. Alphonse was prevented from exercising was an aboriginal hunting right. Accordingly, neither of the reasons was considered in Kruger and Manuel or in Dick, and those cases specifically and expressly leave open the question of what effect the fact that the right being exercised was an aboriginal right would have on the reasoning and conclusions in those cases.

¶ 133 Each of my reasons is an "argument" and not a "point", for the purposes of the distinction made by Chief Justice Duff in *Thomson v. Lambert*, [1938] S.C.R. 253 at pp. 268-269. In other words, if an issue, (that is, a point,) is raised by the parties through their counsel, then the Court in its consideration of that issue or point is not confined to the very arguments made by counsel but is free to think about arguments that counsel may not have addressed specifically. The scope of the Court's thinking is confined by the issues that were raised but not by the arguments actually made by counsel on those issues.

¶ 134 The first reason why s. 27(1)(c) of the Wildlife Act may be said to discriminate against Indians is a qualitative one. That is, it discriminates against them because it prevents the exercise by Indians of their aboriginal hunting rights whereas for non-Indians it merely regulates their statutory privilege to hunt for game.

¶ 135 When s. 27(1)(c) of the Wildlife Act applies to non-Indians, it prevents them from hunting during the closed seasons. They have no right to hunt during those seasons, so no hunting right or other right is being taken away from them. Nor are they being prevented from exercising any hunting right or other right. They have a privilege to hunt during the open season in accordance with the terms of the licence or permit that is required to be held by them before they set out to hunt. That statutory privilege is shared by Indians and non-Indians alike. It can be taken away from both Indians and non-Indians, and, in the closed season, it is taken away from both Indians and non-Indians. That operation of the statutory privilege occurs under the terms of the statute, and when it applies it applies to both Indians and non-Indians. So it is in that respect, a law of general application. And as Mr. Justice Dickson pointed out in Kruger and Manuel, the fact that it falls with much greater frequency, hardship, and suffering on Indians who depend on hunting for sustenance than on sportsmen who do not, does not make the law any less a law of general application.

¶ 136 It was that situation in relation to the removal of a privilege to hunt for deer that was discussed and decided in Kruger and Manuel and in Dick. Both of those cases expressly left open the question of whether s. 27(1)(c) of the Wildlife Act would still be a law of general application if aboriginal title and aboriginal hunting rights were taken into consideration.

¶ 137 But the situation is entirely different when the right that an Indian is being prevented from exercising is either an incident of aboriginal title to the exclusive possession, occupation, use and enjoyment of land and its resources, or an aboriginal hunting right. In either case, the right is derived from the customs, traditions and practices of the Indian people in question, and has been nurtured and protected as an integral part of their distinctive culture since before British sovereignty was first asserted, and has been incorporated into the common law and protected by the common law ever since. When an Indian is prevented from exercising such a fundamental right, a right that is now constitutionally recognized, affirmed and guaranteed by s. 35 of the Constitution Act, 1982, he is suffering a qualitatively different consequence than the consequence that is visited on both Indians and non-Indians when their statutory hunting privilege is not extended to the closed season.

¶ 138 In suffering the consequence of being prevented from exercising an incident of his aboriginal title to land or his aboriginal hunting rights, Mr. Alphonse was singled out from non-Indians and he was discriminated against in such a way as to demonstrate that the application of s. 27(1)(c) is not general, and s. 27(1)(c) is therefore not a law of general application.

¶ 139 By contrast, the second reason why s. 27(1)(c) of the Wildlife Act may be said to discriminate against Indians is a quantitative one, that is, it applies to some Indians but not to others.

¶ 140 We know from the decision of the Supreme Court of Canada in *Dick* that the question of whether a law is one of general application or not is a question that must be determined once s. 88 has been deemed to be applicable. In *Dick*, it was assumed that the Wildlife Act did not apply of its own force to Indians for whom hunting for sustenance was at the core of their Indianness. Accordingly, the Wildlife Act cannot be a law of general application in its own Provincial vigour because it does not apply to a significant segment of the population, and probably it does not apply to a majority of the hunting population, of its own Provincial vigour. So it follows from *Dick* that one must assume that s. 88 applies, and if it applies, then one must ask whether, with the addition of the federal legislative force to the Provincial legislative force, the law is a law of general application.

