nalcor energy
LOWER CHURCHILL PROJECT

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January 6, 2010

Board of Commissioners of Public Utilities
120 Torbay Road
P.O. Box 21040
St. John's, NL
A1A 5B2

Attention: Cheryl Blundon, Director – Corporate Services and Board Secretary

Dear Ms. Blundon:

Re: Application by Nalcor Energy pursuant to Section 5.5(1) of the *Electrical Power Control Act*

Further to your letter of December 29, 2009, enclosed please find an original and eight copies of Nalcor's submissions with respect to the Intervenor Applications of Twin Falls Power Corporation Limited (Twinco) and of the Conseil des Innus de Ekuanitshit and the Innu of Uashsat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band Council and certain traditional families of the Uashat mak Mani-Utenam Innu Nation.

We trust the foregoing is satisfactory.

Sincerely,

Geoffrey P. Young
Senior Legal Counsel

cc. Peter Hickman and Jamie Smith, Q.C., Counsel for Churchill Falls (Labrador) Corporation
Dan Simmons, Legal Counsel for Public Utilities Board
Jim Haynes, President, Twin Falls Power Corporation
David Schulze, DIONNE SCHULZE, Counsel for Innu of Ekuanitshit (Mingan)
Gary Carot, O'Reilly & Associates, Counsel for Innu of Uashat mak Mani-Utenam

IN THE MATTER OF the *Electrical Power Control Act, 1994,* SNL 1994, Chapter E-5.1, as amended (the EPCA); and

IN THE MATTER OF an application by Nalcor Energy to establish the terms of a water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited for the Churchill River, Labrador.

SUBMISSIONS BY NALCOR ENERGY
with respect to the Intervenor Application of Twin Falls Power Corporation Limited (Twinco)

1. The principles relating to granting Intervenor status are set forth in Nalcor's Submissions with respect to the Intervenor Applications of the Aboriginal Intervenor Applicants. A proposed Intervenor must have an interest in the subject matter of the application before the Board of Commissioners of Public Utilities (the Board) in order to be granted Intervenor status.

2. Twinco's rights to receive power and energy pursuant to the Sublease entered into between Twinco and the Hamilton Falls Power Corporation (now CF(L)Co) expire on December 31, 2014.

Pre-filed Evidence of Nalcor, Pages 6-7 and Exhibit 4

3. The proposed water management agreement will not become operational until at least September 1, 2016. By that time, Twinco's rights for the supply of power pursuant to the Sublease will have expired. Twinco therefore has no specific or

recognized interest differentiating it from any other entity with respect to the Application before the Board.

4. Twinco need not be granted Intervenor status in order to enable it to access information with respect to Nalcor's Application. The information is generally available on the Board's website.

5. If the Board decides to grant Intervenor status to Twinco, Nalcor submits that Twinco's right to intervene should be expressly limited to the right to access information and to make written submissions with respect to how, in what manner, and to what extent the proposed water management agreement will adversely affect any right that Twinco alleges to have with respect to the supply of power.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 6th day of January, 2010.

NALCOR ENERGY

for Ian F. Kelly, Q.C. and Geoffrey Young

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IN THE MATTER OF the *Electrical Power Control Act, 1994*, SNL 1994, Chapter E-5.1, as amended (the EPCA); and

IN THE MATTER OF an application by Nalcor Energy to establish the terms of a water management agreement between Nalcor Energy and Churchill Falls (Labrador) Corporation Limited for the Churchill River, Labrador.

SUBMISSIONS BY NALCOR ENERGY

with respect to the Intervenor Applications of the Conseil des Innus de Ekuanitshit and the Innu of Uashat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band Council and Certain Traditional Families of the Uashat mak Mani-Utenam Innu Nation (collectively the Aboriginal Intervenor Applicants)

Introduction

1. Nalcor Energy (Nalcor) filed an Application pursuant to the EPCA on November 10, 2009 to establish the terms of a water management agreement between Nalcor and Churchill Falls (Labrador) Corporation Limited (CF(L)Co) for the Churchill River, Labrador. Nalcor and CF(L)Co have proposed the same water management agreement for the Churchill River.

2. The Conseil des Innus de Ekuanitshit and the Innu of Uashat mak Mani-Utenam, the Innu Takuaikan Uashat mak Mani-Utenam Band Council and certain traditional families of the Uashat mak Mani-Utenam Innu Nation (collectively the Aboriginal Intervenor Applicants), filed applications dated December 15, 2009 and December 21, 2009 respectively, seeking Intervenor status.

3. The Board of Commissioners of Public Utilities (the Board) has control over the nature and extent of interventions before it. The Board may give directions as to the nature and extent of interventions by persons interested in a matter that is to be the subject of a reference or inquiry held under the EPCA.

> **Powers of board**
> 27. (1) The public utilities board may
> (a) give directions as to the nature and extent of interventions by persons interested in a matter that is to be the subject of a reference or inquiry held under this Act; [Emphasis added]

4. Consequently, s. 27 of the EPCA expressly contemplates that a person must have an interest in the subject matter before the Board in order to be granted Intervenor status. The nature of the interest required for Intervenor status has been the subject of various decisions by courts and regulatory bodies, as discussed later in these Submissions.

5. The EPCA requires that two or more persons who have been granted rights to the same body of water as a source for the production of power and who utilize or propose to utilize, or to develop and utilize the body of water as a source for the production of power shall enter into a water management agreement. The Board does not determine how the development will occur on the Churchill River. The function of determining how the development will occur is performed by others, in particular, the regulatory processes under applicable federal and provincial environmental assessment legislation and also through authorizations and permits that may be granted by the federal or provincial governments relating to construction or operation of the facilities.

6. The Project Description for the Lower Churchill Hydroelectric Generation Project (the Project) contained in Appendix B to Nalcor's Application has been extracted from the

Environmental Impact Statement (EIS) submitted by Nalcor for the Project. The proposed water management agreement does not affect the specifications or characteristics of the Lower Churchill Project, in particular, the size of the development, the size or volume of its reservoirs, maximum and minimum storage levels, or the maximum flow rate through the facilities.

7. The Aboriginal Intervenor Applicants seek Intervenor status based on their assertion that the approval of the water management agreement by the Board may adversely affect aboriginal rights and title and that this potential adverse impact supports the existence of a duty to consult on the part of the Board.

8. The Crown has a duty to consult when it has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. The Crown's duty to consult may be satisfied by a variety of regulatory processes, including the environmental assessment process and, once a project has received environmental assessment approval, through permitting, licensing and related processes (Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] 3 S.C.R. 550) **[TAB 1].** The environmental assessment process is designed to provide a forum in which the potential adverse impacts of a development may be fully identified and evaluated, including adverse impacts upon asserted aboriginal rights and title. According to the Supreme Court of Canada in Friends of the Oldman River Society v. Canada (Minister of Transport, [1992] 1 S.C.R. 3 **[TAB 2]**, at para. 103, the purpose of environmental assessment is as follows: "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), p. 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."

The Environmental Assessment Process

9. The Aboriginal Intervenor Applicants are participants in the ongoing environmental assessment of the Project and have been provided with funding to facilitate this participation. The specific process which has been established for the environmental assessment of the Project provides an opportunity for consultation by both the Crown and the proponent with the Aboriginal Intervenor Applicants. On July 15, 2008, the Canadian Environmental Assessment Agency and the Newfoundland and Labrador Department of Environment and Conservation issued the final Guidelines for the preparation of the Environmental Impact Statement for the proposed Lower Churchill Hydroelectric Generation Project in Labrador. The Guidelines provide direction to the proponent, and identify the information that will be required in the statement of the anticipated effects of the project on the environment.

10. The EIS Guidelines require the proponent to provide specifications including volume of the dams, water intake, spillways, diversion facilities, parameters for reservoirs, total land area flooded and total volume. They also require a description of the operating regime, including, *inter alia*: i) water management (turbine flows, ecological flows, reservoir head, maximum and minimum operating levels, operation of structures) for different hydrological conditions (low and high flows including flows lower than the ecological flows); ii) the time of year, frequency and amplitude (maximum and minimum levels) of water level fluctuation ranges for all water bodies; iii) flow rates (maximum, minimum and average) and velocities; iv) maximum and minimum surface areas; and v) changes in water temperature.

EIS Guidelines, **[TAB 3]**, at pages 19, 22

11. The EIS Guidelines also require the proponent to demonstrate its understanding of the interests, values, concerns, contemporary and historic activities, Aboriginal and traditional knowledge and important issues facing Aboriginal groups, and indicate how these will be considered in planning and carrying out the Project. The Aboriginal Intervenor Applicants are expressly listed in the EIS Guidelines as Aboriginal groups and communities to be considered and the proponent is directed to consult with them. The results of these consultations are to be presented in a separate chapter of the EIS with an individual section for each of the affected Aboriginal groups, including the Aboriginal Intervenor Applicants.

EIS Guidelines, **[TAB 3]**, at pages 40, 41

12. An Environmental Impact Statement was submitted by Nalcor in March, 2009. It includes component studies, hydrology, hydraulic modeling of the river and sections concerning consultations with Aboriginal groups, including the Aboriginal Intervenor Applicants.

13. On January 8, 2009, the federal and provincial governments signed a Joint Panel Agreement for environmental review which describes the Panel's terms of reference and the process to be followed for conducting the joint panel review. According to the Agreement, the panel is mandated to: conduct an examination of the environmental effects of the proposed project and the significance of those effects; consider measures that are technically and economically feasible to mitigate any adverse environmental effects, the need for and the requirements of any follow-up programs with respect to the project; and consider comments from the public that are received during the review.

Joint Panel Agreement, **[TAB 4]**, pages 1, 2

14. Schedule 1 to the Joint Panel Agreement contains the terms of reference for the Panel. They include promoting and facilitating public participation and ensuring that the process takes into account the concerns and traditional knowledge of Aboriginal persons or groups. Factors the Panel must consider include the extent to which biological diversity is affected by the Project, proposals for environmental compliance monitoring and comments received from Aboriginal persons or groups during the environmental assessment.

Joint Panel Agreement, **[TAB 4]**, pages 8, 9

15. The Panel has the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Lower Churchill Hydroelectric Generation Project (Project), as well as information on the potential adverse impacts or potential infringement that the Project will have on asserted or established Aboriginal rights or title.

Joint Panel Agreement, **[TAB 4]**, page 9

16. The Panel's report must include information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the Project on recognized and asserted Aboriginal rights and title and any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.

Joint Panel Agreement, **[TAB 4]**, page 10

17. Aboriginal groups, including the Aboriginal Intervenor Applicants, are entitled to review the EIS and provide comments to the Panel on whether it adequately addresses

the EIS Guidelines and whether additional information should be provided before public hearings are convened.

Issues

18. Should the Aboriginal Intervenor Applicants be granted Intervenor status in this Application?

Law and Argument

19. Nalcor submits that the Aboriginal Intervenor Applicants do not have an interest in the terms of the water management agreement between Nalcor and CF(L)Co. The Board has no jurisdiction or power to hear and determine matters of aboriginal rights or title. Matters relating to aboriginal consultation with respect to the Lower Churchill Project are being addressed in another forum, in particular, the environmental assessment process for the Project. Nalcor's Application with respect to the proposed water management agreement is not the appropriate forum to consider matters relating to aboriginal consultation with respect to the Project. The Board should therefore decline to grant Intervenor status to the Aboriginal Intervenor Applicants.

20. As noted earlier, s. 27 of the EPCA expressly contemplates that a person must have an interest in the subject matter before the Board in order to be granted Intervenor status.

21. In the absence of statutory provisions granting discretion concerning Intervenor status, an agency's authority to grant Intervenor status flows implicitly from the power to conduct a hearing or to hold an inquiry. Intervenors are added at the discretion of the agency and the extent of an Intervenor's participation is fixed by the agency. The degree of participation will be determined by the extent the agency feels the Intervenor's participation will assist it in its mandate.

R.W. MaCaulay & J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 2004) ("MaCaulay"), **[TAB 5]** at page 12-66.3.

22. A board should limit the scope of an intervention before it and not allow an Intervenor to speak to questions which are not raised by the underlying proceeding.

MaCaulay **[TAB 5]**, at page 12-66.4:

> ...it must be remembered that an intervenor is there to bring a view or an expertise before the agency which will be useful in determining the matter which is before the agency. An intervenor should not be given leave to speak to questions which are not raised by the underlying proceeding.

23. A person who seeks Intervenor status must have a sufficient "interest" in the proceedings and something to contribute to the resolution of the issues before the board that the parties or other Intervenors will not necessarily bring out. The intervention must not unnecessarily increase the length, cost and complexity of the proceedings or take the presentation and defence of the application away from those who are parties.

Canadian Encyclopedic Digest, 3rd ed. (Toronto: Carswell, 2009) ("CED"), "Administrative Law," **[TAB 6]** s. 645.

24. In *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 157 Nfld & PEIR 164 (TD) **[TAB 7]** the Supreme Court of Newfoundland and Labrador held that the parties, not the intervenors, must be permitted to define the issues to be decided. The intervention must not unduly delay or prejudice the adjudication of the rights of the parties. In that case the proposed intervenor was not a party to the agreement it sought to have interpreted and therefore did not have a sufficient interest in the proceeding to be granted intervenor status.

Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour) (1997), 157 Nfld & PEIR 164 (TD) **[TAB 7]**, at paras. 9, 17:

> 9 In considering whether an applicant should be a party the Court must consider the scope of the intended intervention. Intervenors must take the litigation as framed by the parties. The parties must be permitted to define the issues which should be dealt with by the Court. They should not be forced to deal with new or separate issues that concern only the intervenor. In other words, an intervenor must not be permitted to "highjack" the litigation.
> ...
>
> ***(d) Discretion***
>
> 17 Rules 54.03, 7.05 and 7.06 provide that an intervention may only occur with" leave of the Court". Even if the Applicants' application had some merit the Court must then determine whether the intervention would unduly delay or prejudice the adjudication of the rights of the parties.

25. These principles are affirmed in *Dalton v. Hutton*, 2003 CarswellNfld 25 (TD) **[TAB 8]**.

Dalton v. Hutton, 2003 CarswellNfld 25 (TD) **[TAB 8]**:

> 34 Applicants to intervene in proceedings must show: that they have a *sufficient* interest in the proceedings; that they can make a *useful* contribution; and, that their participation will not *unduly lengthen or delay* the proceedings nor *impose an injustice or excessive burden* on the parties...
>
> 36 ...Courts are cautious about granting leave if there is a risk the applicants will "hijack" the litigation or the issues they raise will add to its time, cost or complexity.

26. In the context of this Application, the Board must consider the particular statutory objects governing the issues set out in the Application.

MaCaulay **[TAB 9]**, at page 28-46:

> A board's only concern should be whether the proposed intervention would enable it to better achieve its statutory objects. Thus, a board

> should grant standing to *anyone* who has **both** a **legitimate interest in the proceedings before it**, and who will constructively contribute to a determination of the issues at hand. [emphasis added]

27. In *Newfoundland Telephone Co. v. TAS Communications Systems Ltd.* (1984), 47 Nfld. & P.E.I.R. 277 (NLCA) **[TAB 10]** the decision of the Board of Commissioners of Public Utilities to allow the Director of Investigation and Research under the *Combines Investigation Act* to intervene in an application by Newfoundland Telephone for approval of a new service was overturned. The Court of Appeal found that the Director was required to show an interest in the specific application before the Board. Parties must show status **and** interest before being granted a right to intervene. It would not be just and fair to parties with a genuine interest to be burdened with extra costs which would inevitably flow from the additional time of a hearing caused by having unnecessary parties before the Board.

> *Newfoundland Telephone Co. v. TAS Communications Systems Ltd.* (1984), 47 Nfld. & P.E.I.R. 277 (NLCA) **[TAB 10]**:
>
> 13 In my opinion the Board, in defining and establishing the procedure on hearings before it, cannot confer a right on a statutory creature, such as the Director, which the statute itself does not confer. **Nor indeed should the Board confer standing on any person, statutory, corporate or otherwise, who has not been able to show an interest in the specific application before it**. We are not here dealing with the powers and duties of the Board to obtain whatever information it desires by examination or otherwise given by ss. 14, 15, 18, 35 and 113 of the Public Utilities Act, R.S.N. 1970, c. 322. For the Board to discharge the obligations imposed on it by these sections intervention of the Director is not necessary. We are here dealing with the sole right of the Director to be made a party to proceedings. The Director admits that he has no specific interest in the subject matter and says that he desires only to be a guiding light to the Board.
> ...
>
> 15 I might add in passing that it seems to me not to be just and fair to the applicant and to parties with genuine interests to be saddled with the extra costs which they must bear on a solicitor-and-client basis

> which would inevitably flow from the additional time of a hearing caused by having unnecessary parties before the Board.
>
> 16 In my view the Board has a discretion to permit parties to intervene, but that discretion is not untrammelled. **Parties must show status and interest before being granted a right to intervene.**
>
> 17 It follows that the appeal is allowed with costs.
> [emphasis added]

28. *Newfoundland Telephone Co. v. TAS Communications Systems Ltd.* was upheld at the Supreme Court of Canada on the status issue. The finding that the Director was required to show an interest in the specific application before the Board was not overturned.

> *Newfoundland Telephone Co. v. TAS Communications Systems Ltd.*, [1987] 2 S.C.R. 466 **[TAB 11]**.

29. The statutory object of the Board in the within Application is to establish the terms of an agreement between Nalcor and CF(L)Co for the purpose of achieving the policy objective that all sources and facilities for the production, transmission and distribution of power in the Province should be managed and operated in a manner that would result in the most efficient production, transmission and distribution of power.

30. Looking at these statutory objects, the Board's function is to establish the terms of a water management agreement. The Board does not determine how the Lower Churchill Project will be developed. The proposed water management agreement does not affect the specifications or characteristics for the Lower Churchill Project that will be established through the environmental assessment process. The Aboriginal Intervenor Applicants have not demonstrated an interest in the matter before the Board that would justify the granting of Intervenor status. Aboriginal consultation

with respect to the development of the Project is being addressed through the environmental assessment process.

31. Utilities boards will limit or deny intervention requests in order to ensure that only matters relevant to the proceeding are heard.

> *TransCanada PipeLines Limited* (November, 1996), GH-3-96 (NEB) **[TAB 12]** at pages 3 to 4;
> MaCaulay **[TABS 5 and 9]**, at pages 28-46, 12-66.4.

32. In *Yellow Falls Power Limited Partnership* (Procedural Order No. 1, July 24, 2009), EB-2009-0120 (OEB) the Ontario Energy Board considered an application to construct a transmission line to connect a generating facility to the existing transmission system. The OEB found that Aboriginal consultation issues were not appropriately before them.

> *Yellow Falls Power Limited Partnership* (Procedural Order No. 1, July 24, 2009), EB-2009-0120 (OEB) **[TAB 13]**, at page 3:
>
> To the extent that there are Aboriginal consultation issues arising within the scope of the EA process, it is the Board's view that it is not appropriate to consider those issues in this proceeding. Given the limits on the Board's jurisdiction imposed by s. 96(2), it is the Board's view that the EA is clearly the preferable forum where Aboriginal consultation issues relating to environmental matters can be considered and addressed.

33. The Board should decline to grant Intervenor status to the Aboriginal Intervenor Applicants. The Board has no jurisdiction or power to hear and determine matters of Aboriginal rights or title. This Application is not the appropriate forum to consider Aboriginal consultation relating to the development of the Project. The Aboriginal Intervenor Applicants are already Intervenors in the environmental assessment of the

Project. The environmental assessment process is the appropriate forum for consultation with respect to the development of the Lower Churchill Project.

Conclusion

34. In summary, the Board should decline to grant Intervenor status to the Aboriginal Intervenor Applicants. The Aboriginal Intervenor Applicants do not have an interest in the matter before the Board. The environmental assessment process is the appropriate forum for consultation with respect to the development of the Lower Churchill Project.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 6th day of January, 2010.

NALCOR ENERGY

per Ian F. Kelly, Q.C. and Geoffrey Young

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INDEX

TAB

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

2004 CarswellBC 2654

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development (Appellants) v. Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd. (Respondents) and Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit and Union of British Columbia Indian Chiefs (Interveners)

Supreme Court of Canada

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: March 24, 2004
Judgment: November 18, 2004
Docket: 29146

Proceedings: reversing *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 211 D.L.R. (4th) 89, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 163 B.C.A.C. 164, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.); varying *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers])

Counsel: Paul J. Pearlman, Q.C., Kathryn L. Kickbush for Appellants

Arthur C. Pape, Jean Teillet, Richard B. Salter for Respondents, Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation

Randy J. Kaardal, Lisa Hynes for Respondents, Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.

Mitchell Taylor, Brian McLaughlin for Intervener, Attorney General of Canada

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

Pierre-Christian Labeau for Intervener, Attorney General of Quebec

Kurt J.W. Sandstrom, Stan Rutwind for Intervener, Attorney General of Alberta

Charles F. Willms, Kevin G. O'Callaghan for Interveners, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Court of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia

Jeffrey R.W. Rath, Allisun Rana for Intervener, Doig River First Nation

Hugh M.G. Braker, Q.C., Anja Brown, Arthur C. Pape, Jean Teillet for Intervener, First Nations Summit

Robert J.M. Janes, Dominique Nouvet for Intervener, Union of British Columbia Indian Chiefs

Subject: Environmental; Public; Property; Constitutional

Environmental law --- Statutory protection of environment — Environmental assessment — Aboriginal interests

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Aboriginal law --- Reserves and real property — Rights and title — General principles

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Crown --- Crown property — Miscellaneous issues

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Droit de l'environnement --- Protection accordée par la loi à l'environnement — Évaluation environnementale — Intérêts autochtones

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

Droit autochtone --- Réserves et biens-fonds — Droits et titres — Principes généraux

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

Couronne --- Biens de la Couronne — Questions diverses

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

R Ltd. sought permission from the British Columbia government to reopen an old mine. R Ltd.'s proposal was accepted for review under the former Mine Development Assessment Act, and a project committee was established in November 1994. Invited to participate was an Indian band, which objected to R Ltd.'s plan to build a 160-km road from the mine to a town through a portion of the band's traditional territory. When the Environmental Assessment Act was instituted in 1995, the project committee was formally constituted under s. 9 with the band as one of its members. After a three-and-one-half-year assessment process, project approval was granted on March 19, 1998, by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines. The Indian band successfully brought a petition in February 1999 under the Judicial Review Procedure Act to quash the Ministers' decision. The Crown's appeal was dismissed. The Crown appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

The process engaged in by the Crown under the Environmental Assessment Act fulfilled the requirements of its duty. The band was part of the project committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Crown was under a duty to consult. It did so, and proceeded to make accommodations. The Crown was not under a duty to reach agreement with the band, and its failure to do so did not breach the obligations of good faith that it owed the band.