¶ 141 But s. 88 only applies to status Indians under the Indian Act. It does not apply to non-Indians, Inuit and Metis. I do not think there are any Inuit with aboriginal hunting rights in British Columbia. But there are many non-status Indians and many Metis. And there is no reason whatsoever to believe that they do not hold aboriginal title to their traditional ancestral lands and aboriginal hunting rights in their traditional ancestral hunting areas. Indeed, s. 35 of the Constitution Act, 1982 recognizes, affirms, and guarantees those rights.

¶ 142 The Indian Act defines an Indian to mean "a person who pursuant to this Act is registered as an Indian, or is entitled to be registered as an Indian". Section 4.1 of the Indian Act provides that a reference to an Indian in s. 88 includes any person whose name is entered on a Band list and who is entitled to have it entered on the list. But there remain many non-status Indians and Metis who are not Indians for the purposes of the Indian Act and to whom s. 88 does not apply. Yet those very people may well belong to a community of people which holds aboriginal title or aboriginal rights. It must be remembered that membership of such a community must be determined in accordance with the customs, traditions and practices of the aboriginal people in question, and not in accordance with the Indian Act or with non-Indian common law principles. Professor Hogg sums up this point in "Constitutional Law of Canada" (3rd ed. Carswell, 1992) at pp. 27-3 to 27-4, in this way:

But there are also many persons of Indian blood and culture who are outside the statutory definition. These "non-status Indians" are also undoubtedly "Indians" within the meaning of s. 91(24), although they are not governed by the Indian Act.

¶ 143 Section 27(1)(c) affects the core of Indianness for status Indians, non-status Indians and Metis alike, because for all of them it affects or may affect the exercise of their aboriginal rights. Accordingly, it reaches into the exclusive federal nature of the federal legislative power under s. 91(24) of the Constitution Act, 1867. Therefore it does not apply to them of its own Provincial vigour. Only by the operation of s. 88 can s. 27(1)(c) of the Wildlife Act be given Federal vigour, and so be made to apply to status Indians under the Indian

Act. However, it still would not apply to non-status Indians and Metis in the exercise of their aboriginal rights, because they are not considered to be Indians for the purposes of the Indian Act. In my opinion, because s. 27(1)(c) of the Wildlife Act applies to status Indians and to non-Indians but does not apply to non-status Indians and Metis, it cannot be said to be a law of general application. It singles out status Indians for special treatment in comparison to non-status Indians and Metis in relation to the exercise of similar aboriginal rights, and it discriminates against status Indians and in favour of non-status Indians and Metis.

¶ 144 For these two reasons I conclude that s. 27(1)(c) of the Wildlife Act is not a law of general application.

¶ 145 Each of the two reasons which I have given is, in itself, a sound reason for concluding that s. 27(1)(c) of the Wildlife Act, even if deemed to have been given Federal force as well as Provincial force in relation to Indians, would not be a law of general application for the purposes of s. 88. The first reason is because it takes away an aboriginal, fundamental and constitutionally protected right from Indians, but only fails to extend a privilege with respect to non-Indians. The second reason is because it applies to some Indians and not to others.

¶ 146 I wish to emphasize that both of the reasons that I have given relate to the exercise of aboriginal rights. It is the prohibition of the exercise of aboriginal rights that prevents the law from being a law of general application. And it is only in the context of aboriginal rights that Kruger and Manuel and Dick are not binding on the question of whether s. 27(1)(c) of the Wildlife Act is a law of general application for the purposes of s. 88 of the Indian Act.

¶ 147 It is therefore my opinion that when Mr. Alphonse shot the antlerless male mule deer on 3 April, 1985 in the exercise of his aboriginal rights he did not commit an offence under s. 27(1)(c) of the Wildlife Act. Section 27(1)(c) did not apply to him of its own Provincial legislative vigour when he carried out the act which lay at the core of his Indianness, namely the act of killing the deer and keeping its carcass. And s. 27(1)(c) could not be given Federal vigour because it was not a law of general application.

PART VI

OTHER ARGUMENTS AND PROPOSED DISPOSITION

¶ 148 A number of other arguments were raised on this appeal. They included a Sparrow argument on s. 35(1) of the Constitution Act, 1982; an argument that because of Sparrow, the Wildlife Act applied in some circumstances and not in others and so was not a law of general application; an argument that the law of aboriginal rights is federal common law and for that reason cannot be altered by a Provincial legislature; an argument that Mr. Alphonse was exercising a right that was an incident of his aboriginal title and that s. 88 only applied to laws relating to Indians and not to laws relating to lands reserved for the Indians; an argument that the land where Mr. Alphonse shot the deer was subject to an interest other than the interest of the Province and was immune from Provincial regulation under s. 109 of the Constitution Act, 1867; and an argument that the generality of s. 88 was an impermissible inter-delegation of legislative powers in that it represented a legislative departure from the fiduciary obligations of the Sovereign in Parliament to the Indians. (Whether referential incorporation of already read-down legislation so as to read it up again under s. 88 constitutes unconstitutional interdelegation of the core of an exclusive federal power was not argued as a separate point from the fiduciary question.) It is not necessary for me to deal with any of those arguments.

¶ 149 I would allow the appeal, set aside the conviction, and enter a verdict of acquittal.

LAMBERT J.A.

DRS/DRS/DRS

**** Preliminary Version ****

Case Name:
R. v. Kapp

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theodore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky, Appellants;

v.

Her Majesty The Queen, Respondent, and Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian

Band, Tseshaht First Nation and Assembly of First Nations, Interveners.

[2008] S.C.J. No. 42

2008 SCC 41

EYB 2008-135098

J.E. 2008-1323

[2008] 8 W.W.R. 1

294 D.L.R. (4th) 1

2008 CarswellBC 1312

232 C.C.C. (3d) 349

[2008] 3 C.N.L.R. 347

376 N.R. 1

78 W.C.B. (2d) 343

37 C.E.L.R. (3d) 1

File No.: 31603.

Supreme Court of Canada

Heard: December 11, 2007;

Judgment: June 27, 2008.

**Present: McLachlin C.J. and Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron and Rothstein JJ.**

(123 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Aboriginal law -- Hunting, fishing and logging rights -- Regulation of -- Licences -- Constitutional

issues -- Canadian Charter of Rights and Freedoms -- Appeal by accused from decision setting aside stay of proceedings and entering convictions, dismissed -- Federal government granted communal fishing licence to three aboriginal bands that gave bands exclusive right to fish during certain period -- Appellants participated in protest fishery during prohibited period and were consequently charged with fishing at a prohibited time -- They argued that licence violated s. 15 of Charter -- Licence fell under s. 15(2), as its objectives included supporting aboriginal self-sufficiency and attempting to redress social and economic disadvantage of targeted bands -- Therefore it met requirement of having amelioration of conditions of disadvantaged groups as its purpose -- Canadian Charter of Rights and Freedoms, 1982, ss. 15(1), 15(2).

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Equality rights -- Appeal by accused from decision setting aside stay of proceedings and entering convictions, dismissed -- Federal government granted communal fishing licence to three aboriginal bands that gave bands exclusive right to fish during certain period -- Appellants participated in protest fishery during prohibited period and were consequently charged with fishing at a prohibited time -- They argued that licence violated s. 15 of Charter -- Licence fell under s. 15(2), as its objectives included supporting aboriginal self-sufficiency and attempting to redress social and economic disadvantage of targeted bands -- Therefore it met requirement of having amelioration of conditions of disadvantaged groups as its purpose -- Canadian Charter of Rights and Freedoms, 1982, ss. 15(1), 15(2).

Natural resources law -- Fishing -- Licensing and registration -- Appeal by accused from decision setting aside stay of proceedings and entering convictions, dismissed -- Federal government granted communal fishing licence to three aboriginal bands that gave bands exclusive right to fish during certain period -- Appellants participated in protest fishery during prohibited period and were consequently charged with fishing at a prohibited time -- They argued that licence violated s. 15 of Charter -- Licence fell under s. 15(2), as its objectives included supporting aboriginal self-sufficiency and attempting to redress social and economic disadvantage of targeted bands -- Therefore it met requirement of having amelioration of conditions of disadvantaged groups as its purpose -- Canadian Charter of Rights and Freedoms, 1982, ss. 15(1), 15(2).

Appeal by the accused from the decision of the Court of Appeal dismissing their appeals from a decision that set aside the trial judge's stay of proceedings and entered convictions. The Aboriginal Fisheries Strategy was implemented by the federal government in order to enhance aboriginal involvement in the commercial fishery. Pursuant to this strategy, three aboriginal bands were granted a communal fishing licence under the Aboriginal Communal Fishing Licences Regulations that gave fishers designated by the bands an exclusive right to fish during a certain pre-determined period. Non-aboriginal fishers were prohibited from fishing during this period. The appellants were all commercial gillnet fishers, mainly non-aboriginal, who participated in a protest fishery during this 24-hour prohibited period. Consequently they were all charged with fishing at a prohibited time. The appellants argued that the program implemented by the federal government, the

communal fishing licence, and the related legislation violated their equality rights under s. 15 of the Charter in a manner that was not justified by s. 1. At the trial level, the court stayed the charges, however on appeal the stay was lifted and convictions were entered. That decision was further upheld by the Court of Appeal.