R Ltd. a demandé au gouvernement de la Colombie-Britannique l'autorisation de rouvrir une ancienne mine. On a accepté d'examiner sa proposition présentée en vertu de la Mine Development Assessment Act, et un comité responsable du projet a été mis sur pied en novembre 1994. Une bande indienne, qui avait été invitée à participer au processus, s'est objectée au projet de R Ltd. consistant en la construction, sur une partie de son territoire traditionnel, d'une route de 160 km entre la mine et une ville. Lorsque l'Environmental Assessment Act a été promulguée en 1995, le comité responsable du projet a été formellement constitué en vertu de l'art. 9, la bande étant un de ses membres. Le processus d'évaluation a duré trois ans et demie, au terme duquel le projet a été approuvé le 19 mars 1998 par le ministre de l'Environnement, des Terres et des Parcs et par le ministre de l'Énergie et des Mines. En février 1999, la bande indienne a présenté avec succès une demande en vertu de la Judicial Review Procedure Act afin d'obtenir l'annulation de la décision des ministres. Le pourvoi de la Couronne a été rejeté. Celle-ci a interjeté appel devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

La Couronne s'est acquittée de son obligation en engageant le processus prévu à l'Environmental Assessment Act. La bande a fait partie du comité responsable du projet, ce qui lui a permis de participer pleinement au processus d'évaluation environnementale. Elle a été déçue lorsque, après trois ans et demie, le processus a pris fin sur ordre du Bureau des évaluations environnementales. Elle a cependant eu l'opportunité de faire valoir son point de vue devant les ministres, et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La Couronne avait l'obligation de consulter. Elle l'a fait et elle a pris des mesures d'accommodement. Elle n'avait pas l'obligation de s'entendre avec la bande; le fait qu'elle n'y soit pas parvenue ne constituait pas un manquement à son obligation d'agir de bonne foi avec la bande.

Cases considered by *McLachlin C.J.C.*:

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

Haida Nation v. British Columbia (Minister of Forests) (2004), 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, [2005] 3 W.W.R. 419, 2004 SCC 73 (S.C.C.)

R. v. Gladstone (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — referred to

R. v. Nikal (1996), [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal)* 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — referred to

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 35(1) — considered

Environmental Assessment Act, R.S.B.C. 1996, c. 119

Generally — considered

s. 2(a) — considered

s. 2(b) — considered

s. 2(c) — considered

s. 2(d)(i) — considered

s. 2(e) — considered

s. 7 — referred to

s. 9 — considered

s. 9(1) — considered

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

s. 9(2)(d) — considered

s. 9(6) — considered

s. 10 — considered

ss. 14-18 — considered

s. 19(1) — considered

s. 21(a) — considered

s. 21(b) — considered

s. 22 — considered

s. 23 — considered

s. 29 — considered

s. 29(1) — considered

s. 29(4) — considered

s. 30(1)(a) — considered

s. 30(1)(b) — considered

s. 30(1)(c) — considered

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — referred to

Mine Development Assessment Act, S.B.C. 1990, c. 55

Generally — referred to

APPEAL by provincial Crown from judgment reported at *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 211 D.L.R. (4th) 89, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 163 B.C.A.C. 164, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.), varying *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers]), which al-

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

lowed Indian band's application for judicial review with respect to Crown approval of project under *Environmental Assessment Act*.

POURVOI de la Couronne provinciale à l'encontre de l'arrêt publié à *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 211 D.L.R. (4th) 89, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 163 B.C.A.C. 164, *(*sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director))* 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.), qui a modifié le jugement publié à *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers]), qui avait accueilli la demande de la bande indienne visant à obtenir le contrôle judiciaire de la décision de la Couronne approuvant un projet en vertu de l'*Environmental Assessment Act.*

***McLachlin C.J.C.*:**

I. Introduction

1 This case raises the issue of the limits of the Crown's duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims. The Taku River Tlingit First Nation ("TRTFN") participated in a three and a half year environmental assessment process related to the efforts of Redfern Resources Ltd. ("Redfern") to reopen an old mine. Ultimately, the TRTFN found itself disappointed in the process and in the result.

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

II. Facts and Decisions Below

3 The Tulsequah Chief Mine, operated in the 1950s by Cominco Ltd., lies in a remote and pristine area of northwestern British Columbia, at the confluence of the Taku and Tulsequah Rivers. Since 1994, Redfern has sought permission from the British Columbia government to reopen the mine, first under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, and then, following its enactment in 1995, under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. During the environmental assessment process, access to the mine emerged as a point of contention. The members of the TRTFN, who participated in the assessment as Project Committee members, objected to Redfern's plan to build a 160-km road from the mine to the town of Atlin through a portion of their traditional territory. However, after a lengthy process, project approval was granted on March 19, 1998 by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines ("Ministers").

4 The Redfern proposal was assessed in accordance with British Columbia's *Environmental Assessment Act*. The environmental assessment process is distinct from both the land use planning process and the treaty negotiation process, although these latter processes may necessarily have an impact on the assessment of individual proposals.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

The following provisions are relevant to this matter.

5 Section 2 sets out the purposes of the Act, which are:

(a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,

(b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,

(c) to prevent or mitigate adverse effects of reviewable projects,

(d) to provide an open, accountable and neutrally administered process for the assessment

(i) of reviewable projects, and

. . . . .

(e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

6 "The proponent of a reviewable project may apply for a project approval certificate" under s. 7 of the Act, providing a "preliminary overview of the reviewable project, including" potential effects and proposed mitigation measures. If the project is accepted for review, "the executive director must establish a project committee" for the project (s. 9(1)). The executive director must invite a number of groups to nominate members to the committee, including "any first nation whose traditional territory includes the site of the project or is in the vicinity of the project" (s. 9(2)(d)). Under s. 9(6), the committee "may determine its own procedure, and provide for the conduct of its meetings".

7 Redfern's proposal was accepted for review under the former *Mine Development Assessment Act*, and a project committee was established in November 1994. Invited to participate were the TRTFN, the British Columbia, federal, Yukon, United States, and Alaskan governments, as well as the Atlin Advisory Planning Commission. When the *Environmental Assessment Act* was instituted, the Project Committee was formally constituted under s. 9. Working groups and technical sub-committees were formed, including a group to deal with Aboriginal concerns and a group to deal with issues around transportation options. The TRTFN participated in both of these groups. A number of studies were commissioned and provided to the Project Committee during the assessment process.

8 The project committee becomes the primary engine driving the assessment process. It must act in accordance with the purposes of a project committee, set out in s. 10 as:

(a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and

(b) to analyze and advise the executive director, the minister and the responsible minister as to,

(i) the comments received in response to an invitation for comments under this Act,

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

(ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,

(iii) the potential effects, and

(iv) the prevention or mitigation of adverse effects.

9 The proponent of the project is required to engage in public consultation and distribution of information about the proposal (ss. 14-18). After the period for receipt of comments has expired, the executive director must either "refer the application to the [Ministers] ... for a decision ... or order that a project report be prepared ... and that the project undergo further review" (s. 19(1)). If a project report is to be prepared, the executive director must prepare draft project report specifications indicating what information, analysis, plans or other records are relevant to an effective assessment, on the recommendation of the project committee (s. 21(a)). Sections 22 and 23 set out a non-exhaustive list of what matters may be included in a project report. These specifications are provided to the proponent (s. 21(b)).

10 In this case, Redfern was required to produce a project report, and draft project report specifications were provided to it. Additional time was granted to allow the executive director and Project Committee to prepare specifications.

11 When the proponent submits a project report, the project committee makes a recommendation to the executive director, whether to accept the report for review or to withhold acceptance if the report does not meet the specifications. Redfern submitted a multiple volume project report in November 1996. A time limit extension was granted to allow extra time to complete the review of the report. In January 1997, the Project Committee concluded that the report was deficient in certain areas, and Redfern was required to address the deficiencies.

12 Through the environmental assessment process, the TRTFN's concerns with the road proposal became apparent. Its concerns crystallized around the potential effect on wildlife and traditional land use, as well as the lack of adequate baseline information by which to measure subsequent effects. It was the TRTFN's position that the road ought not to be approved in the absence of a land use planning strategy and away from the treaty negotiation table. The environmental assessment process was unable to address these broader concerns directly, but the project assessment director facilitated the TRTFN's access to other provincial agencies and decision makers. For example, the Province approved funding for wildlife monitoring programs as desired by the TRTFN (the Grizzly Bear Long-term Cumulative Effects Assessment and Ungulate Monitoring Program). The TRTFN also expressed interest in TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of the use of the access road by third parties. It was informed that these issues were outside the ambit of the certification process and could only be the subject of later negotiation with the government.

13 While Redfern undertook to address other deficiencies, the Environmental Assessment Office's project assessment director engaged a consultant acceptable to the TRTFN, Mr. Lindsay Staples, to perform traditional land use studies and address issues raised by the TRTFN. Redfern submitted its upgraded report in July 1997, but was requested to await receipt of the Staples Report. The Staples Report, prepared by August 1997, was provided for inclusion in the Project Report. The Project Report was distributed for review in September 1997, with public comments received for a 60-day period thereafter. However, the TRTFN, upon reviewing the Staples Report, voiced additional concerns. In response, the Environmental Assessment Office engaged Staples to prepare an addendum to his report, which was completed in December 1997 and also included in the Project Report from that time forward.

14 Under the Act, the executive director, upon accepting a project report, may refer the application for a project

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

approval certificate to the Ministers for a decision (s. 29). "In making a referral ... the executive director must take into account the application, the project report and any comments received about them" (s. 29(1)). "A referral ... may be accompanied by recommendations of the project committee" (s. 29(4)). There is no requirement under the Act that a project committee prepare a written recommendations report.

15 In this case, the staff of the Environmental Assessment Office prepared a written Project Committee Recommendations Report, the major part of which was provided to committee members for review in early January 1998. The final 18 pages were provided as part of a complete draft on March 3, 1998. The majority of the committee members agreed to refer the application to the Ministers and to recommend approval for the project subject to certain recommendations and conditions. The TRTFN did not agree with the Recommendations Report, and instead prepared a minority report stating their concerns with the process and the proposal.

16 After a referral under s. 29 is made, "the ministers must consider the application and any recommendations of the project committee" (s. 30(1)(a)), in order to either "issue a project approval certificate", "refuse to issue the ... certificate", or "refer the application to the Environmental Assessment Board for [a] public hearing" (s. 30(1)(b)). Written reasons are required (s. 30(1)(c)).

17 The executive director referred Redfern's application to the Ministers on March 12, 1998. The referral included the Project Committee Recommendations Report, the Project Approval Certificate in the form that it was ultimately signed, and the TRTFN Report (A.R., Vol. V, p. 858). In addition, the Recommendations Report explicitly identified TRTFN concerns and points of disagreement throughout, as well as suggested mitigation measures. The Ministers issued the Project Approval Certificate on March 19, 1998, approving the proposal subject to detailed terms and conditions.

18 Issuance of project approval certification does not constitute a comprehensive "go-ahead" for all aspects of a project. An extensive "permitting" process precedes each aspect of construction, which may involve more detailed substantive and information requirements being placed on the developer. Part 6 of the Project Committee's Recommendations Report summarized the requirements for licences, permits and approvals that would follow project approval in this case. In addition, the Recommendations Report made prospective recommendations about what ought to happen at the permit stage, as a condition of certification. The Report stated that Redfern would develop more detailed baseline information and analysis at the permit stage, with continued TRTFN participation, and that adjustments might be required to the road route in response. The majority also recommended creation of a resource management zone along the access corridor, to be in place until completion of a future land use plan; the use of regulations to control access to the road; and creation of a Joint Management Committee for the road with the TRTFN. It recommended that Redfern's future Special Use Permit application for the road be referred to the proposed Joint Management Committee.

19 The TRTFN brought a petition in February 1999 under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, to quash the Ministers' decision to issue the Project Approval Certificate on administrative law grounds and on grounds based on its Aboriginal rights and title. Determination of its rights and title was severed from the judicial review proceedings and referred to the trial list, on the Province's application. The chambers judge on the judicial review proceedings, Kirkpatrick J., concluded that the Ministers should have been mindful of the possibility that their decision might infringe Aboriginal rights, and that they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001 (B.C. S.C. [In Chambers])). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59 (B.C. C.A.)). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.), heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Mine had the potential to adversely affect the substance of the TRTFN's claims.

22 On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

A. Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?

23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida*, *supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at p. 1119, *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.); *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 168. The obligation to consult

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.

26 The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

27 When Redfern applied for project approval, in its efforts to reopen the Tulsequah Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

B. What was the Scope and Extent of the Province's Duty to Consult and Accommodate the TRTFN?

29 The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida*, *supra*, at para. 39). It will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

31 The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life (at para. 70). The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-km^2 area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy: see, for example, Dewhirst Report, R.R., Vol. I, at pp. 175, 187, 190 and 200; Staples Addendum Report, A.R., Vol. IV, at pp. 595-600, 604-5 and 629. The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

32 In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

C. Did the Crown Fulfill its Duty to Consult and Accommodate the TRTFN?

33 The process of granting project approval to Redfern took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications (the "Specifications") detail a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern's exploration activities and TRTFN's concerns and information requirements. Redfern also contracted an independent consultant to conduct archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life: Southin J.A., at para. 41. The Specifications document TRTFN's written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of the proposed access road, of barging and of mine development activities: Southin J.A., at para. 41.

36 The TRTFN declined to participate in the Road Access Subcommittee until January 26, 1998. The Environmental Assessment Office appreciated the dilemma faced by the TRTFN, which wished to have its concerns addressed on a broader scale than that which is provided for under the Act. The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

37 With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN's concerns, the Environmental Assessment Office commissioned an addendum. The TRTFN notes that the Staples Addendum Report was not specifically referred to in the Recommendations Report eventually submitted to the Ministers. However, it did form part of Redfern's Project Report.

38 While acknowledging its participation in the consultation process, the TRTFN argues that the rapid conclusion to the assessment deprived it of meaningful consultation. After more than three years, numerous studies and meetings, and extensions of statutory time periods, the assessment process was brought to a close in early 1998. The Environmental Assessment Office stated on February 26 that consultation must end by March 4, citing its work load. The Project Committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report. Appendix C to the Recommendations Report notes that the TRTFN disagreed with the Recommendations Report because of certain "information deficiencies": Southin J.A., at para. 46. Thus, the TRTFN prepared a minority report that was submitted with the majority report to the Ministers on March 12. Shortly thereafter, the project approval certification was issued.

39 It is clear that the process of project approval ended more hastily than it began. But was the consultation provided by the Province nonetheless adequate? On the findings of the courts below, I conclude that it was.

40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (at para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.

41 The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

42 As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982*, is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

43 The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

44 With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46 The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.

IV. Conclusion

47 In summary, I conclude that the consultation and accommodation engaged in by the Province prior to issuing the Project Approval Certificate for the Tulsequah Chief Mine were adequate to satisfy the honour of the Crown. The appeal is allowed. Leave to appeal was granted on terms that the appellants pay the party and party costs of the respondents TRTFN and Melvin Jack for the application for leave to appeal and for the appeal in any event of the cause. There will be no order as to costs with respect to the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd.

Appeal allowed.

Pourvoi accueilli.

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1992 CarswellNat 1313

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, MINISTER OF TRANSPORT and MINISTER OF FISHERIES AND OCEANS v. FRIENDS OF THE OLDMAN RIVER SOCIETY; ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL FOR NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL FOR SASKATCHEWAN, ATTORNEY GENERAL OF NEWFOUNDLAND, MINISTER OF JUSTICE OF THE NORTHWEST TERRITORIES, NATIONAL INDIAN BROTHERHOOD/ASSEMBLY OF FIRST NATIONS, DENE NATION AND METIS ASSOCIATION OF THE NORTHWEST TERRITORIES, NATIVE COUNCIL OF CANADA (ALBERTA), SIERRA LEGAL DEFENCE FUND, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, SIERRA CLUB OF WESTERN CANADA, CULTURAL SURVIVAL (CANADA), FRIENDS OF THE EARTH and ALBERTA WILDERNESS ASSOCIATION (Intervenors)

Supreme Court of Canada

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

Heard: February 19 and 20, 1991
Judgment: January 23, 1992
Docket: Doc. 21890

Counsel: *D.R. Thomas, Q.C., T.W. Wakeling* and *G.D. Chipeur* , for appellant the Crown in Right of Alberta.

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G.H. Copley , for intervenor Attorney General of British Columbia.

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B.G. Welsh , for intervenor Attorney General of Newfoundland.

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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

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

J.J. Gill and *Karen M. Trace* , for intervenors 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 intervenors 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 intervenor the Alberta Wilderness Association.

Subject: Environmental; Public

Administrative Law --- Certiorari — Discretion of court to refuse certiorari — Miscellaneous grounds.

Environmental Law --- Statutory protection of environment — Environmental assessment — General.

Environmental Law --- Statutory protection of environment — Environmental assessment — Need for assessment — Whether assessment guidelines binding.

Environmental law — Environmental assessments — Federal Minister of Environment establishing environmental guidelines by means of Guidelines Order under s. 6 of Department of the Environment Act — Section 6 sustaining enactment of mandatory guidelines — Guidelines Order as framed being mandatory — Guidelines Order being consistent with Navigable Waters Protection Act — Nothing in Guidelines Order preventing Minister of Transport from exercising discretion under s. 6(4) of Navigable Waters Act to approve work already built — Guidelines Order not applying only to new projects and federal projects.

Environmental law — Legislation — Interpretation — Federal Minister of Environment establishing environmental guidelines by means of Guidelines Order under s. 6 of Department of the Environment Act — Section 6 sustaining enactment of mandatory guidelines — Guidelines Order as framed being mandatory — Guidelines Order being consistent with Navigable Waters Protection Act — Nothing in Guidelines Order preventing Minister of Transport from exercising discretion under s. 6(4) of Navigable Waters Act to approve work already built — Guidelines Order not applying only to new projects and federal projects.

Environmental law — Environmental assessments — Province obtaining approval to build dam on river from federal Minister of Transport under s. 5 of Navigable Waters Protection Act — Society applying for certiorari and mandamus to compel transport and fisheries ministers to comply with federal Guidelines Order under Department of Environment Act — Guidelines Order applying to project where federal government having statutory, affirmative regulatory duty relating to proposal — Federal government not necessarily being sole decision-making authority — Guidelines Order creating super-added duty attaching to any other statutory power residing in ministers — Court accepting generally held definition of environment and not confining concept to biophysical environment — Guidelines Order requiring broad interpretation in compliance with objective of making environmental impact assessment an essential component of federal decision-making — Minister of Transport having affirmative regulatory duty regarding project but Minister of Fisheries having only discretionary duty — Supreme Court of Canada granting application only against Minister of Transport.

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Environmental law — Legislation — Interpretation — Province obtaining approval to build dam on river from federal Minister of Transport under s. 5 of Navigable Waters Protection Act — Society applying for certiorari and mandamus to compel transport and fisheries ministers to comply with federal Guidelines Order under Department of Environment Act — Guidelines Order applying to project where federal government having statutory, affirmative regulatory duty relating to proposal — Federal government not necessarily being sole decision-making authority — Guidelines Order creating super-added duty attaching to any other statutory power residing in ministers — Court accepting generally held definition of environment and not confining concept to biophysical environment — Guidelines Order requiring broad interpretation in compliance with objective of making environmental impact assessment an essential component of federal decision-making — Minister of Transport having affirmative regulatory duty regarding project but Minister of Fisheries having only discretionary duty — Supreme Court of Canada granting application only against Minister of Transport.

Energy and natural resources — Water — Riparian rights — Prevention and removal of obstructions — Province obtaining approval to build dam on river from federal Minister of Transport under s. 5 of Navigable Waters Protection Act — Society applying for certiorari and mandamus to compel transport and fisheries ministers to comply with federal Guidelines Order under Department of Environment Act — Guidelines Order applying to project where federal government having statutory, affirmative regulatory duty relating to proposal — Federal government not necessarily being sole decision-making authority — Guidelines Order creating super-added duty attaching to any other statutory power residing in ministers — Court accepting generally held definition of environment and not confining concept to biophysical environment — Guidelines Order requiring broad interpretation in compliance with objective of making environmental impact assessment an essential component of federal decision-making — Minister of Transport having affirmative regulatory duty regarding project but Minister of Fisheries having only discretionary duty — Supreme Court of Canada granting application only against Minister of Transport.

Fish and game — Legislation — Interpretation — Province obtaining approval to build dam on river from federal Minister of Transport under s. 5 of Navigable Waters Protection Act — Society applying for certiorari and mandamus to compel transport and fisheries ministers to comply with federal Guidelines Order under Department of Environment Act — Guidelines Order applying to project where federal government having statutory, affirmative regulatory duty relating to proposal — Federal government not necessarily being sole decision-making authority — Guidelines Order creating super-added duty attaching to any other statutory power residing in ministers — Court accepting generally held definition of environment and not confining concept to biophysical environment — Guidelines Order requiring broad interpretation in compliance with objective of making environmental impact assessment an essential component of federal decision-making — Minister of Transport having affirmative regulatory duty regarding project but Minister of Fisheries having only discretionary duty — Supreme Court of Canada granting application only against Minister of Transport.

Crown — Statutes affecting Crown — Province obtaining approval to build dam on river from federal Minister of Transport under s. 5 of Navigable Waters Protection Act — Society applying for mandamus and certiorari compelling minister to comply with federal environmental guidelines — Navigable Waters Protection Act binding provincial Crown by necessary implication — Moreover, purpose of Act being wholly frustrated if provincial Crown not bound.

Energy and natural resources — Water — Riparian rights — Prevention and removal of obstructions — Province obtaining approval to build dam on river from federal Minister of Transport under s. 5 of Navigable Waters Protection Act — Society applying for mandamus and certiorari compelling minister to comply with federal environmental guidelines — Navigable Waters Protection Act binding provincial Crown by necessary implication — Moreover, purpose of Act being wholly frustrated if provincial Crown not bound.