HELD: Appeal dismissed. The communal fishing licence fell in the ambit of s. 15(2) of the Charter. Sections 15(1) and 15(2) of the Charter worked together to promote a vision of substantive equality that formed the basis for s. 15 as a whole. Section 15 sought to combat discrimination in two ways: (a) by preventing discriminatory distinctions that impact adversely on members of groups identified by the enumerated grounds in s. 15(1) and analogous grounds, and (b) by allowing for the development of programs aimed at helping disadvantaged groups improve their situation through s. 15(2). The communal fishing licence was authorized by the Aboriginal Communal Fishing Licences Regulations, which brought it under s. 15(2) as a "law, program or activity". The communal fishing licence also met the requirement under s. 15(2) that it have as its purpose "the amelioration of conditions of disadvantaged groups or individuals". Numerous objectives were described by the Crown for the program, including supporting self-sufficiency, negotiating a solution to aboriginal fishing rights claims and attempting to redress the social and economic disadvantage of the targeted bands. The means that the government chose to achieve those objectives, namely awarding special fishing privileges for aboriginal communities, was rationally related to serving that purpose. The government's objectives correlated to the actual economic and social disadvantage suffered by members of the three aboriginal bands. As such, the program was protected by s. 15(2) and did not violate the equality guarantee in s. 15 of the Charter.

Statutes, Regulations and Rules Cited:

Aboriginal Communal Fishing Licences Regulations, SOR/93-332,

Canadian Bill of Rights, R.S.C. 1985, App. III, s. 2

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2, s. 3, s. 15(1), s. 15(2), s. 16(3), s. 21, s. 24, s. 25, s. 27, s. 28, s. 29, s. 32(a)

Constitution Act, 1867, s. 91(24), s. 93

Constitution Act, 1982, s. 35, s. 35(1), s. 35(3)

Constitution Amendment Proclamation, 1983, R.S.C. 1983, App. II, No. 46,

Fisheries Act, R.S.C. 1985, c. F-14

Indian Act, R.S.C. 1985, c. I-5, s. 81, s. 83, s. 85.1, s. 88

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Right to equality -- Affirmative action programs -- Relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms -- Ambit and operation of s. 15(2) -- Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours -- Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination -- Whether program protected by s. 15(2) of Charter.

Constitutional law -- Charter of Rights -- Aboriginal rights and freedoms not affected by Charter -- Right to equality -- Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours -- Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination -- Whether s. 25 of Canadian Charter of Rights and Freedoms applicable to insulate program from discrimination charge.

Fisheries -- Commercial fishery -- Aboriginal Fisheries Strategy -- Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours -- Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination -- Whether licence constitutional -- Canadian Charter of Rights and Freedoms, s. 15.

Court Summary:

The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* that was not justified under s. 1 of the *Charter*. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed. The communal fishing licence was constitutional.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, **Abella**, Charron and Rothstein JJ.: The communal fishing licence falls within the ambit of s. 15(2) of the *Charter*, and the appellants' claim of a violation of s. 15 cannot succeed. [para. 3]

Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish, that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. [para. 16] [para. 37] [para. 40]

A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under s. 15 if, under s. 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. The program's ameliorative purpose need not be its sole object. [para. 44] [para. 48] [para. 50] [para. 57]

The government program at issue here is protected by s. 15(2) of the *Charter*. The communal fishing licence was issued pursuant to an enabling statute and regulations and qualifies as a "law, program or activity" within the meaning of s. 15(2). The program also "has as its object the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the program, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the program. The program also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members. It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*. [para. 30] [paras. 57-59] [para. 61]

With respect to s. 25 of the *Charter*, it is not clear that the communal fishing licence at issue lies within the provision's compass. The wording of s. 25 and the examples given therein suggest that

only rights of a constitutional character are likely to benefit from s. 25. A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise. [paras. 63-65]

Per Bastarache J.: Section 25 of the *Charter* operates to bar the appellants' constitutional challenge under s. 15. Although there is agreement with the restatement of the test for the application of s. 15 of the *Charter* set out in the main opinion, there is no need to go through a full s. 15 analysis before considering whether s. 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. [para. 75] [para. 77] [para. 108]