Energy and natural resources — Water — Licences and permits — Province obtaining approval to build dam on river from federal Minister of Transport under s. 5 of Navigable Waters Protection Act — Society applying for mandamus and certiorari compelling minister to comply with federal environmental guidelines — Navigable Waters

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

Protection Act binding provincial Crown by necessary implication — Moreover, purpose of Act being wholly frustrated if provincial Crown not bound.

Constitutional law — Constitution Act, 1867 — Distribution of legislative powers — Federal Minister of Environment establishing environmental guidelines by means of Guidelines Order under s. 6 of Department of Environment Act — Environment not being independent matter of legislation under Constitution Act, 1867 but touching on several heads of power assigned to respective governments — Guidelines Order dealing in substance with environmental impact assessment facilitating decision-making under federal head of power through which proposal or project being regulated — Procedural element of Guidelines Order regulating federal institutions either as adjunct of particular legislative power involved or under s. 91 residuary power — Guidelines Order being intra vires Parliament.

Constitutional law — Judicial review of legislation — Principles of interpretation — Pith and substance doctrine — Federal Minister of Environment establishing environmental guidelines by means of Guidelines Order under s. 6 of Department of Environment Act — Environment not being independent matter of legislation under Constitution Act, 1867 but touching on several heads of power assigned to respective governments — Guidelines Order dealing in substance with environmental impact assessment facilitating decision-making under federal head of power through which proposal or project being regulated — Procedural element of Guidelines Order regulating federal institutions either as adjunct of particular legislative power involved or under s. 91 residuary power — Guidelines Order being intra vires Parliament.

Environmental law — Environmental assessments — Federal Minister of Environment establishing environmental guidelines by means of Guidelines Order under s. 6 of Department of Environment Act — Environment not being independent matter of legislation under Constitution Act, 1867 but touching on several heads of power assigned to respective governments — Guidelines Order dealing in substance with environmental impact assessment facilitating decision-making under federal head of power through which proposal or project being regulated — Procedural element of Guidelines Order regulating federal institutions either as adjunct of particular legislative power involved or under s. 91 residuary power — Guidelines Order being intra vires Parliament.

Administrative law — Judicial review of decisions — Remedies — Discretion to refuse — Province obtaining approval to build dam on river from federal Minister of Transport after years of provincial study — Society applying in federal court for certiorari and mandamus compelling minister to comply with federal environmental guidelines after taking several unsuccessful provincial actions — Dam being almost 40 per cent complete at time of application — Motions court judge dismissing application on grounds of delay and duplication — Federal Court of Appeal and Supreme Court of Canada finding delay reasonable under circumstances and granting application.

Civil procedure — Appeals — Powers of court — Discretionary rulings — Province obtaining approval to build dam on river from federal Minister of Transport after years of provincial study — Society applying in federal court for certiorari and mandamus compelling minister to comply with federal environmental guidelines after taking several unsuccessful provincial actions — Dam being almost 40 per cent complete at time of application — Motions court judge dismissing application on grounds of delay and duplication — Federal Court of Appeal and Supreme Court of Canada finding delay reasonable under circumstances and granting application.

Costs — Parties entitled to or liable for costs — Intervenors and volunteers — Public interest group successfully applying for certiorari and mandamus compelling federal Minister of Transport to comply with federal environmental guidelines — Supreme Court of Canada awarding solicitor and client costs throughout.

Costs — Orders as to costs — Solicitor-and-client basis — Public interest group successfully applying for certiorari and mandamus compelling federal Minister of Transport to comply with federal environmental guidelines — Supreme Court of Canada awarding solicitor and client costs throughout.

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The province of Alberta proposed to construct a dam on the Oldman River. Over several years it conducted extensive environmental studies which took into account public views. However, since the project affected navigable waters, fisheries, Indians and Indian lands, federal interests were involved. The province finally applied to the federal Minister of Transport for approval of the project under s. 5 of the *Navigable Waters Protection Act* . It provides that no work is to be built in navigable waters without the prior approval of the minister. The minister approved the application. In assessing the application he considered the project's effect on marine navigation, but he did not subject it to an assessment under the *Guidelines Order* which had been approved pursuant to s. 6 of the *Department of the Environment Act* . These guidelines require all federal departments that have a decision-making authority for any activity that may have an environmental effect on an area of federal responsibility to initially screen such a proposal to determine whether it may give rise to any potentially adverse environmental effects. If it may, provision is made for public review by an unbiased, expert environmental assessment panel. The society became aware of the approval granted by the Minister of Transport five months after it was granted. The society brought several proceedings in Alberta courts to have the project stopped, but all were ultimately unsuccessful. Fourteen months after it learned of the approval, when the dam was 40 per cent complete, the society commenced action in the federal court. In the action, the society applied for certiorari to quash the approval, and for mandamus requiring the Minister of Transport and the Minister of Fisheries and Oceans to comply with the *Guidelines Order* . The motions judge dismissed the application, holding that both ministers were without jurisdiction to apply the *Guidelines Order* . He also exercised his discretion not to grant the relief, because of delay and the unnecessary duplication that would result. The Federal Court of Appeal reversed the decision. It found that both ministers were compelled to apply the *Guidelines Order* , and that the *Navigable Waters Protection Act* binds the provincial Crown. It also found that the delay was explained by the facts, in particular that the society did not become aware of the approval until two months before the action was commenced and it was otherwise engaged in challenging the provincial licence issued. Moreover, there was no unnecessary duplication because the provincial environmental review process was deficient when contrasted with that required by the *Guidelines Order* . The Crown appealed.

Held:

Appeal allowed in part; order of mandamus against Minister of Fisheries and Oceans quashed with solicitor and client costs to society throughout.

Per La Forest J. (Lamer C.J.C., L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. concurring):

The power to make mandatory subordinate legislation, non-compliance with which can found prerogative relief, must lie within the four corners of the enabling statute. Section 6 of the *Department of the Environment Act* is capable of supporting the enactment of mandatory guidelines, and the guidelines as framed are mandatory in nature. There is nothing to indicate that the *Guidelines Order* is merely another form of administrative directive which cannot confer enforceable rights. In contrast with the usual ministerial internal policy guidelines, the *Guidelines Order* is a directive that is required to be formally enacted by "order," and promulgated under s. 6 with the approval of the Governor in Council. The word "guidelines" is in itself neutral in this regard. Upon reading s. 6 as a whole it is clear that Parliament has adopted a regulatory scheme that is "law." The subject matter covered in the *Guidelines Order* does not go beyond that authorized by the Act. The concept that environmental quality is confined to the biophysical environment alone is contrary to the generally held view that the "environment" is a diffuse subject matter. The potential consequences for a community's livelihood, health and other social matters stemming from environmental change are integral to decision-making on matters affecting environmental quality, subject to the constitutional imperatives.

The *Guidelines Order* is consistent with the *Navigable Waters Protection Act* . While subordinate legislation cannot conflict with other Acts of Parliament, as a matter of construction a court will prefer an interpretation that permits reconciliation of the two. Here, if the Act limited the Minister of Transport to considering only the potential effects

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

on marine navigation, he would be unlikely to give approval to the dam because by its very nature it interferes with navigation. The *Guidelines Order* requires the minister to consider the environmental impact of a work. It creates a duty which is "super-added" to any other statutory power residing in him which can stand with that power. The minister cannot narrowly interpret his existing statutory powers to avoid compliance with the *Guidelines Order* , the application of which should be broadly interpreted to comply with its objective of making environmental impact assessment an essential component of federal decision-making. To hold otherwise would set aside the legislative scheme in the Department of the Environment Act for protecting the environment. Nor is s. 3 of the *Guidelines Order* inconsistent with s. 6 of the *Navigable Waters Protection Act* . The fundamental requirement set out in s. 5(1)(*a*) of the Act is that an approval be obtained prior to commencement of construction. Nothing in the *Guidelines Order* prevents the minister from exercising his discretion under s. 6(4) of the Act to approve a work that has already been built.

The *Department of the Environment Act* applies to the project. Section 4(1)(*a*) of the Act does not oust the environment minister's jurisdiction merely because the *Fisheries Act* regulates all "matters" affecting fish habitat. The "matters" covered by the two Acts are different. The *Guidelines Order* establishes an environmental assessment *process* for use by all federal departments whereas the *Fisheries Act* embraces the *substantive matter* of protecting fish and fish habitat. Nor is the *Guidelines Order* restricted to new federal projects by s. 5(*a*)(ii) of the *Department of the Environment Act* . The *Guidelines Order* was enacted under s. 6 of the Act, and the powers of the minister encompass matters found in s. 4 as well as s. 5, including the preservation of the environment generally.

In applying the guidelines, there must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision-making responsibility." "Responsibility" means that the federal government, having entered a field assigned to it under the *Constitution Act, 1867* , must have a statutory affirmative regulatory duty which relates to the proposed initiative. "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, but not necessarily the sole decision-making authority. Once such a duty exists, the "initiating department" responsible for its performance becomes the decision-making authority responsible for initiating the process under the *Guidelines Order* . Here, the project qualified as a "proposal" for which the Minister of Transport alone was the "initiating department." The project might have an environmental effect on an area of federal responsibility. The *Navigable Waters Protection Act* places an affirmative duty on the minister. His approval is required for any work that substantially interferes with navigation, and s. 5 gives him the power to impose or to enforce such conditions as he deems fit on any approval granted. However, the Minister of Fisheries and Oceans is merely given a discretion under the *Fisheries Act* to request information to assist him in exercising an ad hoc delegated legislative power to allow an exemption from the general prohibition against any work harming fish habitat. This discretionary power does not constitute a decision-making responsibility within the meaning of the *Guidelines Order* as it is not an affirmative regulatory duty. Thus the application for mandamus against the Minister of Fisheries and Oceans could not succeed.

Section 17 of the *Interpretation Act* codifies the presumption that the Crown is not bound by statute. However, the Crown may be bound if: 1) the statute expressly binds it; 2) a contextual analysis of the statute, including the circumstances of its enactment and the mischief addressed, reveals the necessary implication that it is bound; or, 3) the statute otherwise would be wholly frustrated. There are no express words in the *Navi- gable Waters Protection Act* binding the Crown. However, the provincial Crown is bound by the Act by necessary implication. The exceptions contained in s. 4 of the Act and, more importantly, the circumstances surrounding the Act's passage lead to that logical inference. Neither the Crown nor its grantees may interfere with the public right of navigation without legislative authorization. Any right of the provincial Crown in the river bed is subject to that right of navigation, over which the federal Crown has exclusive legislative jurisdiction. The Act is the means by which the Alberta Crown must obtain the required federal legislative authorization to erect any obstruction that substantially interferes with navigation in the Oldman River. The provincial Crown is thus bound by the Act, for it is the only practicable procedure available for getting approval. Moreover, the purpose of the Act would otherwise be wholly frustrated. The regulation of navigable waters must be viewed functionally as an integrated whole. It would result in an absurdity if the provincial

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

Crown was left to obstruct navigation with impunity at one point along a navigational system while Parliament worked to preserve its navigability at another point.

If legislation relates in "pith and substance" to matters within Parliament's exclusive jurisdiction, it is not ultra vires Parliament. The "pith and substance" is the dominant or most important characteristic of the challenged law. The environment is not an independent matter of legislation under the *Constitution Act, 1867* . As understood in its generic sense, it encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government. Environ mental legislation must be linked to the appropriate head of power. Rather than characterizing a project as "provincial" or "federal," it should be determined whether either level of government may legislate. A local project falling within provincial responsibility may require federal participation if the project impinges on an area of federal jurisdiction. Absent a colourable purpose or lack of bona fides, the purpose or implications of legislation will not detract from its fundamental nature.

The *Guidelines Order* is intra vires Parliament. It can be supported by the particular head of federal power invoked in each instance. The scope of the assessment is not confined to the particular head of power under which the federal Crown has a decision-making responsibility. In fact, the initiating department has the responsibility for assessing the environmental implications on all areas of federal jurisdiction. Thus the *Guidelines Order* has two fundamental aspects. First, in substance it deals with environmental impact assessment to facilitate decision-making under the federal head of power through which a proposal is regulated. This can be sustained on the basis it is legislation in relation to the relevant s. 91 subject matter. Second, its procedural element co-ordinates the assessment process which can touch upon several areas of federal responsibility. This facet of the legislation in pith and substance regulates federal institutions. It is unquestionably intra vires Parliament, either as an adjunct of the particular legislative power involved or under the s. 91 residuary power. Any intrusion of the *Guidelines Order* into provincial matters is merely incidental to its pith and substance.

An appeal court should not reverse an order made by a judge in the exercise of his discretion unless it reaches the clear conclusion that no weight, or no sufficient weight, was given to relevant considerations. 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. The question of unreasonableness will turn on the facts of each case. While the motions judge took cognizance of the time that had elapsed before the application was filed, he ignored the considerable other activity of the society in opposing the dam during that time. That was a concerted and sustained effort by the society to challenge the legality of the process followed by the province to build the dam. As construction of the dam continued, there was no evidence that the province suffered any prejudice from any delay in taking the action. The motions judge did not weigh those considerations adequately or at all, and so the appeal court was justified in interfering with the exercise of his discretion.

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. Here, aside from the qualitative differences between the process mandated by the *Guidelines Order* and what had gone before, implementation of the *Guidelines Order* even at a late stage might have some influence over mitigating measures that might be taken to ameliorate any deleterious impact from the dam on an area of federal jurisdiction. The society should be awarded costs on a solicitor and client basis.

Per Stevenson J. (dissenting):

The analysis of La Forest J. of the constitutional questions and his interpretation of the provisions implementing the *Guidelines Order* should be followed.

Neither the federal nor the provincial Crowns are bound by the *Navigational Waters Protection Act* : the Crown is indivisible for this purpose. Pursuant to the *Interpretation Act* , the Crown is not bound by legislation unless it is mentioned or referred to in the legislation by: 1) expressly binding words; 2) a clear intention to bind manifest from

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

the very terms of the statute; or, 3) an intention to bind where the purpose of the statute would otherwise be wholly frustrated. Here there are no words in the Act expressly binding the Crown, nor is a clear intention to bind the Crown manifest from the very terms of the statute. Excluding the Crown would not wholly frustrate the Act because there are many private and municipal undertakings also subject to the Act. If the Crown interferes with public rights of navigation, that wrong is remediable by action. Moreover, in invoking the Act, the province did not accept the burden of the environmental regulation regime. There was no significant benefit in approval under s. 5 of the Act, and tort actions might still lie.

Certiorari and mandamus are discretionary remedies by nature, and the applicant has a duty to act promptly in seeking such remedies. Interference by an appellate court is only warranted when a lower court has gone wrong in principle or has given insufficient weight to a relevant consideration. Here the appellate court was wrong in saying that the society did not become aware of the grant of approval until two months before proceedings were launched when it was actually 14 months. Given the enormity of the project, it was unreasonable for the society to wait 14 months before challenging the approval. By then the dam was nearly 40 per cent completed and it would have been impossible to conclude that the province was not prejudiced by the delay. The society's other legal challenges to the project need not have been taken into consideration by the motions judge, as they did not preclude the society from undertaking this challenge.

The general rule in the Supreme Court of Canada is that a successful party recovers costs on the usual party and party basis. Public interest groups should be prepared to abide by the same principles. Those undertaking litigation must be prepared to accept some responsibility for the costs.

Cases considered:

Considered by majority:

Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 2 S.C.R. 225, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 61 D.L.R. (4th) 193, *(*sub nom. *CNCP Telecommunications v. Alberta Government Telephones)* 98 N.R. 161 — *considered*

Angus v. Canada, [1990] 3 F.C. 410, 5 C.E.L.R. (N.S.) 157, 72 D.L.R. (4th) 672, 111 N.R. 321 (C.A.) — *considered*

Anti-Inflation Act, Re, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541 — *considered*

Attorney General v. Johnson (1819), 2 Wils. Ch. 87, 37 E.R. 240 (L.C.) — *considered*

Belanger v. R. (1916), 54 S.C.R. 265, 20 C.R.C. 343, 34 D.L.R. 221 — *referred to*

Bombay Province v. Bombay Municipal Corp., [1947] A.C. 58 (P.C.) — *considered*

Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment), [1989] 3 F.C. 309, [1989] 4 W.W.R. 526, 37 Admin. L.R. 39, 3 C.E.L.R. (N.S.) 287, 26 F.T.R. 245 , affirmed [1990] 2 W.W.R. 69, 38 Admin. L.R. 138, 4 C.E.L.R. (N.S.) 1, 27 F.T.R. 159, 99 N.R. 72 (C.A.) — *considered*

Champion v. Vancouver, [1918] 1 W.W.R. 216 (S.C.C.) — *distinguished*

Charles Osenton & Co. v. Johnston, [1942] A.C. 130, [1941] 2 All E.R. 245 (H.L.) — *considered*

Cie des chemins de fer nationaux du Canada c. Courtois, [1988] 1 S.C.R. 868, 15 Q.A.C. 181, 85 N.R. 260 [Que.] — *distinguished*

Daniels v. White, [1968] S.C.R. 517, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1 *referred to*

Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, 10 C.H.R.R. D/5610, 36 C.R.R. 64, 55 D.L.R. (4th) 641, *(*sub nom. *Allan Singer Ltd. v. Quebec (Attorney General))* 90 N.R. 48, 19 Q.A.C. 33 — *referred to*

Environmental Defense Fund Inc. v. Mathews, 410 F. Supp. 336 (D.C.D.C., 1976) — *considered*

Flewelling v. Johnston, [1921] 2 W.W.R. 374, 16 Alta. L.R. 409, 59 D.L.R. 419 (C.A.) — *considered*

Fowler v. R., [1980] 2 S.C.R. 213, [1980] 5 W.W.R. 511, 9 C.E.L.R. 115, 53 C.C.C. (2d) 97, 113 D.L.R. (3d) 513, 32 N.R. 230 — *considered*

Friends of Oldman River Society v. Alberta (Energy Resources Conservation Board) (1988), 58 Alta. L.R. (2d) 286, 89 A.R. 280 (C.A.) — *considered*

Friends of Oldman River Society v. Alberta (Minister of the Environment) (1987), 56 Alta. L.R. (2d) 368, 2 C.E.L.R. (N.S.) 234, 85 A.R. 321 (Q.B.) — *considered*

Friends of Oldman River Society v. Alberta (Minister of the Environment) (1988), 4 C.E.L.R. (N.S.) 129, 89 A.R. 339 (Q.B.) — *considered*

Grey, Re, 57 S.C.R. 150, [1918] 3 W.W.R. 111, 42 D.L.R. 1 — *referred to*

Harelkin v. University of Regina, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 14, 26 N.R. 364 [Sask.] — *applied*

Isherwood v. Ontario & Minnesota Power Co. (1911), 18 O.W.R. 459, 2 O.W.N. 651 (Div. Ct.) — *considered*

Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182, 7 N.B.R. (2d) 526, 16 C.C.C. (2d) 297, *(*sub nom. *Jones v. Canada (Attorney General))* 45 D.L.R. (3d) 583, *(*sub nom. *Reference re Official Languages of New Brunswick Act)* 1 N.R. 582 — *referred to*

Knox Contracting Ltd. v. Canada, [1990] 2 S.C.R. 338, 90 D.T.C. 6447, [1990] 2 C.T.C. 262, 58 C.C.C. (3d) 65, 73 D.L.R. (4th) 110, 106 N.B.R. (2d) 408, 265 A.P.R. 408, 110 N.R. 171 — *referred to*

Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558, 44 N.R. 354 [Fed.] — *referred to*

Martineau v. Matsqui Institution, [1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285 [Fed.] — *distinguished*

Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia (1976), 136 C.L.R. 1 , 50 A.L.J.R. 570 (H.C.) — *considered*

Northwest Falling Contractors Ltd. v. R., [1980] 2 S.C.R. 292, [1981] 1 W.W.R. 681, 9 C.E.L.R. 145, 53

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

C.C.C. (2d) 353, 113 D.L.R. (3d) 1, 2 F.P.R. 296, 32 N.R. 541 — *considered*

Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839 (H.L.) — *considered*

Pacific Western Airlines Ltd., Re; R. v. Canadian Transport Commission, [1978] 1 S.C.R. 61, 2 Alta. L.R. (2d) 72 , 75 D.L.R. (3d 257, 2 A.R. 539, 14 N.R. 21 [Fed.] — *considered*

Polylok Corp. v. Montreal Fast Print (1975) Ltd., [1984] 1 F.C. 713, 1 C.I.P.R. 113, 41 C.P.C. 294, 76 C.P.R. (2d) 151, 52 N.R. 218 (C.A.) — *considered*

Provincial Fisheries, Re (1896), 26 S.C.R. 444 , on appeal *(*sub nom. *Canada (Attorney General) v. Ontario (Attorney General))* [1898] A.C. 700 (P.C.) — *referred to*

Queddy River Driving Boom Co. v. Davidson (1883), 10 S.C.R. 222 — *considered*

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, 25 B.C.L.R. (2d) 145, 3 C.E.L.R. (N.S.) 1, 40 C.C.C. (3d) 289, 48 D.L.R. (4th) 161, 84 N.R. 1 *considered*

R. v. Eldorado Nuclear Ltd., [1983] 2 S.C.R. 551, 7 Admin. L.R. 195, 77 C.P.R. (2d) 1, 8 C.C.C. (3d) 449, 4 D.L.R. (4th) 193, 1 O.A.C. 243, 50 N.R. 120 — *considered*

R. v. Fisher (1891), 2 Ex. C.R. 365 — *referred to*

R. v. Ouellette, [1980] 1 S.C.R. 568, 14 C.R. (3d) 74, 15 C.R. (3d) 373, 52 C.C.C. (2d) 536, 32 N.R. 361 [Que.] — *referred to*

R. & W. Paul Ltd. v. Wheat Commission, [1937] A.C. 139, [1936] 2 All E.R. 1243 (H.L.) — *referred to*

Reference re Waters and Waterpowers, [1929] S.C.R. 200, [1929] 2 D.L.R. 481 — *referred to*

Smith v. R., [1960] S.C.R. 776, 33 C.R. 318, 128 C.C.C. 145, 25 D.L.R. (2d) 225 [Ont.] — *referred to*

Sparling v. Quebec (Caisse de dépôt et placement du Québec), [1988] 2 S.C.R. 1015, 41 B.L.R. 1, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, *(*sub nom. *Sparling v. Quebec)* 89 N.R. 120 — *considered*

Whitbread v. Walley, [1990] 3 S.C.R. 1273, [1991] 2 W.W.R. 195, 52 B.C.L.R. (2d) 187, 77 D.L.R. (4th) 25, 120 N.R. 109 — *considered*

Wood v. Esson (1884), 9 S.C.R. 239 — *applied*

Considered in dissent:

Alberta Government Telephones v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 2 S.C.R. 225, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 61 D.L.R. (4th) 193, *(*sub nom. *CNCP Telecommunications v. Alberta Government Telephones)* 98 N.R. 161 — *applied*

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Champion v. Vancouver, [1918] 1 W.W.R. 216 (S.C.C.) — *applied*

Harelkin v. University of Regina, [1979] 2 S.C.R. 561, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 14, 26 N.R. 364 [Sask.] — *applied*

P.P.G. Industries Canada Ltd. v. Attorney General of Canada, [1976] 2 S.C.R. 739, 65 D.L.R. (3d) 354, 7 N.R. 209 — *applied*

Polylok Corp. v. Montreal Fast Print (1975) Ltd., [1984] 1 F.C. 713, 1 C.I.P.R. 113, 41 C.P.C. 294, 76 C.P.R. (2d) 151, 52 N.R. 218 (C.A.) — *applied*

Syndicat des employés du Commerce de Rivière-du-Loup (section Émilio Boucher, C.S.N.) v. Turcotte, [1984] C.A. 316 (C.A.) — *considered*

Statutes considered:

An Act for the better protection of Navigable Streams and Rivers, S.C. 1873, c. 65 — *referred to*

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 — *referred to*

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 — *considered*

An Act respecting Bridges over navigable waters, constructed under the authority of Provincial Acts, S.C. 1882, c. 37 — *referred to*

An Act respecting certain works constructed in or over Navigable Waters, S.C. 1886, c. 35

s. 1*considered*

s. 7*considered*

An Act respecting certain works constructed in or over Navigable Waters, S.C. 1886, c. 92 — *referred to*

An Act respecting the protection of Navigable Waters, S.C. 1886, c. 36 — *referred to*

An Act respecting the protection of Navigable Waters, S.C. 1886, c. 91 — *referred to*

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 — *referred to*

Code of Civil Procedure, R.S.Q. 1977, c. C-25

art. 835.1*referred to*

Constitution Act, 1867

s. 91*considered*

s. 91(10)*considered*

s. 91(29)*considered*

s. 92*considered*

s. 92(10)(a)*considered*

s. 92A*considered*

Department of Fisheries and Oceans Act, R.S.C. 1985, c. F-15 — *referred to*

Department of the Environment Act, R.S.C. 1985, c. E-10

s. 4*considered*

s. 4(1)(a)*considered*

s. 5*considered*

s. 5(a)(ii)*considered*

s. 6*considered*

Evidence Act, R.S.N.B. 1952, c. 74 — *referred to*

Federal Court Act, S.C. 1970-71-72, c. 1

s. 28(2)*referred to*

Fisheries Act, R.S.C. 1985, c. F-14

s. 35*considered*

s. 37(1)*considered*

s. 37(2)*considered*

s. 40*considered*

Hydro and Electric Energy Act, R.S.A. 1980, c. H-13 — *referred to*

International River Improvements Act, R.S.C. 1985, c. I-20 — *referred to*

Interpretation Act, R.S.C. 1985, c. I-21

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s. 2(1) "enactment"*considered*

s. 2(1) "regulation"*considered*

s. 17*considered*

Judicial Review of Procedure Act, R.S.B.C. 1979, c. 209

s. 11*referred to*

Judicial Review of Procedure Act, R.S.O. 1990, c. J.1

s. 5*referred to*

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.)

s. 3(1)(d)*considered*

Navigable Waters' Protection Act, R.S.C. 1906, c. 115 — *referred to*

Navigable Waters Protection Act, R.S.C. 1985, c. N-22

s. 4*considered*

s. 5*considered*

s. 6*considered*

s. 6(4)*considered*

s. 21*considered*

s. 22*considered*

Official Languages Act, R.S.C. 1970, c. O-2 — *referred to*

Official Languages of New Brunswick Act, S.N.B. 1969, c. 14 — *referred to*

Penitentiary Act, R.S.C. 1970, c. P-6

s. 29(3)*referred to*

Railway Act, R.S.C. 1985, c. R-2 — *considered*

Water Resources Act, R.S.A. 1980, c. W-5

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

s. 17*referred to*

Rules considered:

Alberta Rules of Court

R. 753.11(1)

Regulations considered:

Department of the Environment Act, R.S.C. 1985, c. E-10 — Environmental Assessment and Review Process Guidelines Order, SOR/84-467

s. 2 "initiating department"

s. 2 "proponent"

s. 2 "proposal"

s. 3

s. 4

s. 6

s. 8

s. 10

s. 12(f)

s. 14

s. 25

Words and phrases considered:

environmentguidelinesmattersproposalresponsibility

Appeal from judgment of Federal Court of Appeal, [1990] 2 F.C. 18, [1991] 1 W.W.R. 352, 76 Alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, 33 F.T.R. 160n, 108 N.R. 241 , reversing order of Jerome A.C.J., [1990] 1 F.C. 248, [1990] 2 W.W.R. 150, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137, 30 F.T.R. 108 , which dismissed application for certiorari and mandamus against Minister of Transport and Minister of Fisheries and Oceans.

***La Forest J. (Lamer C.J.C., L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin* and *Iacobucci JJ.* concurring):**

1 The protection of the environment has become one of the major challenges of our time. To respond to this

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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 20 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 composed 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 recom mended 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 inquiries. 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 re-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

serve 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 per cent complete. The present action was commenced on April 21, 1989 in the Trial Division of the Federal Court, [1990] 1 F.C. 248, [1990] 2 W.W.R. 150, 70 Alta. L.R. (2d) 289, 4 C.E.L.R. (N.S.) 137, 30 F.T.R. 108 . 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, [1991] 1 W.W.R. 352, 76 Alta. L.R. (2d) 289, 5 C.E.L.R. (N.S.) 1, 33 F.T.R. 160n, 108 N.R. 241 . 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*

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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, organizations 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.

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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, [1989] 4 W.W.R. 526, 37 Admin. L.R. 39, 3 C.E.L.R. (N.S.) 287, 26 F.T.R. 245 , affirmed [1990] 2 W.W.R. 69, 38 Admin. L.R. 138, 4 C.E.L.R. (N.S.) 1, 27 F.T.R. 159, 99 N.R. 72 (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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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 per cent 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* .

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 61 D.L.R. (4th) 193, *(*sub nom. *CNCP Telecommunications v. Alberta Government Telephones)* 98 N.R. 161 , 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, the Society then sought and was granted leave to appeal to this court, 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 submis-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

sions, but I prefer to deal with them as follows:

1. Statutory Validity of the Guidelines Order

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

33 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

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

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

36 c. Are the ministers "initiating departments"?

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

3. Constitutional Question

38 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

39 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?

40 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.

41 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 manda-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

tory nature, the non-compliance with which can found prerogative relief.

42 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).

43 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 *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541 , 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.

44 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*, [1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285 [Fed.]. 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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

> 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. Canada*, [1982] 2 S.C.R. 2, 137 D.L.R. (3d) 558, 44 N.R. 354 [Fed.]. 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.

45 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.

46 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.

47 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, 25 B.C.L.R. (2d) 145, 3 C.E.L.R. (N.S.) 1, 40 C.C.C. (3d) 289, 48 D.L.R. (4th) 161, 84 N.R. 1 . 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 environ-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

mental 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.

48 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

49 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.

50 The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. R.* (1916), 54 S.C.R. 265, 20 C.R.C. 343, 34 D.L.R. 221), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul Ltd. v. Wheat Commission*, [1937] A.C. 139, [1936] 2 All E.R. 1243 (H.L.)), unless a statute so authorizes (*Re Grey*, 57 S.C.R. 150, [1918] 3 W.W.R. 111, 42 D.L.R. 1). 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, 64 W.W.R. 385, 4 C.R.N.S. 176, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1 . 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. R.*, [1960] S.C.R. 776 at 800, 33 C.R. 318, 128 C.C.C. 145, 25 D.L.R. (2d) 225 [Ont.].

51 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 sig nificance 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.

52 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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

"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* .

53 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.C.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.

54 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.

55 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

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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

> 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," 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

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

Initiating Departments

58 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 con-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

cede 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.

59 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]

60 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:

> 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]

61 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 "pro-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

posal" 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.

62 In *Angus v. Canada*, [1990] 3 F.C. 410, 5 C.E.L.R. (N.S.) 157, 72 D.L.R. (4th) 672, 111 N.R. 321 (C.A.) , Décary J.A. adopted a similar approach to construing the *Guidelines Order* but in a different context. There the issue was whether the *Guidelines Order* applied to an order in council issued by the Governor in Council under s. 64 of the *National Transportation Act, 1987* , R.S.C. 1985, c. 28 (3rd Supp.), which required VIA Rail to eliminate or reduce certain passenger services. Although the case turned on the narrow issue of whether the *Guidelines Order* was binding on the Governor in Council, which does not arise here, and Décary J.A. was dissenting on this point, his overall analysis of the application of the *Guidelines Order* is helpful where he stated, at p. 434:

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

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

63 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* ." 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* .

64 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.

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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.

65 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."

66 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]

67 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 lim-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

ited 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

68 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.

69 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.

70 It is helpful to turn first to the common law. The leading case is the Privy Council decision in *Bombay Province v. Bombay Municipal Corp.*, [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."

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

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

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

72 As I mentioned in *Sparling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015 at 1022, 41 B.L.R. 1, 55 D.L.R. (4th) 63, 20 Q.A.C. 174, *(*sub nom.*Sparling v. Quebec)* 89 N.R. 120 , some doubt was

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

expressed in *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, 7 Admin. L.R. 195, 77 C.P.R. (2d) 1, 8 C.C.C. (3d) 449, 4 D.L.R. (4th) 193, 1 O.A.C. 243, 50 N.R. 120 , and *Re Pacific Western Airlines Ltd.; R. v. Canadian Transport Commission*, [1978] 1 S.C.R. 61, 2 Alta. L.R. (2d) 72, 75 D.L.R. (3d) 257, 2 A.R. 539, 14 N.R. 21 [Fed.] (cf. *R. v. Ouellette*, [1980] 1 S.C.R. 568, 14 C.R. (3d) 74, 15 C.R. (3d) 373, 52 C.C.C. (2d) 536, 32 N.R. 361 [Que.]), 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.

73 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.C. 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.

74 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.

75 In so doing, it is useful to return to some of the fundamental principles of water law in this area, particularly

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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.

76 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 *Re Provincial Fisheries* (1896), 26 S.C.R. 444 , on appeal *(*sub nom. *Canada (Attorney General) v. Ontario (Attorney General))* [1898] A.C. 700 (P.C.) ; for a summary of the cases, see my book on *Water Law In Canada: The Atlantic Provinces* (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] 2 W.W.R. 374, 16 Alta. L.R. 409, 59 D.L.R. 419 (C.A.) , 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.

77 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 at 846 (H.L.) . 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 (L.C.) , 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.

78 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 *R. v. Fisher* (1891), 2 Ex. C.R. 365 ; *Re Provincial Fisheries* , supra, at p. 549, per Girouard J.; and *Reference re Waters and Waterpowers*, [1929] S.C.R. 200, [1929] 2 D.L.R. 481 .

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

79 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.

80 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.

81 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).

82 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

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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.

83 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.

84 The 1886 Acts were re-enacted in R.S.C. 1886, c. 91 and c. 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.

85 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.

86 My colleague, Stevenson J., has however referred to the statement of Fitzpatrick C.J.C. in *Champion v. 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 & Minnesota Power Co.* (1911), 18 O.W.R. 459, 2 O.W.N. 651 (Div. Ct.) , that the Act does

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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.

87 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.

88 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 were left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point.

89 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, [1991] 2 W.W.R. 195, 52 B.C.L.R. (2d) 187, 77 D.L.R. (4th) 25, 120 N.R. 109 , and the reasoning given there in support of a single body of maritime law within federal jurisdiction is equally applicable to this case. At pp. 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

90 The constitutional question asks whether the *Guidelines Order* is so broad as to offend ss. 92 and 92A of the *Constitutional 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

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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 (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.

91 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.

92 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.

93 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 Univ. of Toronto 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.

94 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.,

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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).

95 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.

96 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.

97 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.

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

> 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.

98 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. R.*, [1980] 2 S.C.R. 213, [1980] 5 W.W.R. 511, 9 C.E.L.R. 115, 53 C.C.C. (2d) 97, 113 D.L.R. (3d) 513, 32 N.R. 230 , the court found that s. 33(3) of the *Fisheries Act* , R.S.C. 1970, c. F-14, 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. R.*, [1980] 2 S.C.R. 292, [1981] 1 W.W.R. 681, 9 C.E.L.R. 145, 53 C.C.C. (2d) 353, 113 D.L.R. (3d) 1, 2 F.P.R. 296, 32 N.R. 541 .

99 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.C. 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.

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

100 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.

101 An Australian case, *Murphyores Incorporated Pty. Ltd. v. Commonwealth of Australia* (1976), 136 C.L.R. 1 , 50 A.L.J.R. 570 (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 sub stances was regulated by the *Customs (Prohibited Exports) Regulations* (passed pursuant to the Commonwealth's trade and commerce power) and approval from the Minister for 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.

102 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 composed of all that is around us and as such must be a part of what actuates many decisions of any moment.

103 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), p. 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 deci-

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

sion-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, § 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.

104 The *Guidelines Order* has merely added to the matters that federal decision-makers should consider. If the Minister of Transport were 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.

105 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 808, 10 C.H.R.R. D/5610, 36 C.R.R. 64, 55 D.L.R. (4th) 641, *(*sub nom. *Allan Singer Ltd. v. Quebec (Attorney General))* 90 N.R. 48, 19 Q.A.C. 33 . 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.

106 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, 7 N.B.R. (2d) 526, 16 C.C.C. (2d) 297, *(*sub nom. *Jones v. Canada (Attorney General))* 45 D.L.R. (3d) 583, *(*sub nom. *Reference re Official Languages of New Brunswick Act)* 1 N.R. 582 , and *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338 at 350, 90 D.T.C. 6447, [1990] 2 C.T.C. 262, 58 C.C.C. (3d) 65, 73 D.L.R. (4th) 110, 106 N.B.R. (2d) 408, 265 A.P.R. 408, 110 N.R. 171 . 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.

107 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 *Con-*

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

stitution 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.

108 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.C. 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.C. 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)).

109 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 *Cie des chemins de fer nationaux du Canada c. Courtois*, [1988] 1 S.C.R. 868, 15 Q.A.C. 181, 85 N.R. 260 [Que.], 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.

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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

Discretion

111 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.

112 The principles governing appellate review of a lower court's exercise of discretion were not extensively considered, only their appli cation to this case. Stone J.A. cited *Polylok Corp. v. Montreal Fast Print (1975) Ltd.*, [1984] 1 F.C. 713, 1 C.I.P.R. 113, 41 C.P.C. 294, 76 C.P.R. (2d) 151, 52 N.R. 218 (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 138, [1941] 2 All E.R. 245 (H.L.) :

> 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, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 14, 26 N.R. 364 [Sask.], 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]

113 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 per cent 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 14 months before the present action was launched.

114 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.

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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 Oldman River Society v. Alberta (Minister of the Environment)* (1987), 56 Alta. L.R. (2d) 368, 2 C.E.L.R. (N.S.) 234, 85 A.R. 321 (Q.B.) . 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), 4 C.E.L.R. (N.S.) 129, 89 A.R. 339 (Q.B.) .

115 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 Oldman River Society v. Alberta (Energy Resources Conservation Board)* (1988), 58 Alta. L.R. (2d) 286, 89 A.R. 280 (C.A.) . 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.

116 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.

117 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 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.

118 On the matter of costs, it is my view that this is a proper case for awarding costs on a solicitor-client basis

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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

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

Stevenson J. **(dissenting):**

120 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,

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

122 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.

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

124 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

125 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 272 -73, [1989] 5 W.W.R. 385, 68 Alta. L.R. (2d) 1, 26 C.P.R. (3d) 289, 61 D.L.R. (4th) 193, *(*sub nom. *CNCP Telecommunications v. Alberta Government Telephones)* 98 N.R. 161 .

126 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.

127 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 *Bombay Province v. Bombay Municipal Corp.*, [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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

to be governing.

128 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).

129 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.

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

131 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.

132 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. Vancouver*, [1918] 1 W.W.R. 216 (S.C.C.) , Fitzpatrick C.J.C. 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. 1916, 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

133 The remedies sought by the respondent society are discretionary: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 574, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 14, 26 N.R. 364 [Sask.]: "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.

134 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 at 724, 1 C.I.P.R. 113, 41 C.P.C. 294, 76 C.P.R. (2d) 151, 52 N.R. 218 (C.A.) .

135 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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

promoters of the society knew even before then.

136 The common law has always imposed a duty on an applicant to act promptly in seeking extraordinary remedies (R. Dussault and L. Borgeat, Administrative Law, 2nd ed. (1990), vol. 4, at pp. 468-69):

> 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 555]: "The prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights".

137 That duty was recognized by Laskin C.J.C. on behalf of this court in *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1976] 2 S.C.R. 739 at 749, 65 D.L.R. (3d) 354, 7 N.R. 209 :

> 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]

138 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 effluxion 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, s. 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 CivilProcedure* , R.S.Q. 1977, 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 Èmilio Boucher, C.S.N.) v. Turcotte*, [1984] C.A. 316 at 318 , that: [Translation] "This article [835.1] merely codified the common law rule that the remedy must be exercised within a reasonable time."

139 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 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.

140 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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

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.

141 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.

142 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.

143 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.

144 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.

145 This action centres on the constitutionality and applicability of the *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

146 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

1992 CarswellNat 1313, 84 Alta. L.R. (2d) 129, [1992] 1 S.C.R. 3, [1992] 2 W.W.R. 193, 7 C.E.L.R. (N.S.) 1, 132 N.R. 321, 88 D.L.R. (4th) 1, 3 Admin. L.R. (2d) 1, 48 F.T.R. 160, J.E. 92-180

to meet the solicitor-and-client costs of this party.

4. Conclusion

147 I would allow the appeal with costs.

Appeal allowed in part; order of mandamus against Minister of Fisheries and Oceans quashed.

END OF DOCUMENT

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Newfoundland Labrador

ENVIRONMENTAL IMPACT STATEMENT GUIDELINES

Lower Churchill Hydroelectric Generation Project

Newfoundland and Labrador Hydro

Issued by the Government of Canada and the Government of Newfoundland and Labrador

July 2008

PREFACE

On November 30, 2006, Newfoundland and Labrador Hydro (the Proponent) submitted a Project Registration/Project Description for the Lower Churchill Hydroelectric Generation Project (the Project), in Labrador. The proposal is to develop hydroelectric generating facilities with interconnecting transmission lines on the lower section of the Churchill River. Generation facilities with a combined capacity of approximately 2,800 MW are proposed at Gull Island and Muskrat Falls, which are approximately 100 km and 30 km southwest of Happy Valley-Goose Bay, respectively. Interconnecting transmission lines are proposed between these generating sites and Churchill Falls.

On January 26, 2007, the Proponent was advised by the Minister of Environment and Conservation that an Environmental Impact Statement (EIS) is required for the Project under the Newfoundland and Labrador *Environmental Protection Act* (EPA). The Project is also subject to the *Canadian Environmental Assessment Act* (CEAA). On June 5, 2007 the Minister of the Environment announced that the Project will undergo a federal environmental assessment by an independent review panel.

Canada and Newfoundland and Labrador intend to conclude a Joint Review Panel Agreement to ensure that the respective requirements of the EPA and the CEAA that apply to the Project are met in an effective and timely manner. As a first step toward that objective, the two governments have agreed that a single set of EIS Guidelines is the most efficient and effective way to guide the Proponent in preparing an environmental assessment that will provide the type and quality of information and conclusions on environmental effects required to satisfy their respective legislative requirements.

These Guidelines are intended to assist the Proponent in its preparation of the EIS. The purpose of the EIS is to identify alternatives to the Project, alternatives methods for carrying it out, the environment that will be affected, the important environmental effects associated with the Project, measures that are required to mitigate against any adverse effects and the significance of residual environmental effects.

The EIS is expected to contain a review of all available pertinent information as well as such additional new information or data as provided by the Proponent or requested by Canada or Newfoundland and Labrador. Component Studies shall address baseline data requirements to support the evaluation of environmental effects and/or develop mitigation measures as well as monitoring and follow up programs. The Guidelines include the information required under Section 57 of the EPA, and the information necessary to address the factors set out in subsections 16(1) and 16(2) of the CEAA, both of which are included in **Appendix A**. As more specific information is provided and as additional baseline information is gathered, Canada and/or Newfoundland and Labrador and/or the Joint Review Panel may require other concerns and potential effects to be considered by the Proponent.

The EIS will be used by the Joint Review Panel in carrying out subsequent public hearings and making recommendations to the governments of Canada and Newfoundland and Labrador on the outcomes of the environmental assessment process.

The draft Guidelines were subject to a public consultation period from December 19, 2007 to February 27, 2008. After consideration of the comments received from Aboriginal

groups and the public during the consultation period, the Guidelines were finalized and submitted to the federal Minister of the Environment and to the Newfoundland and Labrador Minister of Environment and Conservation for approval. The Guidelines were subsequently issued to the Proponent by the two ministers.

TABLE OF CONTENTS

SECTION 1 – BACKGROUND

1.1 PURPOSE OF THE GUIDELINES

The purpose of this document is to identify for the Proponent and interested parties, the nature, scope and extent of the information and analysis required in the preparation of the EIS. The Proponent will prepare and submit an EIS that will identify alternatives to the Project, alternative methods for carrying it out, the environment that will be affected, the important environmental effects associated with the Project, measures that are required to mitigate against any adverse effects and the significance of residual environmental effects.

1.2 PROPOSED PROJECT

The Proponent proposes a project consisting of hydroelectric generating facilities at Gull Island and Muskrat Falls, and interconnecting transmission lines to the existing Labrador grid. The proposed Project includes the following components[1]:

The Gull Island facility would consist of a generating station with a capacity of approximately 2,000 MW that includes:

- A dam 99 m high and 1,315 m long; and
- A reservoir 215 km^2 in area at an assumed full supply level of 125 m above sea level (asl).

The dam is to be a concrete-faced rockfill dam. The reservoir is to be 230 km long, and the area of inundated land is to be 85 km^2 at full supply level. The powerhouse is to contain five Francis turbines.