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this Charter". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives. [paras. 80-81] [para. 89] [para. 93] [para. 97]

The reference to "aboriginal and treaty rights" in s. 25 suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. Legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. Laws adopted under the power set out in s. 91(24) of the *Constitution Act, 1867* would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" in s. 25 comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected. Section 25 reflects the imperative need to accommodate, recognize and reconcile aboriginal interests. [para. 103] [paras. 105-106]

There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the

Charter right and the native right. [para. 111]

Here, there is a *prima facie* case of discrimination pursuant to s. 15(1). The right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. The native right falls under s. 25. The unique relationship between British Columbia aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aboriginals pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions. Furthermore, the Crown itself argued that these rights to fish were a first step in establishing a treaty right and s. 25 reflects the notions of reconciliation and negotiation present in the treaty process. Finally, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867*, which deals with Indians. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1 of the *Charter*. Section 25 is a necessary partner to s. 35(1) of the *Constitution Act, 1982*; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation. There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. Section 25 of the *Charter* accordingly applies in the present situation and provides a full answer to the claim. [para. 116] [paras. 119-123]

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By Bastarache J.

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56; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *R. v. Daoust*, [2004] S.C.R. 217, 2004 SCC 6; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *R. v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *R. v. Steinhauer*, [1985] 3 C.N.L.R. 187; *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1; *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (2000), 187 D.L.R. (4th) 741; *R. v. Nicholas*, [1989] 2 C.N.L.R. 131; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Mackenzie, Low, Levine and Kirkpatrick JJ.A.) (2006), 56 B.C.L.R. (4th) 11, 271 D.L.R. (4th) 70, [2006] 10 W.W.R. 577, 227 B.C.A.C. 248, 374 W.A.C. 248, 24 C.E.L.R. (3d) 99, [2006] 3 C.N.L.R. 282, 141 C.R.R. (2d) 249, [2006] B.C.J. No. 1273 (QL), 2006 CarswellBC 1407, 2006 BCCA 277, affirming a decision of Brenner C.J.S.C. (2004), 31 B.C.L.R. (4th) 258, [2004] 3 C.N.L.R. 269, 121 C.R.R. (2d) 349, [2004] B.C.J. No. 1440 (QL), 2004 CarswellBC 1607, 2004 BCSC 958, lifting a stay of proceedings by Kitchen Prov. Ct. J., [2003] 4 C.N.L.R. 238, [2003] B.C.J. No. 1772 (QL), 2003 CarswellBC 1881, 2003 BCPC 279. Appeal dismissed.

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The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. was delivered by

McLACHLIN C.J. and ABELLA J.:--

A. Introduction

1 The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19-20, 1998.

2 The appellants base their claim on s. 15(1). The essence of the claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, raise the issue of the interplay between s. 15(1) and s. 15(2) of the *Charter*. Specifically, they require this Court to consider whether s. 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination - a possibility left open in this Court's equality jurisprudence.

3 We have concluded that where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail. As the communal fishing licence challenged in this appeal falls within s. 15(2)'s ambit - one of its objects being to ameliorate the conditions of the participating aboriginal bands - the appellants' claim of a violation of s. 15 cannot succeed. While the operation of s. 15(2) is sufficient to dispose of the appeal, these reasons, in addition to examining the respective roles of s. 15(1) and s. 15(2), will comment briefly on s. 25 of the *Charter*, in view of the reasons of Bastarache J. on this point.

B. Factual and Judicial History

4 Prior to European contact, aboriginal groups living in the region of the mouth of the Fraser River fished the river for food, social and ceremonial purposes. It is no exaggeration to say that their life centered in large part around the river and its abundant fishery. In the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The right is a communal right. It inheres in the community, not the individual, and may be exercised by people who are linked to the ancestral aboriginal community.

5 The aboriginal right has not been recognized by the courts as extending to fishing for the purpose of sale or commercial fishing: *R. v. Van der Peet*, [1996] 2 S.C.R. 507. The participation of Aboriginals in the commercial fishery was thus left to individual initiative or to negotiation between aboriginal peoples and the government. The federal government determined that aboriginal people should be given a stake in the commercial fishery. The bands tended to be disadvantaged economically, compared to non-Aboriginals. Catching fish for their own tables and ceremonies left many needs unmet.