The Muskrat Falls facility would consist of a generating station with a capacity of approximately 800 MW that includes:

- A concrete dam with two sections on the north and south banks of the river, and
- A 100 km^2 reservoir at an assumed full supply level of 39 m asl.

The north and south dams will be constructed of roller compacted concrete. The north section dam is to be 32 m high and 432 m long, while the south section is to be 29 m high and 125 m long. The reservoir is to be 60 km long and the area of inundated land is to be 41 km^2 at full supply level. The powerhouse is to contain four propeller or Kaplan turbines, or a combination of both.

Interconnecting transmission lines would consist of:

- A 735 kV transmission line between Gull Island and Churchill Falls; and
- Two 230 kV transmission lines between Muskrat Falls and Gull Island.

The 735 kV transmission line is to be 203 km long and the 230 kV transmission lines are to be 60 km long. Both lines will likely be lattice-type steel structures. The location of the transmission lines is to be north of the Churchill River; the final route is the subject of a route selection study that will be included in the EIS. The lines between Muskrat Falls and Gull Island will be combined on double-circuit structures.

[1] All measures are approximate

1.3 ENVIRONMENTAL ASSESSMENT PROCESS

Under section 5 of the CEAA, an environmental assessment is required for this Project because Fisheries and Oceans Canada may issue a permit or license under subsection 35(2) of the *Fisheries Act* and Transport Canada may issue an approval under paragraph 5(1)(a) of the *Navigable Waters Protection Act*. Because of these regulatory roles, Fisheries and Oceans Canada and Transport Canada are responsible authorities for the environmental assessment.

The responsible authorities recommended that the Minister of the Environment refer the Project for assessment by a review panel. They are of the opinion that the Project is likely to cause significant adverse environmental effects over a large area and to a number of Valued Environmental Components (VECs). The Minister of the Environment accepted this recommendation and has referred the Project to a review panel.

This Project is also being assessed by the Government of Newfoundland and Labrador under Part X of the EPA, pursuant to sections 34(1)(a) and 34(1)(d) of the *Environmental Assessment Regulations*.

Canada and Newfoundland and Labrador intend to conclude a Joint Review Panel Agreement to ensure that the respective requirements of the CEAA and EPA that apply to the Project are met in an effective and timely manner.

SECTION 2 – GUIDING PRINCIPLES

The EIS shall demonstrate adherence to the basic principles of environmental assessment as set out below.

2.1 ENVIRONMENTAL ASSESSMENT: A PLANNING TOOL

Environmental assessment is a planning tool that enables consideration of the potential effects of a project before actions are taken to allow that project to proceed. It is a process for identifying a project's potential interactions with the environment, predicting environmental effects, identifying mitigation measures and evaluating the significance of residual environmental effects. If the project proceeds, the environmental assessment process also provides the basis for setting out the requirements for monitoring and reporting to verify compliance with the terms and conditions of approval and the accuracy and effectiveness of predictions and mitigation measures.

2.2 ABORIGINAL AND PUBLIC PARTICIPATION

Aboriginal and public participation is a central objective of an environmental assessment process and a means to ensure that a proponent considers and responds to Aboriginal and public concerns. In preparing the EIS, the Proponent shall inform and consult with the affected Aboriginal and local communities, interested regional and national organizations and resource users.

Meaningful public involvement can only take place if Aboriginal groups and the public have a clear understanding of the nature of the proposed Project as early as possible in the environmental assessment process. Therefore, it is recommended that the Proponent:

- Continue to provide up-to-date information to Aboriginal groups and the public and especially to the communities likely to be most affected by the Project;
- Involve the main interested parties in determining how best to deliver that information, that is, the type of information required, format and presentation methods, as well as the need for community meetings; and
- Explain the results of the EIS in a clear and direct manner to make the issues comprehensible to the widest possible audience.

2.3 ABORIGINAL TRADITIONAL AND COMMUNITY KNOWLEDGE

Populations living in proximity to the Project may have substantial and distinct knowledge, which may be essential to the assessment of the effects of the Project, and their mitigation. Aboriginal traditional and community knowledge of the existing environment shall be an integral part of the EIS, to the extent that it is available to the Proponent.

In environmental assessment, Aboriginal traditional and community knowledge may be regarded as the knowledge, understanding and values that residents of Aboriginal and local communities have in relation to the environment and the potential environmental effects of the Project and proposed mitigation measures. This knowledge is based on personal observation, collective experience and/or oral transmission.

Aboriginal traditional and community knowledge assists in understanding, including the inter-relationships, among such matters as:

- Ecosystem function;
- Resource abundance, distribution and quality;
- Social and economic well-being; and
- Use of the land and resources.

It also informs the development of adequate baseline information, identification of key issues, prediction of effects, and assessment of their significance, all of which are essential to the EIS and its review.

2.4 SUSTAINABLE DEVELOPMENT

Sustainable development seeks to meet the needs of present generations without compromising the ability of future generations to meet their own needs.

The objectives of sustainable development are:

- The preservation of ecosystem integrity, including the capability of natural systems to maintain their structures and functions and to support biological diversity;
- The respect for the right of future generations to the sustainable use of renewable and non-renewable resources; and
- The attainment of durable and equitable social and economic benefits.

Promotion of sustainable development is a fundamental purpose of environmental assessment, and the Proponent shall include in the EIS consideration of:

(a) The extent to which biological diversity is affected by the Project;
(b) The capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of present and future generations; and
(c) The extent, distribution and duration of social and economic benefits.

The Proponent shall strive to integrate these factors into the planning and decision-making process for the Project, including seeking the views of interested parties, and report on the results in the EIS.

2.5 PRECAUTIONARY PRINCIPLE

One of the purposes of environmental assessment is to ensure that projects are considered in a careful and precautionary manner before action is taken in connection with them in order to ensure that such projects do not cause significant adverse environmental effects.

Principle 15 of the 1992 Rio Declaration on Environment and Development states that "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

In applying the precautionary approach, the Proponent shall:

(a) Demonstrate that the proposed Project is examined in a careful and precautionary manner;

(b) Outline the assumptions made about the effects of the Project and the approaches to prevent and minimize these effects;
(c) Identify where scientific uncertainty exists in the predictions of the environmental effects of the Project; and
(d) Identify any follow-up and monitoring activities planned, particularly in areas where scientific uncertainty exists in the prediction of the effects of the Project.

SECTION 3 – PREPARATION AND PRESENTATION OF THE EIS

3.1 STUDY STRATEGY AND METHODOLOGY

The Proponent shall explain and justify all methods used in the preparation of the EIS. In describing its overall approach, the Proponent shall explain how it used scientific, engineering, Aboriginal traditional and community knowledge. All hypotheses and assumptions shall be clearly identified and justified. All data collection methods, models and studies shall be documented so that the analyses are transparent and reproducible. The degree of uncertainty, reliability and sensitivity of models used to reach conclusions shall be indicated.

All conclusions regarding the receiving environment and predictions as well as the assessment of environmental effects shall be substantiated. The Proponent shall support all analyses, interpretation of results and conclusions with a review of the appropriate literature, providing all references required and indicating the public availability of all works consulted. Any contribution based on Aboriginal traditional and community knowledge shall be specified and the sources identified.

The EIS shall identify all significant gaps in knowledge and explain their relevance to key conclusions drawn. The Proponent shall indicate the measures applied to address these gaps. Where the conclusions drawn from scientific and technical knowledge are inconsistent with the conclusions drawn from Aboriginal traditional or community knowledge, the Proponent shall present the various points of view as well as a statement of the Proponent's conclusions.

3.2 PRESENTATION OF THE EIS

The EIS and all associated reports and studies shall use System International (SI) units of measure and terminology. The Proponent shall present the EIS in the clearest language possible. However, where the complexity of the issues addressed requires the use of technical language, a glossary defining technical words and acronyms shall be included.

The EIS should be presented in the sequence outlined in these Guidelines or the Proponent may decide that the information is better presented following a different sequence. For clarity and ease of reference, the EIS shall include a Table of Concordance that cross-references the EIS Guidelines so that information requirements identified in the Guidelines are easily located in the EIS. The EIS shall refer to rather than repeat information already presented in other sections of the document. A key subject index is to be provided giving locations in the text by volume, section and sub-section. Lines in the EIS shall be numbered in the margin at appropriate intervals.

The Proponent shall provide charts, diagrams and maps wherever useful to clarify the text, including a depiction of what the developed Project sites would look like from an aerial perspective. Maps shall use a limited number of common scales to allow for comparison and overlay of mapped features. Maps shall indicate common and accepted local place names. The Proponent shall present information, where technically feasible, using a standard Geographic Information System (GIS) mapping (digital) format with maps geo-referenced.

Throughout the preparation of the EIS, the Proponent should freely cite experiences from other environmental assessments, with emphasis on Newfoundland and Labrador and other Canadian examples, to support the methodology and value of the information provided, or as reasons in support of the selection of a preferred alternative.

An initial requirement for seventy-five (75) paper copies of the EIS and sixty (60) electronic copies may be sufficient. They shall be written in English and printed or copied on two sides of recycled *Environmental Choice* and/or *Forest Stewardship Council*-certified paper. The paper choice shall be conspicuously stated. Where possible, maps and other attachments should be scaled to fit on standard size papers to facilitate copying. The electronic version of the EIS shall be submitted in a format so that it may be posted on the internet and in a manner which shall facilitate downloading and printing in part or in whole.

To facilitate the identification of the documents submitted and their coding in the Canadian Environmental Assessment Registry, the title page of the EIS and its related documents should contain the following information:

(a) Project name and location;
(b) Title of the document, including the term "environmental impact statement";
(c) Subtitle of the document;
(d) Name of the Proponent;
(e) Names of the consultants, as appropriate; and
(f) Date.

SECTION 4 – OUTLINE OF THE ENVIRONMENTAL IMPACT STATEMENT

4.1 EXECUTIVE SUMMARY

The Executive Summary shall include identification of the Proponent, a brief project description, predicted environmental and socio-economic effects, mitigation measures, residual effects, follow-up and monitoring programs, an outline of the component studies, and a summary of the fundamental conclusions of the EIS. The Executive Summary shall also include a review of Aboriginal concerns about the Project and the key findings of the Aboriginal consultation activities undertaken by the Proponent.

The Executive Summary should be written in terms understandable to the general public and in such a manner as to allow reviewers to focus on items of concern.

4.2 INTRODUCTION

4.2.1 Identification of the Proponent

This section shall introduce readers to the Proponent by providing pertinent corporate information, including the following:

(a) Name of corporate body and mailing address;
(b) Chief Executive Officer;
(c) Principal contact person for purposes of environmental assessment
(d) Ownership of rights and interests in the Project and associated natural resources;
(e) Corporate accountability for management of environmental and socio-economic effects and operational arrangements and corporate and management structures, including the linkage of these factors between the Proponent, its parent companies and any other organizations with operational or ownership rights;
(f) Environmental and community relations policies; and
(g) Key elements of the Proponent's environment, health and safety management system and how the system will be integrated into the Project.

In addition the Proponent shall describe its history in Canada's hydroelectricity industry, with specific reference to the existing hydroelectric generation project at Churchill Falls.

4.2.2 Overview of the Project

The intent of this section is to provide an overview of key components rather than a detailed description of the Project, which will follow under Section 4.3 – The Proposed Undertaking.

The Proponent shall briefly summarize the Project, by presenting the project components, associated activities, scheduling details, the timing of each phase of the Project and other key features. If the Project is part of a larger sequence of projects, the Proponent shall outline the larger context and present the relevant references, if available.

4.2.3 Purpose of the EIS

The purpose of the EIS shall be described.

4.2.4 Relationship to Legislation, Permitting, Regulatory Agencies and Policies

The EIS shall identify and discuss all relationships between the Project and relevant legislation, regulations and policies (municipal, provincial, and federal). Pertinent government policies, such as land and water resources development and use policies that may influence environmental management in the project area, and the Project's compliance with respect to these policies are to be addressed. The EIS shall describe how project siting, design and management have been influenced by compliance with legislation and policies.

The Proponent shall provide a comprehensive list of anticipated permits and regulatory approvals required for the undertaking. The list shall include the following details:

(a) Activity requiring regulatory approval;
(b) Name of permit or regulatory approval;
(c) Name of legislation applicable in each case; and
(d) Regulatory agency responsible for each permit of approval.

4.2.5 Land Claim Agreements and Interim Agreements

The EIS shall identify any publicly available agreements or arrangements, including the *Interim Forest Agreement (2003)* and the *Labrador Inuit Land Claims Agreement*, entered into between the Proponent and/or the Government of Canada and/or the Government of Newfoundland and Labrador and/or Aboriginal group(s) in the context of land claims, and address how they may affect or be affected by the Project.

With respect to the *Labrador Inuit Land Claims Agreement* (the Agreement), the EIS should include a determination of whether the Project may be reasonably expected to have adverse environmental effects on the Labrador Inuit Settlement Area for the purpose of determining the applicability of the Agreement.

4.2.6 Previous Registration and Environmental Assessment

The Proponent shall describe their previous registrations of proposed hydro developments on the Lower Churchill River, environmental assessment(s), the outcome of the assessment(s), and the reasons the proposals presented in those previous registrations did not commence.

4.2.7 Other Registrations

The Proponent shall indicate whether any other registrations are to be submitted for environmental assessment in the future as a result of this Project.

4.3 THE PROPOSED UNDERTAKING

4.3.1 Need, Purpose and Rationale of the Project

The "need for" the Project is defined as the problem or opportunity the Project is intending to solve or satisfy. The "need for" will establish the fundamental rationale of the Project.

The "purpose of" the Project defines what the Proponent hopes to accomplish by carrying out the Project.

"Need for" and "Purpose of" the Project should be established from the perspective of the Proponent and provide a context for the consideration of alternatives to the Project.

This section of the EIS shall provide a comprehensive explanation of the need, purpose and rationale for the Project. The statement of the Project's justification shall be presented in both energy and economic terms, shall provide a clear description of methodologies, assumptions and conclusions used in the analysis, and shall include an evaluation of the following:

(a) Current and forecasted provincial electricity supply and demand;
(b) Current and forecasted provincial electricity conservation;
(c) Current and future provincial transmission line network;
(d) Current exports by the Proponent to markets outside the Province;
(e) Export market opportunities, forecasts and expected evolution;
(f) Current energy and water management regimes;
(g) Risks to the Project, in-stream flow variability, market prices and schedule delays, interest rates and other risk factors relevant to the decision to proceed with the Project;
(h) Projected financial benefits of the Project (including their distribution) as measured by standard financial indicators; and
(i) Relationship with the Newfoundland and Labrador's 2007 Energy Plan.

4.3.2 Alternatives

4.3.2.1 Alternatives to the Project

The alternatives to a project are defined as functionally different ways of addressing the need for the project. The EIS shall contain an analysis of alternatives to the Project, including the following:

(a) Management of electricity demand through utility-based energy efficiency and conservation initiatives;
(b) Alternative generation sources to the Project (e.g., hydrocarbons, wind, other hydro projects such as run-of-river projects);
(c) Combinations of alternative generation sources with hydroelectricity (e.g., hydro-wind);
(d) The addition by the Proponent of more capacity at existing generation facilities; and
(e) Status quo (no Project).

Among the alternatives to the Project to be considered, the Proponent shall pay close attention to how they would be integrated within Newfoundland and Labrador's 2007 Energy Plan.

The analysis of alternatives to the Project is to include clearly described methods and criteria for comparing alternatives, and sufficient information for the reader to understand the reasons for selecting the preferred alternative and for rejecting others. This shall include a description of the conditions or circumstances that could affect or alter these choices, such as market conditions, regulatory changes and other power developments, either prior to construction or during the life of the Project.

The EIS shall include a comparative analysis of the environmental effects and technical and economic feasibility of alternatives that led to the choice of the selected Project alternative. The comparative analysis shall indicate how the Proponent took into account the sustainable development objectives outlined previously in these Guidelines in determining criteria for selecting the preferred alternative. The Proponent shall include an evaluation of the thresholds for economic viability of the Project and considerations respecting the timing of phases and components of the Project. The Proponent shall also indicate under what circumstances a change in economic conditions may influence its selection of the preferred alternative.

4.3.2.2 Alternative Means of Carrying Out the Project

Alternative means of carrying out the Project, which are technically and economically feasible, and the environmental effects of any such alternative means shall be discussed.

The EIS shall describe design and siting alternatives for dams/reservoirs, generating stations, transmission facilities and ancillary facilities (such as roads and temporary infrastructure). The preferred alternatives shall be identified, with the selection based on clearly described methods and criteria. An explanation shall be included of how environmental factors affect the design and consideration of alternatives.

The Proponent shall provide the rationale for selecting Project components and shall discuss the state of the art of the various technologies being proposed. The Proponent shall indicate the known experience with, and the effectiveness and reliability of these techniques, procedures and policies, particularly under arctic or subarctic conditions, in Canada and elsewhere, and their relation to best practice in Canada. This discussion shall also show how design, engineering and proposed procedures are compatible with the environment and the local communities and shall minimize adverse environmental and social effects.

The EIS shall analyze and compare the design alternatives for the Project in relation to their environmental and social costs and benefits, including those alternatives which cost more to build and/or operate but which result in

reduced adverse environmental effects or more durable social and economic benefits.

Alternatives for the pace and scale of the project shall be discussed, and the chosen alternative justified. The Proponent shall also indicate under what circumstances a change in economic conditions may influence its selection of preferred alternative means.

Alternative means of carrying out the Project shall include the following as discussed below:

(a) Reservoir Preparation

Flooding shall remove access to the forest resources and other terrestrial vegetation within the newly formed reservoirs. Inundation of vegetation is of concern with respect to aesthetics, resource and recreational use of the waterway and valley, recovery of wood fibre, the sequestration and release of carbon dioxide, mercury uptake, and habitat loss. A selection of reservoir preparation strategies is necessary to address these concerns, including economic, technical and environmental considerations which are to be evaluated in order to select and justify the proposed mitigation measures.

(b) Transmission Line Route Selection

The Proponent is to undertake a Route Selection Study which identifies the alignment for transmission lines proposed between Gull Island and Muskrat Falls and from Gull Island to Churchill Falls. The study shall involve the selection of a study corridor, approximately 1.0 km in width, within which various engineering, social and environmental constraints are identified. A preferred alignment and one or two alternative alignments shall be selected for evaluation, as appropriate.

(c) Facility Layout and Siting

The Proponent shall evaluate facility layout and locations, including access roads, quarries, borrow pits and camps, based on a variety of engineering and environmental considerations. For access roads, the EIS shall consider alternative locations of stream crossings and types of crossing structures. Where such facilities are yet to be located, a site selection process and evaluation process shall be described to demonstrate how potential environmental effects will be avoided or mitigated.

(d) Generation Stations Optimization

The Proponent shall outline generation station optimization alternatives (e.g., number of turbines, type of turbines, head, capacity, intakes, spillway design and associated operating regimes). These optimization studies are to consider technical and economic feasibility, and environmental considerations.

(e) Construction Sequence

The EIS shall consider alternative construction sequence for all described facilities (e.g., Gull Island or Muskrat Falls first).

(f) Construction Labour Force Accommodation

The EIS shall describe alternative labour force accommodation strategies (e.g., number and location of camps, in-community housing). These evaluations are to consider economic, social and worker conditions (including health and hygiene) as well as any other relevant community, including Aboriginal community, considerations and environmental factors.

(g) Reservoir Management

The EIS shall consider a selection of reservoir management strategies, including consideration of scheduling/timing of filling, rate of flow release and proposed mitigative measures (e.g., identification of suitable fish refugia areas, provision of minimum flows).

4.3.3 Project Description

The Proponent shall describe the scope of the Project for which the EIS is being conducted.

To facilitate the understanding of the Project by the public, the Proponent shall produce a scale model and/or appropriate audiovisual materials describing the Project.

4.3.3.1 Spatial and Temporal Boundaries

A precise description of the spatial boundaries of the Project shall be presented accompanied by map(s) of appropriate scale showing the entire Project area with the proposed principal structures and related works. The Proponent shall provide aerial images that illustrate representative habitats within each study area (see Section 4.4.2 – Study Areas).

The proposed principal structures and related works to be described include but are not limited to the following:

(a) The Gull Island and Muskrat Falls generating stations, including intakes, intake canals, dams, dykes, tailrace channels and spillways associated with each of these sites;
(b) The transmission terminal facilities and transmission lines linking the two stations and interconnecting with Churchill Falls Station;
(c) The reservoirs and their management; and
(d) Related works and activities including all temporary facilities required for the construction and operation of the previously mentioned facilities, in particular:
    (i) Temporary control structures and diversion works;

(ii) Work camps;
(iii) Permanent and temporary access roads;
(iv) Bridges and watercourse crossings;
(v) Infrastructure for wastewater treatment & waste management;
(vi) Energy supply for camps and worksites;
(vii) Drinking water supply;
(viii) Borrow pits and quarries;
(ix) Management and disposal of excavated material; and
(x) Construction worksites and storage areas.

The temporal boundaries of the Project shall cover all phases of the project: construction, operation, maintenance, foreseeable modifications and abandonment and decommissioning of works and the rehabilitation of the sites affected by the Project. If the Proponent does not believe the full temporal boundaries should be used for a phase of the Project, the report shall identify the boundaries used and provide a rationale for the boundaries selected.

4.3.4 Construction

The EIS shall show the construction and commissioning schedules for Project elements, based on the most current information available. In addition, the approach, details, materials, methods, locations and security measures of all planned construction activities related to the physical features, including site preparation, permanent and temporary infrastructure and site rehabilitation shall be presented, including estimates of magnitude or scale where applicable. This shall include the following:

(a) Reservoir Preparation

Describe the work required and schedule for reservoir preparation, including volume of merchantable and non-merchantable wood within the flood zone, location of cleared areas, clearing/harvesting strategy and methods (e.g., labour requirements, transportation to processing facilities) and methods for eliminating wood debris.

(b) Dams, Reservoirs and Generating Stations

(i) Describe the methods for construction and creation of all permanent facilities, including the main dams, reservoirs and generating stations.
(ii) Provide the main specifications for all permanent facilities, including volume of the dams, water intake, spillways, diversion facilities and tailraces.
(iii) Provide the main parameters for the reservoirs, including total area, land area flooded, total volume, live storage, bathymetry, scheduling of initial flooding and duration of filling period.
(iv) Provide the main specifications of the generating stations.

(c) Access Infrastructures

(i) Describe the permanent and temporary access infrastructures (including road, air and water) to be constructed, as well as existing infrastructures to be utilized.
(ii) Describe new access roads and corridors (including locations, anticipated traffic, technical characteristics and general road construction standards such as maintenance, useful life, ditches, bridges and culverts and use of dust-control and de-icers) and any modifications and/or upgrades required to existing access infrastructures.
(iii) For the Goose Bay airport, specify the current traffic and the expected changes during construction and operation of the Project.
(iv) For the Goose Bay port, specify the current traffic and the expected changes during construction and operation of the Project.

(d) Borrow Pits, Quarries and Spoil Areas

(i) Identify the source, quantity and end use of all rock and aggregate materials to be used.
(ii) Identify the source, quantity and proposed disposal location of all excavated materials.
(iii) If quarrying/excavating/using rock with the potential for acid generation, provide an assessment of the potential for and the impacts of metal leaching and acid rock drainage (ML/ARD).

(e) Transmission Facilities

(i) Describe the construction methods for transmission facilities, including crossings of water bodies, access roads and modifications to existing facilities.
(ii) Describe the routing, type of line and interconnection points of the transmission lines.
(iii) Describe the volume of wood (e.g., merchantable and non-merchantable) within right-of-way and clearing/removal methods.

(f) Personnel Requirements

(i) Present the estimated size of projected workforce by month over the construction phase, indicating occupations by National Occupation Classification (NOC) Codes, skills, entry requirements and duration of work.
(ii) Describe the anticipated working schedule for Project construction activities.

(g) Temporary Structures and Infrastructure

(i) Describe camp locations; drinking water supply sources; methods of managing wastewater and discharge areas; location, capacity and operating conditions of solid waste disposal sites; power

supply; and management of any other installations (including fuel storage depots) required for the camps to function properly and safely.

(ii) Provide the scope and location of any communication and telecommunications systems required by the Project (e.g., transmission towers, access roads, energy sources).

(iii) Identify and quantify the use, management and production of dangerous products and hazardous waste generated by the Project during the construction phase.

(iv) Describe the type, location and management of river diversion and control structures (e.g., cofferdams, diversion tunnels), including those intended for the management of minimum flows and frazil ice.

(v) Identify the location, capacity and access to material and fuel receiving, handling and storage areas.

(vi) Describe the location, capacity and access to disposal and recycling sites for domestic and construction waste, including those developed during construction and existing sites to be used for the Project.

(vii) Identify and describe potential landing areas for wood piles or wood storage sites.

(viii) Provide an inventory of equipment and materials required for the Project, including hazardous materials.

(ix) Describe any storage or use of explosives.

(h) Mitigation and Compensation Works

Describe any physical works proposed as mitigation or compensation measures (e.g., reservoir access, sedimentation control).

(i) Demobilization

(i) Describe the approach and conceptual plans for demobilizing all structures used or created during construction that are of a temporary nature.

(ii) Identify, within the limits of the Proponent's knowledge and control, how the operation, use, development, possible rebuilding and eventual dismantling and demobilization of certain installations shall be handled in consideration of other uses.

(iii) Specifically note, to the extent possible, whether some installations, including all of the access infrastructures, may be used as they are, or may be converted or salvaged for other purposes by other proponents or communities, or if they must be dismantled and demobilized at the end of their useful life. The proposed means of rehabilitation of any areas to be abandoned shall be described.

4.3.5 Operation and Maintenance

All aspects of the operation and maintenance of the undertaking shall be detailed in this section of the EIS. This shall include the following:

(a) Operating Regime

Describe the following elements of the Project operating regime:

(i) Water management (turbine flows, ecological flows[2], reservoir head, maximum and minimum operating levels, operation of structures) for different hydrological conditions (low and high flows including flows lower than the ecological flows);
(ii) The time of year, frequency and amplitude (maximum and minimum levels) of water level fluctuation ranges for all water bodies;
(iii) Flow rates (maximum, minimum and average) and velocities in the sections of the river affected with detailed maps showing the areas affected, and seasonal and daily variations in water levels;
(iv) The maximum and minimum surface areas, total volume, live storage, and bathymetry of reservoirs, with detailed maps and residence time of water masses;
(v) Changes in water temperature and oxygen regimes upstream and downstream of dams;
(vi) Velocity of water at intake structures and outlets of spillways and tailrace canals;
(vii) Changes in management of lakes or reservoirs upstream and downstream of the Project area;
(viii) Changes in flow rates, velocities, temperature and oxygen regimes at the mouths of major tributaries to the Lower Churchill River;
(ix) The control and management of sedimentation and erosion;
(x) Maintenance plan for structures (dams) and facilities; and
(xi) Management of ice, including frazil ice.

(b) Access Roads and Transmission Facilities

(i) Describe roads and transmission facilities maintenance (e.g., vegetation management, dust control, de-icing).
(ii) Indicate electromagnetic fields.

(c) Personnel Requirements

(i) Present the estimated size of projected workforce by month over the operation and maintenance phase, indicating occupations by National Occupation Classification (NOC) Codes, skills, entry requirements and duration of work.
(ii) Describe the anticipated working schedule for Project operation and maintenance activities.

[2] Ecological flow is defined as the minimum flow required to protect fish and fish habitat

(d) Fuel and Dangerous and Hazardous Products and Waste

(i) Identify and quantify the use, management and production of dangerous and hazardous products and waste generated by the Project during the operation and maintenance phase.
(ii) Describe material and fuel receiving, handling and storage areas and provision for management and disposal of waste and discarded equipment.

(e) Operating Requirements

Describe, in addition to permits and authorizations, all other requirements to operate the Project, including leases, water rentals and insurance.

4.3.6 Decommissioning

The EIS will present an approach for the decommissioning phase of the Project, which sets out a commitment to address:

- Environmental planning and mitigation measures;
- Socio-economic mitigation measures; and
- Public health and safety procedures.

4.4 ENVIRONMENT

4.4.1 Identification of Issues and Selection of Valued Environmental Components (VECs)

To help focus the environmental assessment, the Proponent shall identify and justify, based on a clearly defined set of criteria, those components of the biophysical and socioeconomic environment that are most valued and/or sensitive, and which have a meaningful potential to be affected by the Project (the "Valued Environmental Components" or VECs).

It is understood that the process for defining VECs is iterative and that the list of VECs can be modified during the environmental effects analysis phase. The VECs can be revised and adjusted in relation to the information acquired during the environmental assessment process.

For information purposes, the following are factors that could prove relevant in the choice of VECs:

- Aboriginal and public concerns related to the component;
- Economic significance;
- Protected status of the component;
- Regulatory requirements;
- Rarity or special status of the component;
- Preservation of biodiversity;
- Sensitivity of the component to disturbances or pollution;
- Human health;

- Importance of the component ecological role; and
- Cultural heritage[3] or social significance of the component.

In considering VECs, the Proponent shall recognize that:

- The value of a component not only relates to its role in the ecosystem, but also to the value placed on it by humans;
- Culture and way of life of those using the area affected by the Project may also be considered as VECs; and
- Functional relationships within the environment may also be considered as VECs.

4.4.2 Study Areas

For the purpose of describing the existing environment and assessing the Project's anticipated effects on the biophysical and socio-economic environments, the Proponent shall determine study areas specific to each VEC. Each study area should be inclusive of the landscape necessary to predict the environmental effects of the Project on each VEC. For the purposes of assessing the Project's effects on the socio-economic environment, the study areas shall take into consideration the landscape used to support contemporary and historic Aboriginal and non-Aboriginal land use.

The delineation of the study areas is crucial to scope the extent of the environmental assessment. The rationale used to delineate the boundaries of the study areas shall be provided.

The mapping and description of the study areas for each VEC may include the following information:

- The main ecological constraints of the environment;
- Land use;
- Local communities; and
- The environmental significance and value of the Lower Churchill River Area.

4.4.3 Previous Development

Hydroelectric generation projects have been occurring on the Churchill River, since the 1960's. As such, understanding how the effects of past hydroelectric generation projects have been mitigated and/or managed is of interest where those environmental effects have the potential to overlap with those of the Project or

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[3] For the purpose of this environmental assessment, "cultural heritage" includes but is not limited to a human work or a place that
(a) either
(i) gives evidence of human activity;
(ii) has spiritual and/or cultural meaning; or
(iii) gives evidence of human activity and has spiritual and/or cultural meaning;
and
(b) that has heritage value.

would provide lessons that could be applied to the environmental assessment of the Project. The EIS should include a concise discussion of past hydroelectric generation projects on the Churchill River, the environmental effects that have occurred as a result, where overlapping environmental effect are anticipated, and the measures that have been taken to mitigate or manage these overlapping environmental effects. Discussion of overlapping environmental effects should include consideration of the degree to which those mitigation measures have been successful. Any long-term monitoring or follow-up programs of relevance to these overlapping environmental effects and the key results should also be described. This information will help interested parties to understand the potential environmental effects of the Project and how they may be addressed.

4.4.4 Description of the Existing Environment

The EIS shall identify the study area for each VEC and include a description of the existing biophysical and socio-economic environment and the resources within it that will be affected or that might reasonably be expected to be affected, directly or indirectly, by the Project.

The EIS shall describe relevant aspects of the existing environment in the study area for each VEC prior to development of the Project, which constitutes the reference state of the environment. This description of the environment must reflect Aboriginal traditional and community knowledge, as well as social, cultural and economic activities and values related to the described components.

Where appropriate and possible to do so, the Proponent shall present a time series of data and sufficient information to establish the averages, trends and extremes of the data that are necessary for the evaluation of potential environmental and cumulative effects of the Project. For each VEC, the Proponent should consider and justify how far back in time and how far into the future the environmental assessment should be conducted. The Proponent will identify any deficiencies in information, and how these deficiencies will be addressed.

Using qualitative and quantitative surveys, the EIS shall describe the components of the biophysical and human environments likely to be affected by the Project. If the information available from government or other agencies is insufficient or no longer representative, the Proponent shall complete the description of the environment with current surveys.

Components of the environment must be described and shall include the necessary data and the required information to understand, interpret and address the confidence levels of these data (e.g., methods; survey dates and times; weather conditions; location of sampling stations) and shall employ appropriate methods to identify, understand, analyze and assess the environmental effects of the Project.

In addition, the EIS shall describe environmental interrelationships and sensitivity to disturbance. If the study results or data have been extrapolated or otherwise manipulated to depict environmental conditions in the study area modeling methods and equations shall be described with calculations of margins of error and/or confidence limits.

A description of the existing environment shall be developed for each alternative drawing specific reference to the VECs. References are attached at the end of these Guidelines to provide direction to the Proponent. Detailed discussions shall be developed and VECs described for the following environmental components.

4.4.4.1 Atmospheric Environment

The Proponent shall describe the relevant components of the atmospheric environment within the study area of the VECs, including the following:

(a) Climate and meteorology;
(b) Indication of recent climate change observations;
(c) Emissions of greenhouse gases (e.g., CO_2, CH_4) in the context of provincial and regional emissions and targets and federal objectives;
(d) Existing ambient air quality, including current substantive sources of emissions of conventional air contaminants (PM, SO_2, NO_x, VOCs); and
(e) Existing ambient noise level.

4.4.4.2 Aquatic Environment

The Proponent shall describe the relevant components of the aquatic environment within the study area of the VECs, including the following:

(a) Hydrological features such as lakes and streams/rivers, watershed boundaries, river hydrology and hydraulics, bathymetry, surface water flow, flood zones, lake and river ice formation, dynamics and melt patterns, salinity, tides, freshwater mixing zones and delta formation;
(b) Geomorphology, including erosion, sedimentation, channel dynamics and sediment supply;
(c) Water quality and quantity from both surface and groundwater sources, including any saltwater intrusion up the Churchill River or into aquifers;
(d) Sediment quality of watercourse;
(e) Important habitats found along the shoreline, banks, wetlands and floodplain;
(f) Aquatic and riparian vegetation;
(g) Biological diversity, composition, abundance, distribution, population dynamics and habitat utilization of aquatic species, including fish, semi-aquatic species and marine mammals such as ringed seals;
(h) Mercury concentrations, mobility and fate within the ecosystem to be affected by the Project, including in water, fish and fish-eating wildlife at representative levels of the food chain as determined in an ecological risk assessment that includes freshwater and marine fish and fish-eating wildlife;
(i) Species of special interest or conservation concern (including their habitat), with an emphasis on rare, vulnerable or threatened

species (e.g., species listed in the *Endangered Species Act* or the *Species at Risk Act*); and

(j) Human-environment interactions.

4.4.4.3 Terrestrial Environment

The Proponent shall describe the relevant components of the terrestrial environment within the study area of the VECs, including the following:

(a) Bedrock and surficial geology, terrain and soil conditions;
(b) Regional seismicity (natural and reservoir-induced) and relevant geological structures (lineaments, faults, joints);
(c) Reservoir-induced seismic activity of the neighbouring regions;
(d) Pertinent physical and chemical properties of sediment and rock, that might be affected by or have an effect on the Project;
(e) For areas that will be flooded, the levels of mercury and other potentially toxic metals in the soils, in particular for soils with high organic content and indurated soils (ortstein);
(f) Areas of potential reservoir shoreline erosion and potential ground instability such as slumping or landslides;
(g) Groundwater movement and aquifer recharge zones;
(h) Permafrost conditions including areas of discontinuous permafrost, high ice content soils, thaw sensitive slopes and stream banks;
(i) Composition, abundance, distribution, population dynamics and habitat utilization of terrestrial fauna, including mammals, avifauna (e.g., migratory birds, raptor, waterfowl and passerine/songbird surveys) and herpetiles;
(j) Composition, distribution and abundance of terrestrial flora, including forest inventories and ecological land classifications;
(k) Existing patterns of habitat and ecotype alteration, disruption and destruction;
(l) Composition, distribution and abundance of medicinal herbs and plants harvested by affected Aboriginal communities;
(m) Composition, distribution and abundance of wetlands as classified using the Canada Wetland Classification System, and further characterized in terms of a functional analysis (e.g., habitat, water flow regulation, groundwater recharge);
(n) Migratory patterns/river crossings;
(o) Mercury concentrations, mobility and fate within the riparian ecosystem, with an emphasis on representative species at various levels of the food chain as determined in an ecological risk assessment;
(p) Species of special interest or conservation concern (including their habitat), with an emphasis on rare, vulnerable or threatened species (e.g., species listed in the *Endangered Species Act* or the *Species at Risk Act*); and
(q) Human-wildlife interaction (e.g., bear management plans).

For the terrestrial environment, some key indicator species/species assemblages were selected to focus the environmental assessment. The

species selected are reflective of different phyla, orders, families or guilds of species that represent key components of the terrestrial environment. These species were selected as being representative of species groups, importance in the food web (e.g., top predator), and their importance from socio-cultural and economic perspectives. The following is the list of these key indicators:

(a) Beaver;
(b) Marten;
(c) Porcupine;
(d) Caribou;
(e) Moose;
(f) Black bear;
(g) Harlequin duck;
(h) Early breeding waterfowl (including Canada goose);
(i) Late breeding waterfowl (including Scoters);
(j) Upland game birds;
(k) Osprey; and
(l) Passerine/song birds (including Water thrush).

4.4.4.4 Land and Resource Use

The Proponent shall describe relevant land and resource use within the study area of the VECs, including the following:

(a) Present and potential timber resource logging and utilization (commercial and domestic);
(b) Current use of land and resources (including aquatic resources) by Aboriginal persons for traditional purposes, including location of camps, harvested species and transportation routes;
(c) Current use of land and resources (including aquatic resources) by other land users;
(d) Other rural land and resource use including existing and potential recreational and commercial fishing and hunting, gathering of country food and collection of plant propagules;
(e) Current navigation (e.g., vessel/boat traffic) and winter travel on the river;
(f) Location and description of unique sites or special features, including any candidate sites for ecological or cultural heritage preservation and conservation, Environmentally Sensitive Areas, reserves or protected areas, conservation agreement lands and habitat enhancement projects; and
(g) Landscapes, including aesthetic quality and effects on river aesthetics.

4.4.4.5 Cultural Heritage Resources

The Proponent shall describe relevant cultural heritage resources in the study areas of the VECs, including the following:

(a) Cultural heritage sites;
(b) Historic and archaeological resources;
(c) Paleontological resources; and

(d) Architectural resources.

4.4.4.6 Communities

The Proponent shall describe relevant community elements in the study areas of the VECs, including the following:

(a) Demographics;
(b) Community services and infrastructure
- Health services and social programs (e.g., drug addiction, delinquency);

(c) Human health
- Occurrence and trends in chronic diseases (e.g., diabetes, cardiovascular disease, chronic pulmonary disease and cancer), infectious disease, mental illness, addictions and quality of life
- Dietary changes that could lead to health risks from methylmercury (MeHg)
- Drinking water sources and quality;

(d) Community health;
(e) Family life;
(f) Safety;
(g) Culture;
(h) Education and Training;
(i) Housing and accommodation; and
(j) Property value and land use, including within and adjacent to planned future reservoirs.

As the Project is likely to result in an increase in mercury (Hg) concentrations in fish, the Proponent shall assess the human health risk associated with mercury exposure.

This assessment should consider the presence of contaminants in fish (for each species of interest for human consumption) in the study area, including the variations based on fish size and weight, as well as representative fish consumption data for the consumers affected by the Project. The Proponent shall identify the species of fish and specific portions of the fish that are consumed by humans and determine baseline mercury concentrations in the species and tissues expected to be consumed by humans. The Proponent shall also take into account the recommended consumption standards. It is recommended that the Proponent use recognized toxicological reference values. The calculation of mercury exposure should take into account the possible contribution of other local sources, in particular traditional food (e.g., predators of contaminated fish or waterfowl) and discuss the cumulative effect of the contribution of these other sources.

In addition, the Proponent shall:

(a) Characterize the current fishing patterns, including fishing location, frequency, and variability in consumption between communities and within a single community and determine

whether this pattern may change following the construction of the dams;

(b) Develop a baseline of MeHg exposure of the local human population in general and of groups at risk, in particular children and toddlers, and women of childbearing age, which can be accomplished through dietary surveys and human hair sampling;

(c) Present and justify the period deemed adequate to reduce the quantity of mercury ingested and consider the toxicological risk, on sensitive human populations, associated with the consumption of large quantities of fish (e.g., during a weekend of fishing);

(d) Discuss the views of local human populations regarding mercury and its influence on the changes observed in their diet and consequently on their health in general;

(e) Review the results of the research undertaken in the region as relevant. This review shall outline current knowledge and contribute to a better understanding of the evolution of mercury exposure among local human populations; and

(f) Present the health effects of very long-term exposure to mercury at concentrations that are generally below those producing noticeable effects and discuss existing consumption standards.

The collection of baseline data of MeHg exposure of the local human population should be completed, including a review by Aboriginal groups and appropriate government agencies, before the Proponent changes the conditions of the Churchill River in any way that could affect mercury concentrations.

4.4.4.7 Economy, Employment and Business

The Proponent shall describe relevant economy, employment and business elements in the study areas of the VECs, including the following:

(a) Economy of Upper Lake Melville, Labrador and the Province
- Taxes and royalties;
- Effects on gross domestic product;

(b) Employment in Upper Lake Melville, Labrador and the Province;

(c) Skilled and unskilled labour supply in Upper Lake Melville, Labrador and the Province;

(d) Expenditures in Upper Lake Melville, Labrador and the Province;

(e) Availability of skilled and unskilled labour;

(f) Employment equity and diversity including under-represented groups (e.g., women, persons with disabilities, Aboriginal groups);

(g) Business capacity;
- Goods and services;

(h) Agriculture;

(i) Outfitting;

(j) Eco-tourism;
(k) Trapping;
(l) Forest Resources Harvesting; and
(m) Mining and Mineral Exploration.

4.4.5 Component Studies

Component studies shall be prepared for at least the following VECs:

(a) Large mammals;
(b) Furbearers;
(c) Avifauna;
(d) Species at risk;
(e) Fish and fish habitat (plankton, benthos, marine mammals);
(f) Water (quality and quantity);
(g) Hydrology (including ice dynamics, sedimentation, salinity and salt water intrusion);
(h) Mercury (both in terms of increased concentrations in ecosystems and in humans);
(i) Cultural heritage resources;
(j) Timber resources;
(k) Socio-economics; and
(l) Air quality.

Where new information becomes available as a result of baseline studies, additional component studies may be required.

Component studies generally have the following format:

(a) Rationale/Objectives

In general terms, the rationale for a component study is based on the need to obtain additional data to determine the potential for significant effects on a VEC due to the proposed undertaking, and to provide the necessary baseline information for monitoring programs.

(b) Study Area

The boundaries of the study area shall be defined depending on the characteristics of the VEC being investigated.

(c) Methodology

Methodology shall be proposed by the Proponent, in consultation with resource agencies, as appropriate. The methodologies for each component study shall be summarized in the EIS.

(d) Study Outputs

Study outputs shall be proposed by the Proponent. Information and data generated shall be sufficient to adequately predict the effects on the VEC and determine monitoring and follow-up requirements.

4.4.6 Data Gaps

Information gaps from a lack of previous research or practice shall be described indicating baseline/information which is not available or existing data which cannot accurately represent environmental conditions in the study area(s) over four seasons. If background data has been extrapolated or otherwise manipulated to depict environmental conditions in the study area(s), modeling methods and equations shall be described and shall include calculations of margins of error and/or confidence limits.

4.4.7 Future Environment without the Project

The EIS shall describe the predicted future condition of the environment within the expected life span of the Project, if the Project were not to proceed. The predicted future condition of the environment shall help to distinguish project related effects from environmental change due to natural processes and shall include a discussion of climate change.

The socio-economic environment to be described is undergoing substantial change regardless of the Project. The analysis shall consider the likely trends in the area in the absence of the Project given available information about other planned major projects or social, economic, or institutional changes in the zone of influence within the time frame of the Project.

4.5 Environmental Effects

4.5.1 General

The EIS shall contain a comprehensive analysis of the predicted environmental effects on the VECs of each project alternative. If the effects are attributable to a particular phase of the Project (construction, operation and/or maintenance) then they should be designated as such.

Predicted environmental effects (positive and negative, direct and indirect, short and long-term) shall be defined quantitatively and qualitatively for each project alternative and for each VEC. Environmental effects predictions shall be explicitly stated and the theory or rationale upon which they are based shall be presented in terms of the following parameters, as appropriate:

- Nature;
- Magnitude (qualitative and quantitative);
- Geographic (spatial) extent;
- Timing, duration and frequency;
- Degree to which effects are reversible or mitigable;

- Ecological context;
- Cultural heritage and social context;
- Level and degree of uncertainty of knowledge;
- The capacity of renewable resources that are likely to be significantly affected by the Project, to meet the needs of present and future generations;
- The extent to which biological diversity is affected by the Project; and
- Environmental protection goals and objectives as set out in applicable legislation, regulations, policies, plans and programs.