6 The government's decision to enhance aboriginal involvement in the commercial fishery

followed the recommendations of the 1982 Pearse Final Report, which endorsed the negotiation of aboriginal fishery agreements (*Turning the Tide: A New Policy For Canada's Pacific Fisheries*). The Pearse Report recognized the problematic connection between aboriginal communities' economic disadvantage and the longstanding prohibition against selling fish - a prohibition that disrupted what was once an important economic opportunity for Aboriginals. Policing the prohibition was also problematic; the 1994 Gardner Pinfold Report addressed the serious conservation issue stemming from a fish sales prohibition "honoured more in the breach than the observance" (*An Evaluation of the Pilot Sale Arrangement of Aboriginal Fisheries Strategy (AFS)*, p. 3). The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

7 The federal government's policies aimed at giving aboriginal people a share of the commercial fishery took different forms, united under the umbrella of the "Aboriginal Fisheries Strategy". Introduced in 1992, the Aboriginal Fisheries Strategy has three stated objectives: ensuring the rights recognized by the *Sparrow* decision are respected; providing aboriginal communities with a larger role in fisheries management and increased economic benefits; and minimizing the disruption of non-aboriginal fisheries (1994 Gardner Pinfold Report). In response to consultations with stakeholders carried out since its inception, the Aboriginal Fisheries Strategy has been reviewed and adjusted periodically in order to achieve these goals. A significant part of the Aboriginal Fisheries Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 ("ACFLR"). The ACFLR grants communal licences to "aboriginal organization[s]", defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community". The communal licence cannot be granted to individuals, but an aboriginal organization can designate its use to individuals.

8 The licence with which we are concerned permitted fishers designated by the bands to fish for sockeye salmon between 7:00 a.m on August 19, 1998 and 7:00 a.m. on August 20, 1998, and to use the fish caught for food, social and ceremonial purposes, and for sale. Some of the fishers designated by the bands to fish under the communal fishing licence were also licensed commercial fishers entitled to fish at other openings for commercial fishers.

9 The appellants are all commercial fishers who were excluded from the fishery during the 24 hours allocated to the aboriginal fishery under the communal fishing licence. Under the auspices of the B.C. Fisheries Survival Coalition, they participated in a protest fishery during the prohibited period, for the purpose of bringing a constitutional challenge to the communal licence. As

anticipated, they were charged with fishing at a prohibited time. In defence of the charges, they filed notice of a constitutional question seeking declarations that the communal fishing licence, the *ACFLR* and related regulations and the Aboriginal Fisheries Strategy were unconstitutional.

10 The Provincial Court of British Columbia (Judge Kitchen) found that the communal fishing licence granted to the three bands was a breach of the equality rights of the appellants under s. 15(1) of the *Charter* that was not justified under s. 1 of the *Charter*. The court stayed proceedings on all the charges under s. 24 of the *Charter*: [2003] 4 C.N.L.R. 238, 2003 BCPC 279.

11 The Supreme Court of British Columbia (Brenner C.J.S.C.) allowed a summary convictions appeal by the Crown: (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958. It held that the pilot sales program did not have a discriminatory purpose or effect because it did not perpetuate or promote the view that those who were forbidden to fish on the days when the pilot sales program fishery was open are less capable or worthy of recognition or value as human beings or as members of Canadian society. Brenner C.J.S.C. lifted the stay of proceedings and entered convictions against the appellants.

12 The British Columbia Court of Appeal, in five sets of reasons concurring in the result, dismissed the appeal: (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277. Low J.A. concluded that the pilot sales program did not constitute denial of a benefit under s. 15 when the matter was viewed in a contextual rather than formalistic way. Mackenzie J.A. rejected the claim of discrimination on the basis that a discriminatory purpose or effect had not been established, endorsing the view of Brenner C.J.S.C. on the summary convictions appeal. Kirkpatrick J.A. dismissed the s. 15 claim on the basis that s. 25 of the *Charter*, which protects rights and freedoms pertaining to the aboriginal peoples of Canada, insulated the scheme from the discrimination charge. Finch C.J.B.C. concurred with both Low J.A. and Mackenzie J.A. on the s. 15 issue, and found that s. 25 was not engaged. Finally, Levine J.A. agreed with Finch C.J.B.C. on the s. 15 issue, but declined to express a view on whether s. 25 was engaged.

C. Analysis

13 Section 15 of the *Charter* provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.