The Proponent shall prepare a table of the proposed Project's anticipated effects, which shall enable the reader to review and consider those effects.

Among the effects of the Project to be assessed on the biophysical environment, effects on fish and fish habitat (e.g., fish mortality from construction and operation though gas bubble disease or entrainment), greenhouse gases emissions and navigation and navigability should be considered. Effects from mercury and climate change implications should also be considered.

With respect to greenhouse gases, the Proponent shall describe and analyze greenhouse gas emissions from the Project (including methane). This shall include provision of a greenhouse gas budget for emissions from all phases of the Project, including reservoir impoundment and operation, a description of specific greenhouse gas emissions that the Project will or could offset, the necessary conditions for that offset occurring, and a quantitative net estimate of potential greenhouse gas reductions or increases.

With respect to effects of the Project on navigation and navigable waters, the Proponent shall describe effects on the navigability and the navigation patterns of all waters existing, altered or created by the Project. Impacts on traditional (e.g., hunting, fishing) and current recreational and commercial waterway use should be identified and assessed. Particular attention should be paid to traditionally-used patterns to and from Mud Lake and throughout the watercourse. Surface hydrological modelling (i.e. flow dynamics) of impacts resulting from the Project, including for the upstream footprint limit of the reservoir and downstream of Muskrat Falls to Goose Narrows, should also be included.

The assessment of the beneficial and adverse effects of the Project on the socio-economic environment shall consider how the Project may affect various segments of the local populations (e.g., youth, elders, men, women, Aboriginal groups, harvesters, existing workforce including professionals). The following should be taken into account when assessing effects of the Project on the socio-economic environment:

(a) Demographics;
(b) Human health;
(c) Social and cultural patterns (particular attention shall be given to the comparative adverse and beneficial effects of a major base of employment away from the communities, rotational work schedules,

and the presence of large, temporary work forces and contractors in the region);
(d) Services and infrastructure (including road transportation of workers and materials);
(e) Cultural heritage sites;
(f) Land and resource use;
(g) Local, regional and provincial economy;
(h) Employment, education and training;
(i) Governments;
(j) Aboriginal issues; and
(k) Experience gained from previous large developments in Labrador.

In considering the local social and economic effects of the Project, the Proponent shall have due regard for the attitudes, beliefs and perceptions of local residents, and how these are grounded in their culture, social organizations and historical experience.

4.5.2 Accidents and Malfunctions

The Proponent will identify and describe the potential accidents and malfunctions related to the Project, including an explanation of how those events were identified, potential consequences (including the potential environmental effects), the worst case scenarios and the effects of these scenarios. The Proponent will explain the potential quantity, mechanism, rate, form and characteristics of the contaminants and other materials likely to be released into the environment during the malfunction and accident events.

Potential accidents and malfunctions may include those associated with the following occurrences:

- Dam failure;
- Fires;
- Waste management and disposal;
- Use, handling or spills of chemicals and hazardous materials on-site; and
- Any other project components or systems that have the potential, through accident or malfunction, to adversely affect the natural environment.

The Proponents shall pay special attention to the sensitive elements of the environment (e.g., communities, homes, natural sites of interest, areas of major use) that may be affected in the event of an accident or a major malfunction.

The Proponent shall assess the likelihood of occurrence of the accidents and malfunctions.

Detailed plans, measures and systems to reduce the potential occurrence of an accident or malfunction shall be provided by the Proponent. They shall indicate how they will reduce the effects or consequences of an accident or malfunction, should it occur.

4.5.3 Cumulative Effects

The Proponent shall identify and assess the Project's cumulative environmental effects. Cumulative effects are defined as changes to the environment due to the Project where those overlap, combine or interact with the environmental effects of other existing, past or reasonably foreseeable projects or activities.

In the cumulative effects assessment, the Proponent shall consider guidance provided by the Canadian Environmental Assessment Agency in its Cumulative Effects Assessment Practitioners Guide (1999) and other literature and experience with environmental assessment in Canada or elsewhere that it finds helpful in framing the cumulative environmental effects analysis.

The Proponent shall:

(a) Identify and justify the VECs that will constitute the focus of the cumulative effects assessment. The Proponent's assessment should examine the likelihood, nature and extent of the predicted cumulative effects of each Project alternative for each VEC. It may be appropriate, during the course of the environmental assessment, to refine the definition of the VECs selected for cumulative effects assessment;
(b) Present a justification of the spatial and temporal boundaries of the cumulative effects assessment. The boundaries for the cumulative effects assessment will again depend on the effects being considered (e.g., will generally be different for different effects). These cumulative effects boundaries will also generally be different from (larger than) the boundaries for the corresponding Project effects;
(c) Describe and justify the choice of projects and selected activities for the cumulative effects assessment. These shall include past activities and projects, those being carried out and future projects or activities likely to be carried out;
(d) Describe the mitigation measures that are technically and economically feasible and determine the significance of the residual cumulative effects; and
(e) Assess the effectiveness of the measures applied to mitigate the cumulative effects. In cases where measures exist that are beyond the scope of the Proponent's responsibility that could be effectively applied to mitigate these effects, the Proponent shall identify these effects and the parties that have the authority to act. In such cases, the Proponent shall summarize the discussions that took place with the other parties in order to implement the necessary measures over the long term.

4.5.4 Renewable Resources

The Proponent shall determine, based on the results of their assessment, whether the Project is likely to cause significant environmental effects on renewable resources and therefore compromise their capacity to meet present and future needs.

Renewable resources are defined as resources that can be renewed on a regular basis, either naturally or by human action. While the emphasis is placed on living

renewable resources such as fish, wildlife and forest, the analysis of the effects on renewable resources should also consider non-living renewable resources such as water.

The Proponent shall briefly describe the renewable resources that may be affected by the Project. The Proponent shall clearly establish, taking into account the result of their impact assessment, whether these renewable resources are likely to be significantly affected following the implementation of proposed mitigation measures (residual significant environmental effects). Should this be the case, the following points shall be addressed:

(a) A brief description of the Project's environmental effects on the renewable resource;
(b) An indication as to the way in which the capacity of this resource was measured or evaluated;
(c) An indication of the temporal and geographic boundaries used to assess the capacity of the affected resource;
(d) A determination of the capacity of the resource to meet current needs;
(e) A determination of the capacity of the resource to meet future needs;
(f) A description of any other appropriate mitigation measures;
(g) A determination of the significance of the residual effects on the renewable resource and its capacity to meet the needs of current and future generations; and
(h) An identification of the risks and uncertainties that remain and the description of the next steps, if any, that will be required to address this effect.

4.5.5 Effects of the Environment on the Project

The environmental effects that may occur as a result of the environment acting on the Project shall be assessed.

Environmental changes and hazards that may occur and may affect the Project shall be described (e.g., wind, currents, waves, storm surges, severe precipitation events, flooding, extended dry periods, ice, earthquakes). The EIS shall take into account the potential influence of climate change scenarios (e.g., sea level rise, increased severity and frequency of storms and flooding). The influence that these environmental changes and hazards may have on the Project shall be predicted and described.

4.6 ENVIRONMENTAL PROTECTION

4.6.1 Mitigation

The EIS shall identify and discuss the proposed mitigation measures that are technically and economically feasible and that would mitigate the significant adverse effects of the Project and enhance beneficial effects, including the interaction of these measures with existing environmental management plans. Under the CEAA, mitigation is defined as the elimination, reduction or control of the adverse environmental effects of the Project, and includes restitution for any damage to the environment caused by such effects through replacement,

restoration, compensation or any other means. The rationale for and effectiveness of the proposed mitigation and enhancement measures should be discussed and evaluated. The Proponent, where possible, should refer to similar situations where the proposed mitigation has proven to be successful. Mitigation failure should be discussed with respect to risk and severity of consequence. The discussion should include failure of dam/control structures.

The Proponent shall identify who is responsible for the implementation of these measures and the system of accountability, including the obligations of all its contractors and subcontractors.

Mitigation measures shall be described for the construction, operation and maintenance phases and shall include:

(a) Procedures that would be used to avoid environmentally sensitive areas or periods of the year;
(b) Contingency plans and procedures to respond to accidents, malfunctions and emergencies;
(c) Fish habitat compensation strategies;
(d) A description of the approach to determine, develop and maintain minimum flow requirements when describing mitigation measures for the construction, reservoir filling and operation phases of the Project, including fish habitat maintenance and fish passage such as the fish passage facility in the causeway across the Churchill River associated with the Trans Labrador Highway Phase III;
(e) Methods to control and manage sediment action and shoreline stability;
(f) Measures to ensure continued unrestricted and safe access and passage on land and sea for harvesting and travel by Aboriginal and non-Aboriginal local residents, and the alternatives to be provided in the event of disruption;
(g) Methods of soil and vegetation preparation employed to mitigate the release of mercury and MeHg from flooded soils and vegetation;
(h) Measures which would be taken to reduce or offset adverse effects of increased mercury and MeHg concentrations in fish, fish-eating wildlife, and human consumers of fish and fish-eating wildlife;
(i) Mitigation measures which would be taken to reduce or offset adverse effects on communities affected by the Project;
(j) Mitigation measures which would be taken to reduce or offset adverse effects on local businesses most directly affected by the Project;
(k) Measures to enhance any beneficial environmental effects, such as economic benefits to businesses affected by the Project; and
(l) Measures to maximize labour market opportunities, including Aboriginal labour, and address labour challenges with an emphasis on strategies to enhance recruitment and retention and increase employment and participation. To this end, the Proponent must minimally describe a human resources plan that includes a description of objectives and strategies to address labour force availability, skilled trades recruitment, diversity in recruitment, training and employment equity. This plan should also minimally identify employment objectives and targets for women and other labour force groups if applicable.

Other mitigation measures, if any, which were considered shall be identified, and the rationale for rejecting these measures shall be explained. Trade-offs between costs and predicted effectiveness of the mitigation measures shall be justified.

The Proponent shall discuss the application of the Precautionary Principle in the identification of mitigation measures. The Precautionary Principle is defined in Section 2.5. The best available technology and best management practices shall be considered. Avoidance of environmental effects through implementation of scheduling and siting constraints and pollution prevention opportunities shall also be taken into account.

4.6.1.1 Compensation

The Proponent shall describe, in general terms, compensation programs and arrangements as follows:

(a) Any compensation programs for damage caused by the Proponent's activities to the environment, to property, business operations, or to the land and resources of others. The Proponent shall describe any existing or proposed compensation programs for losses relating to property, use, access, harvests, added harvesting effort and costs that may be incurred by users of the land and its resource (e.g., tourism operators, trappers, subsistence hunters). A comparison with compensation programs for other projects and other resource development activities shall be provided.

(b) Any compensation arrangements for local, public or private providers whose burdens and costs are increased or who incur losses as a result of the Project.

4.6.2 Emergency Response / Contingency Plans

The Proponent shall describe its Environmental Management System (EMS) and Safety, Health and Environmental Emergency Response Plans (SHERP) to provide an overall perspective on how potentially adverse environmental effects shall be managed over time. The EMS shall include various plans (e.g., emergency response plans, contingency plans, environmental protection plans, waste management plans, hazardous spill plans, monitoring plans) and developed in a manner consistent with the International Organization for Standardization (ISO) 14001 program. It shall show how the Project is consistent with sustainable development efforts in the region. Appropriate government agencies, Aboriginal groups and local communities shall be involved in the development of the plans.

4.6.3 Rehabilitation

A plan of proposed rehabilitation measures is required to address areas disturbed by temporary activities (e.g., access roads, off-loading facilities, construction camp(s), land clearing prior to inundation). The plan shall discuss the rationale, objectives and procedures for proposed rehabilitation measures. A schedule for carrying out the work (e.g., seasonal requirements) shall be included in the plan. Appropriate materials (e.g., plant species, soils) shall be indicated.

4.6.4 Monitoring and Follow-up Programs

The EIS shall describe the environmental and socio-economic monitoring and follow-up programs to be incorporated into construction, operation and maintenance activities.

Monitoring programs will ensure that the Project is implemented as proposed, that the mitigation or compensation measures proposed to minimize the Project's environmental effects are effectively implemented, and that the conditions set at the time of the Project's authorization and the requirements pertaining to the relevant laws and regulations are met. The monitoring program will also make it possible to check the proper operation of works, equipment and facilities. If necessary, the program will help reorient the work and possibly make improvements at the time of construction and implementation of the various elements of the Project.

The purpose of the follow-up program is to verify the accuracy of the predictions made in the assessment of the effects as well as the effectiveness of the mitigation measures. The duration of the follow-up program shall be as long as is needed to evaluate the effectiveness of the mitigation measures.

If either of these programs identifies unforeseen adverse environmental effects, the Proponent shall commit to adjust existing mitigation measures, or, if necessary, develop new mitigation or compensation measures. The Proponent shall describe how the results of monitoring and follow-up programs will be used to refine or modify the design and implementation of management plans, mitigation measures and Project operations. This section shall also discuss the ways in which holders of Aboriginal traditional and community knowledge, including elders, women and youth, shall be involved in any monitoring and follow-up programs. The Proponent shall distinguish as appropriate between monitoring (compliance) and effects follow-up programs.

The proposed approach for monitoring shall be described and shall include:

(a) The objectives of the monitoring program and a schedule for collection of the monitoring data required to meet these objectives;
(b) The sampling design, methodology, selection of the subjects and indicators to be monitored, and their selection criteria;
(c) The frequency, duration and geographic extent of monitoring, and justification for the extent;
(d) The application of the principles of Adaptive Environmental Management;
(e) Reporting and response mechanisms, including criteria for initiating a response and procedures;
(f) The approaches and methods for monitoring the cumulative effects of the Project with existing and future developments in the Project area;
(g) Integration of monitoring results with other aspects of the Project including adjustments to operating procedures and refinement of mitigation measures;
(h) Experience gained from previous and existing monitoring programs;

(i) The advisory roles of independent experts, government agencies, communities, holders of Aboriginal traditional and community knowledge and renewable resource users;
(j) Procedures to assess the effectiveness of monitoring and follow-up programs, mitigation measures and recovery programs for areas disturbed by the Project; and
(k) A communications plan to describe the results of monitoring to interested parties.

The Proponent shall explain how the public shall continue to be involved, including participation in the design and implementation of environmental management and monitoring and follow-up programs.

The Proponent shall describe plans to maintain communications and working relationships with the affected communities, Aboriginal organizations, municipalities and government agencies throughout the life of the Project. The intent of these plans is to involve those groups in monitoring and follow-up programs, including in the identification and work towards the reduction of adverse physical, biological or socio-economic effects, and the enhancement of beneficial effects.

To design complete and comprehensive program proposals, the Proponent shall prepare and submit these documents subsequent to the completion of the environmental assessment, but before the initiation of the Project itself.

4.7 Residual Effects and Determination of Significance

Residual effects are those adverse environmental effects which cannot or will not be avoided or mitigated through the application of environmental control technologies, best management practices or other acceptable means.

The EIS shall list and contain a detailed discussion and evaluation of residual effects, including residual cumulative effects, which shall be defined in terms of the parameters outlined in sections 4.5.1 and 4.5.3.

The EIS shall contain a concise statement and rationale for the overall conclusion relating to the significance of the residual adverse environmental effects. The EIS will, for ease of review, include a summary table of the environmental effects, proposed mitigation and residual adverse effects.

4.8 Consultation with Aboriginal Groups and Communities

The EIS shall demonstrate the Proponent's understanding of the interests, values, concerns, contemporary and historic activities, Aboriginal traditional knowledge and important issues facing Aboriginal groups, and indicate how these will be considered in planning and carrying out the Project. The Aboriginal groups and communities to be considered include, in Newfoundland and Labrador, the Innu Nation, the Labrador Métis Nation and the Nunatsiavut Government and, in Quebec, the Innu communities of Uashat Mak Mani-Utenam, Ekuanitshit, Nutaskuan, Unamen Shipu, Pakua Shipi and Matimekush-Lake John.

To assist in ensuring that the EIS provides the necessary information to address issues of potential concern to these groups, the Proponent shall consult with each group for the purpose of:

(a) Familiarizing the group with the Project and its potential environmental effects;
(b) Identifying any issues of concern regarding potential environmental effects of the Project; and
(c) Identifying what actions the Proponent is proposing to take to address each issue identified, as appropriate.

If the Proponent is not able or should not address any particular issue(s), the EIS should include supporting reasons.

The results of those consultations are to be presented in a separate chapter of the EIS with individual section for each of the affected Aboriginal groups. The Proponent must refer readers to the relevant sections of the EIS, as appropriate.

4.9 PUBLIC PARTICIPATION

Public consultation meetings are required of the Proponent to present the proposal and to record interests and concerns, including those received in response to the Registration. These concerns shall be addressed in a separate chapter of the EIS.

The Proponent shall describe the activities and information sessions that it will hold or that have already been held within the context of the Project at the local, regional and national levels, where applicable. The Proponent shall indicate the methods used and their relevance, the locations where information sessions were held, the persons and organizations attending, the concerns voiced and the extent to which this information was incorporated in the design of the Project as well as in the EIS. Moreover, the Proponent shall describe how issues were recorded and addressed through the use of tables of concordance. Any outstanding issues shall be clearly identified.

Protocol for this meeting shall comply with the legislation and with the Newfoundland and Labrador's Department of Environment and Conservation's Environmental Assessment Division's policy (as amended) on advertisement requirements for public meetings/information sessions included in **Appendix B**.

As a minimum, public meetings must be held in the communities of Happy Valley-Goose Bay, Northwest River, Mud Lake, Rigolet, Churchill Falls, in the region of Labrador West and St-John's.

4.10 ENVIRONMENTAL PROTECTION PLAN

The Proponent shall prepare an Environmental Protection Plan (EPP) for each main construction site and have them approved by the regulatory authorities before starting construction. They shall be stand-alone documents that shall target the site foreperson, the Proponent's occupational health, safety and environmental compliance staff, as well as government environmental surveillance staff. The EPPs shall address construction, operation and modification phases of the Project. A proposed Table of Contents and an annotated outline for the EPPs is to be presented in the EIS which shall address the major

construction and operational activities, permit requirements, mitigation measures and contingency planning as follows:

(a) Proponent's environmental policies;
(b) Objectives and voluntary commitments;
(c) Relevant human resource management plans;
(d) Environmental compliance monitoring;
(e) Environmental protection measures;
(f) Mitigation measures;
(g) Permit application and approval planning;
(h) Contingency planning for accidental and unplanned events;
(i) Statutory requirements; and
(j) Revision procedures and contact lists.

4.11 REFERENCES CITED

All references used during the preparation of the EIS shall be cited in the text and listed in this section.

4.12 PERSONNEL

The names and qualifications of all key professionals responsible for preparing the EIS and supporting documentation shall be included.

4.13 COPIES OF REPORTS

The Proponent shall prepare a complete and detailed bibliography of all studies used to prepare the EIS. Supporting documentation shall be referenced in the EIS and submitted in separate volumes or attached as an Appendix to the EIS.

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- Wright, D.G. and G.E. Hopky. 1998. Guidelines for the Use of Explosives in or Near Canadian Fisheries Waters. Can. Tech. Rep. Fish. Aquat. Sci. 2107. Internet:

http://www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/guidelines-conseils/guides/explosguide/pdf/explos_e.pdf.

APPENDIX A

Requirements of an Environmental Impact Statement under the *Environmental Protection Act* (Section 57) and Assessment by a Review Panel under the *Canadian Environmental Assessment Act* (Section 16)

Environmental Protection Act

Section 57 - Environmental Impact Statement

57. An environmental impact statement shall be prepared in accordance with the guidelines, and shall include,

(a) a description of the undertaking;

(b) the rationale for the undertaking;

(c) the alternative methods of carrying out the undertaking, and the alternatives to the undertaking;

(d) a description of the

(i) present environment that shall be affected or that might reasonably be expected to be affected, directly or indirectly, by the undertaking, and

(ii) predicted future condition of the environment that might reasonably be expected to occur within the expected life span of the undertaking, if the undertaking was not approved;

(e) a description of

(i) the effects that would be caused, or that might reasonably be expected to be caused, to the environment by the undertaking with respect to the descriptions provided under paragraph (d), and

(ii) the actions necessary, or that may reasonably be expected to be necessary, to prevent, change, mitigate or remedy the effects upon or the effects that might reasonably be expected upon the environment by the undertaking;

(f) an evaluation of the advantages and disadvantages to the environment of the undertaking, the alternative methods of carrying out the undertaking and the alternatives to the undertaking;

(g) a proposed set of control or remedial measures designed to minimize any or all significant harmful effects identified under paragraph (e);

(h) a proposed program of study designed to monitor all substances and harmful effects that would be produced by the undertaking; and

(i) a proposed program of public information as required under section 58.

Canadian Environmental Assessment Act

Section 16 - 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.

APPENDIX B

Department of Environment & Conservation
Environmental Assessment Division

ADVERTISEMENT REQUIREMENTS FOR PUBLIC MEETINGS / INFORMATION SESSIONS

Purpose: To clarify for staff, proponents, public interest groups, etc. the types, timing, number, notification requirements, etc. for public consultations in relation to undertakings required under the *Environmental Protection Act, SNL 2002 cE-14.2*, (Section 58) to prepare an Environmental Impact Statement (EIS) or required under the *Environmental Assessment Regulations, 2003* (Section 10) to prepare an Environmental Preview Report (EPR).

1. The Proponent is not required to conduct public meeting(s) (information sessions) under an EPR process unless specifically required to do so in the project Guidelines. This requirement shall be at the Minister's discretion, based upon advice from the Assessment Committee (AC) as provided by the Chairperson, taking into account the level of expressed public interest.

2. The Proponent is always required to conduct public meeting(s) (information sessions) under an EIS process as specified in the Legislation. This requirement shall be specified in the project Guidelines.

3. When required, a public meeting shall normally be held in the largest local population centre within the project area. This shall be the minimum requirement. In addition, when demonstrated public interest or concern warrants, additional meetings may be required. This may take the form of additional meetings to be held in major regional or provincial population centres, or possibly additional meetings within the original community. Such requirements are at the discretion of the Minister based on consensus advice from the AC Chairperson, and based upon public interest as evidenced by public submissions received.

4. The requirements for the location of public meetings may be modified for projects proposed within areas where there is an assertion of potential Aboriginal or treaty rights, excluding projects located entirely within municipal boundaries. In such cases, a public meeting may specifically be required in an appropriate Aboriginal community which has a direct interest in the land claim. Such a meeting may be required in addition to others required under #3 (above). The Proponent may be required to provide appropriate translation services for such meetings. This provision is subject to alternate direction relating to dealings with Aboriginal groups which may be imposed by government under special circumstances.

5. The format of the public meeting may be flexible, and the Proponent is free to propose a suitable format for approval by the AC. The format may

range from formal public meetings chaired by the Proponent or representative with presentations followed by questions and answers, to a less formal open house forum where the public may discuss the proposal with the Proponent or representatives. Other formats may be considered by the AC. The purpose of the public information session is to 1) provide information concerning the proposed undertaking to those who may be affected, and 2) to record the concerns of the local community regarding the undertaking. Any format must meet these objectives.

6. The Proponent must ensure that each public meeting is advertised in accordance with the following specified public notification requirements, which shall form part of the project Guidelines when appropriate:

- Minimum information content of public advertisement - (Proponent to substitute appropriate information for italicised items):

PUBLIC NOTICE

Public Information Session on the Proposed

Name of undertaking
Location of undertaking

shall be held at
Date and Time
Location

This session shall be conducted by the Proponent,
Proponent name and contact phone number,
as part of the environmental assessment for this Project.
The purpose of this session is to describe all aspects of the proposed Project, to describe the activities associated with it, and to provide an opportunity for all interested persons to request information or state their concerns.

ALL ARE WELCOME

- If translation services are to be provided as per #4 (above), then the ad should specify this fact and the languages to be used for the session.

- Minimum newspaper ad size: 2 columns wide.

- Minimum posted ad size: 10 cm x 12 cm.

- Minimum newspaper ad frequency (to be run in newspaper(s) locally distributed within each meeting area or newspaper(s) with the closest local distribution area):
    - For dailies, the weekend between 2 and 3 weeks prior to each session and the two consecutive days prior to each session, OR
    - For weeklies, in each of the two weeks prior to the week in which the

session is to be held.

- Minimum posted ad coverage: In the local Town or City Hall or office, and the local post office, within the Town or City where the meeting is to be held, to be posted continually for not less than 15 days prior to each session.

- Any deviation from these requirements for any reason must receive the prior written approval of the Minister.

- The Proponent must provide the Chairperson of the AC with copies of advertisements and public notices.

AGREEMENT

Concerning

The Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project

between

The Government of Canada, as represented by the Minister of the Environment

and

The Government of Newfoundland and Labrador, as represented by the Minister of Environment and Conservation and the Minister for Intergovernmental Affairs

PREAMBLE

WHEREAS Newfoundland and Labrador Hydro is proposing to develop hydroelectric generating facilities with interconnecting transmission lines on the lower section of the Churchill River;

WHEREAS the Project/Undertaking, as proposed by the Proponent, is subject to an environmental assessment under the *Canadian Environmental Assessment Act* and the *Environmental Protection Act*;

WHEREAS the Governments of Canada and Newfoundland and Labrador wish to ensure that the type and quality of information and conclusions on environmental effects required to satisfy their respective legislative requirements are produced through a single, effective and efficient environmental assessment process;

WHEREAS the Minister of the Environment of Canada has responsibilities pursuant to the *Canadian Environmental Assessment Act* and has referred the environmental assessment relating to the project to a review panel in accordance with subsection 29(1) of the Act;

WHEREAS the Minister of Environment and Conservation of Newfoundland and Labrador has responsibilities pursuant to the *Environmental Protection Act* and has recommended to the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador that public hearings be held on the Project/Undertaking;

WHEREAS the Minister for Intergovernmental Affairs of Newfoundland and Labrador has responsibilities pursuant to the *Intergovernmental Affairs Act*;

WHEREAS section 72 of the *Environmental Protection Act* provides that the Minister of Environment and Conservation, with the approval of the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador, may enter into an agreement with another government regarding the environmental assessment of an undertaking;

WHEREAS section 73 of the *Environmental Protection Act* provides that the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador may establish a joint review panel in conjunction and coordination with another government where an agreement has been reached with such other government pursuant to section 72 of the Act with respect to an undertaking;

WHEREAS section 40(2) of the *Canadian Environmental Assessment Act* enables the Minister of the Environment to enter into an agreement with other jurisdictions 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;

WHEREAS the Minister of the Environment has determined that a joint review panel with the Province of Newfoundland and Labrador will be the means by which Canada will proceed with the environmental assessment of the Project/Undertaking;

WHEREAS the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador has ordered public hearings and authorized the Minister of Environment and Conservation to enter into an agreement with Canada on the conduct of those hearings; and

WHEREAS the Ministers have requested the Proponent to submit an Environmental Impact Statement to the joint review panel for the purposes of informing the environmental assessment process.

THEREFORE, the Minister of the Environment and the Minister of Environment and Conservation hereby establish a joint review panel for the environmental assessment of the Project/Undertaking in accordance with the conditions of this agreement and the Terms of Reference attached as Schedule 1.

1.0 Definitions

For the purpose of this Agreement, including the recitals and Schedule 1:

"Agency" means the Canadian Environmental Assessment Agency;

"Agreement" means this Agreement including Schedule 1;

"CEAA" means the *Canadian Environmental Assessment Act*;

"Day" means a calendar day;

"Department" means the Newfoundland and Labrador Department of Environment and Conservation;

"EIS Guidelines" mean the direction provided to the Proponent by Canada and Newfoundland and Labrador, which must be addressed in the Proponent's Environmental Impact Statement;

"Environment" means the components of the Earth, and includes:

(i) land, water and air and all layers of the atmosphere,
(ii) all organic and inorganic matter and living organisms as well as plant, animal and human life,
(iii) the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community,
(iv) a building, structure, machine or other device or thing made by humans,
(v) a solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of humans, or
(vi) the interacting natural systems, a part or a combination of those things referred to in subparagraphs (i) to (v) and the interrelationships between 2 or more of them;

"Environmental Assessment" ("EA") means an assessment of the Environmental Effects of the Project/Undertaking that is conducted in accordance with the Legislation;

"Environmental Effect" means:

(a) any change that the Project/Undertaking may cause in the Environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the Species at Risk Act;
(b) any effect of any change referred to in paragraph (a) on:
    (i) health and socio-economic conditions;
    (ii) physical and cultural heritage;
    (iii) the current use of lands and resources for traditional purposes by aboriginal persons; or,
    (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance; or,
(c) any change to the Project/Undertaking that may be caused by the Environment;

whether any such change or effect occurs within or outside Canada.

For the purposes of this Agreement, "cultural heritage" includes but is not limited to a human work or a place that

(a) either
    (i) gives evidence of human activity;
    (ii) has spiritual and/or cultural meaning; or
    (iii) gives evidence of human activity and has spiritual and/or cultural meaning;
and
(b) that has heritage value.

"Environmental Impact Statement" (hereinafter "EIS") means the environmental assessment report that is prepared by the Proponent;

"EPA" means the Newfoundland and Labrador *Environmental Protection Act;*

"Follow-up Program" means a program for

(a) verifying the accuracy of the EA of the Project/Undertaking; and,

(b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the Project/Undertaking;

"Legislation" means, collectively, the CEAA and the EPA;

"Ministers" means the federal Minister of the Environment and the provincial Minister of Environment and Conservation;

"Panel" means the joint review panel, which is appointed pursuant to Section 2 of this Agreement;

"Participant Funding Program" means the program referred to in Section 8.0 of this Agreement;

"Parties" means the signatories to this Agreement;

"Project/Undertaking" means the Lower Churchill Hydroelectric Generation Project as described in Scope of the Project/Undertaking in Part 1 of the attached Schedule.

"Proponent" means Newfoundland and Labrador Hydro;

"Public Registry" means a repository to facilitate public access to the records relating to the EA of the Project/Undertaking in accordance with section 55 of the CEAA, that has been established by Fisheries and Oceans Canada and Transport Canada and that will be maintained by the Agency or the Secretariat until submission of the Panel report to the Ministers;

"Secretariat" means the Secretariat referred to in Section 5.0 of this Agreement;

"Terms of Reference" means the Terms of Reference for the Panel, as set out in Schedule 1 of this Agreement;

2.0 Establishment of the Panel

2.1 A process is hereby established for the creation of a Panel, pursuant to sections 40, 41 and 42 of the CEAA and section 73 of the EPA and, for the purposes of the review of the Project/Undertaking.

2.2 The Agency and the Department will make arrangements for the coordination of public announcements respecting the establishment of the Panel.

3.0 Constitution of the Panel

3.1 The Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador shall jointly establish the Panel

3.2. The Panel shall consist of five members.

3.3 The Agency and the Department will jointly compile a list of recommended Panel members and will provide that list to the Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador for their consideration in establishing the Panel.

3.4 The Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador shall appoint Panel members from the joint list, consistent with the requirements of the CEAA and the EPA.

3.5 The Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador shall each appoint one member of the Panel and shall jointly appoint the remaining members.

3.6 The Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador shall jointly appoint the chair of the Panel, or appoint respectively one panel co-chair, who shall not be a resident of the geographical area of the Project/Undertaking.

3.7 Panel members shall be unbiased and free from any conflict of interest relative to the Project/Undertaking and have knowledge or experience relevant to the anticipated effects of the Project/Undertaking on the environment.

3.8 Panel members will not be employed by the Public Service of Newfoundland and Labrador or of Canada.

3.9 At least two (2) of the Panel members shall be residents of the geographical area of the Project/Undertaking.

3.10 In the event that a Panel member resigns or is unable to continue to work, the remaining members shall constitute the Panel unless the Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador determine otherwise. In such circumstances, the Minister of the Environment and the Lieutenant-Governor in Council of the Province of Newfoundland and Labrador may choose to replace the Panel member.

4.0 Conduct of the Environmental Assessment by the Panel

4.1 The Panel shall have all the powers and duties of a panel set out in section 35 of the CEAA and sections 64 and 65 of the EPA and applicable regulations.

4.2 The Panel shall conduct the EA in a manner that discharges the requirements set out in the CEAA, the EPA and in the Terms of Reference for the Panel set out in Schedule 1.

4.3 All Panel hearings shall be public and shall provide for the participation of Aboriginal groups, the public, governments, the Proponent and other interested parties.

4.4 A majority of the Panel members constitutes a quorum for the purposes of the EA to be conducted by the Panel. When a hearing, public meeting, or other activity is conducted by the Panel and a member of the Panel for any reason does not attend on any day or part of a day, the other member or members who are sitting at the hearing, public meeting or other activity, if they constitute a quorum, may continue as fully and effectively as though the absent member or members were present.

5.0 Secretariat and Administrative Matters

5.1 Administrative, technical and procedural support for the Panel shall be provided by a Secretariat jointly established by the Agency and the Department.

5.2 The Secretariat shall report to the Panel and shall be structured and operated so as to allow the Panel to conduct the EA in an efficient and cost effective manner.

5.3 Prior to the appointment of the Panel, the Agency and the Department shall prepare a budget estimate for the activities of the Panel. The budget as agreed to by the Agency and the Department shall be finalized following the appointment of the Panel.

5.4 Costs associated with the review by the Panel will be apportioned between the Agency and the Department in accordance with a cost-sharing agreement to be finalized prior to the appointment of the Panel.

6.0 Record of Environmental Assessment and Panel Report

6.1 A Project File containing all records produced, collected or submitted with respect to the EA of the Project/Undertaking shall be maintained by the Agency from the appointment of the Panel until the report of the Panel is submitted to the Ministers. The Public Registry shall be operated in a manner to ensure convenient public access to the records for the purposes of compliance with section 55 of the CEAA and the practices of the Department.

6.2 On completion of the EA of the Project/Undertaking, the Panel shall prepare a report and submit it to the Ministers who will make it public.

6.3 The report will address the factors required to be considered under section 16 of the CEAA and section 65 of the EPA, will set out the rationale, conclusions and recommendations of the Panel relating to the EA of the Project/Undertaking, including any mitigation measures and follow-up program, and include a summary of issues raised by Aboriginal groups, the public, governments and other interested parties.

6.4 The Parties agree to coordinate, to the extent possible, the timing and announcements of decisions on the Project/Undertaking.

6.5 Once the report is submitted to the Minister of the Environment, responsibility for the maintenance of the Public Registry in accordance with section 55 of the CEAA will be transferred to Fisheries and Oceans Canada as responsible authority.

7.0 Other Government Departments or Agencies

7.1 At the request of the Panel, federal and provincial departments or agencies having specialized knowledge with respect to the Project/Undertaking shall provide available information and knowledge in a manner acceptable to the Panel.

7.2 Subject to clause 7.1 of this Agreement and subsection 12(3) of the CEAA, nothing in this agreement shall restrict the participation by way of submission to the Panel of federal or provincial departments or agencies.

8.0 Participant Funding

8.1 The Agency will administer a participant funding program to facilitate the participation of Aboriginal groups and the public in the EA of the Project/Undertaking.

9.0 Review, Interpretation and Amendment of this Agreement

9.1 The Parties will review this Agreement at the request of either Party.

9.2 The Parties will make every reasonable effort to agree on the interpretation and application of this Agreement.

9.3 To the extent practicable, the Parties will seek to resolve differences of opinion in the interpretation and application of this Agreement at a working level, through good faith reasonable efforts.

9.4 The Agreement may only be amended with the written consent of both Parties. Unless another day is agreed, an amendment will become effective upon its execution by the last of the Parties.

In witness whereof our signatures are hereunto inscribed on this _____ day of _____ 2008.

Original signed by:

The Honourable Jim Prentice
Minister of the Environment - Government of Canada
Date:

The Honourable Clyde Jackman
Minister of Environment and Conservation (Acting) - Government of Newfoundland and Labrador
Date:

The Honourable Dave Denine
Minister for Intergovernmental Affairs – Government of Newfoundland and Labrador
Date:

Schedule 1 - Terms of Reference for the Panel

Introduction

Pursuant to the Agreement Concerning the Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project, a Panel is appointed to conduct an EA of the Project/Undertaking proposed by Newfoundland and Labrador Hydro.

The Panel shall conduct the EA of the Project/Undertaking in accordance with these Terms of Reference and consistent with the Agreement between Canada and Newfoundland and Labrador on the Establishment of a Joint Review Panel for the Environmental Assessment of the Lower Churchill Hydroelectric Generation Project.

In performing its responsibilities, the Panel shall promote and facilitate public participation and ensure that the process takes into account the concerns and traditional knowledge of Aboriginal persons or groups and the concerns and community knowledge of the public.

Part I – Scope of the Project/Undertaking

The Proponent proposes a project/undertaking consisting of hydroelectric generating facilities at Gull Island and Muskrat Falls, and interconnecting transmission lines to the existing Labrador grid. The Project/Undertaking includes the following components as described by the Proponent[1]. The specific dimensions/characteristics of the proposal are subject to change as a result of the findings of the environmental assessment.

The Gull Island facility consisting of a generating station with a capacity of approximately 2,000 MW that includes:

- A dam 99 m high and 1,315 m long: and
- A 215 km^2 reservoir in area at an assumed full supply level of 125 m above sea level (asl).

The dam is to be a concrete faced, rock fill dam. The reservoir is to be 230 km long, and the area of inundated land is to be in the order of 85 km^2 at full supply level. The powerhouse is to contain five Francis turbines.

The Muskrat Falls facility consisting of a generating station with a capacity of approximately 800 MW that includes:

- A concrete dam with two sections on the north and south banks of the river, and
- A 100 km^2 reservoir in area at an assumed full supply level of 39 m asl.

The north and south dams will be constructed or roller compacted concrete. The north section dam is to be in the order of 32 m high and 432 m long, while the south section is to be in the order of 29 m high and 125 m long. The reservoir is to be 60 km long and the area of inundated land is to be in the order of 41 km^2 at full supply level. The powerhouse is to contain four propeller or Kaplan turbines, or a combination of both.

Interconnecting transmission lines consisting of:

- A 735 kV transmission line between Gull Island and Churchill Falls; and,
- Two 230 kV transmission lines between Muskrat Falls and Gull Island.

The 735 kV transmission line is to be 203 km long and the 230 kV transmission lines are to be 60 km long. Both lines will be lattice-type steel structures. The location of the transmission lines is to be north of the Churchill River; the final route is the subject of a route selection study that will be combined on double-circuit structures.

[1] All measures are approximate

Part II – Scope of the Environmental Assessment

The Panel shall consider the following factors in the EA of the Project/Undertaking as outlined in Sections 16(1) and 16(2) of the CEAA and Sections 57 and 69 of the EPA:

1. Purpose of the Project/Undertaking;
2. Need for the Project/Undertaking;
3. Rationale for the Project/Undertaking;
4. Alternative means of carrying out the Project/Undertaking that are technically and economically feasible and the environmental effects of any such alternative means;
5. Alternatives to the Project/Undertaking;
6. Extent to which biological diversity is affected by the Project/Undertaking;
7. Description of the present environment which may reasonably be expected to be affected, directly or indirectly, by the Project/Undertaking, including adequate baseline characterisation;
8. Description of the likely future condition of the environment within the expected life span of the Project/Undertaking if the Project/Undertaking was not approved;
9. Environmental Effects of the Project/Undertaking, including the Environmental Effects of malfunctions, accidents or unplanned events that may occur in connection with the Project/Undertaking;
10. Any cumulative Environmental Effects that are likely to result from the Project/Undertaking in combination with other projects or activities that have been or will be carried out;
11. The significance of the Environmental Effects as described in items 9 and 10;
12. Mitigation measures that are technically and economically feasible and that would mitigate any significant adverse Environmental Effects of the Project/Undertaking, including the interaction of these measures with existing management plans;
13. Proposals for environmental compliance monitoring;
14. Measures to enhance any beneficial Environmental Effects;
15. Need for and requirements of any follow-up program in respect of the Project/Undertaking;
16. Capacity of renewable resources that are likely to be significantly affected by the Project/Undertaking to meet the needs of the present and those of the future;
17. Extent of application of the precautionary principle to the Project/Undertaking; and
18. Comments received from Aboriginal persons or groups, the public and interested parties by the Panel during the EA;
19. Factors related to climate change including greenhouse gas emissions;
20. Proposed public information program.

To assist in the analysis and consideration of these issues, in addition to the Secretariat established by Canada and Newfoundland and Labrador to support the Panel, the Panel may retain, within its approved budget, independent expertise to provide information on and help interpret technical and scientific issues and matters related to traditional knowledge and community knowledge.

Aboriginal Rights Considerations

The Panel will have the mandate to invite information from Aboriginal persons or groups related to the nature and scope of potential or established Aboriginal rights or title in the area of the Project, as well as information on the potential adverse impacts or potential infringement that the Project/Undertaking will have on asserted or established Aboriginal rights or title.

The Panel shall include in its Report:

1. information provided by Aboriginal persons or groups related to traditional uses and strength of claim as it relates to the potential environmental effects of the project on recognized and asserted Aboriginal rights and title.
2. any concerns raised by Aboriginal persons or groups related to potential impacts on asserted or established Aboriginal rights or title.

The Panel will not have a mandate to make any determinations or interpretations of:

- the validity or the strength of any Aboriginal group's claim to aboriginal rights and title or treaty rights;
- the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
- whether Canada or Newfoundland and Labrador has met its respective duty to consult and accommodate in respect of potential rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*; and
- The scope, nature or meaning of the Labrador Inuit Land Claims Agreement.

Part III - Steps in the Environmental Assessment Process

The main steps in the EA by the Panel will be as follows:

1. Site Visit:

The Panel will visit the proposed Project area to gain a first-hand understanding of the Project/Undertaking and its surroundings.

2. Public Information Centres

Public information centres will be established by the Panel in Happy Valley – Goose Bay, Sheshatshiu, Natuashish, and other locations in the Province as deemed appropriate by the Panel. These public information centres will be administered by the Secretariat.

3. Submission of the EIS

The Proponent shall submit to the Panel the EIS prepared in accordance with the EIS Guidelines issued by the Ministers. The Panel shall direct the Proponent to distribute the EIS to Aboriginal groups, the public, governments and other interested parties.

4. Review of the EIS:

Within 7 days of receiving the EIS from the Proponent, the Panel shall initiate a 75-day public comment period on the EIS. Aboriginal groups, the public, governments and other interested parties will be able to review the EIS and provide comments to the Panel on whether it adequately addresses the EIS Guidelines and whether additional information should be provided before public hearings are convened. The Panel also has the independent authority to request additional information from the Proponent. The comments are to be provided either in writing or verbally by submitting quality recordings. Comments given verbally are to be considered as fully as written comments.

5. Comments provided to the Proponent

Comments received by the Panel during the public comment period, shall be provided to the Proponent. The Proponent shall provide its response to the comments not later than 60 days following completion of the public comment period.

6. EIS Sufficiency

The Panel shall review all comments received from Aboriginal groups, the public, governments and other interested parties. Should deficiencies be identified as a result of the review of the EIS, and in consideration of any comments received from Aboriginal groups, the public, governments and other interested parties and of the Proponent's response to those comments, clarification, explanation or additional technical analyses may be required from the Proponent by the Panel. The Panel will determine the need for an additional 30-day public comment period on any supplemental information provided by the Proponent in response to deficiencies identified by the Panel. Any request for additional information shall be issued by the Panel within 30 days following the close of the public comment period [or 60 days following receipt of written comments from the Proponent, whichever occurs later.] The Panel will determine the need, timing and location of any meetings required for the clarification of additional and/or technical information. Once the Panel is satisfied that all the relevant information is available, it will make a determination on the sufficiency of the EIS for the purpose of proceeding to public hearings.

7. Scheduling of Public Hearings

The Panel shall schedule and announce the start of the public hearings once it is satisfied that it has adequate information to proceed to public hearings. A minimum of 45 days notice will be provided to Aboriginal groups, the public, governments and other interested parties prior to the start of the public hearings. The Panel will schedule the public hearings to encourage the attendance and participation of Aboriginal groups and the public.

As required, the Panel will hold technical hearings on specific aspects of the Project/Undertaking in addition to community-based hearings focused on seeking the views of Aboriginal persons or groups and the public on the potential Environmental Effects of the Project/Undertaking.

8. Location of Public Hearings

The Panel will hold public hearings in locations determined by the Panel within the area likely to be affected by the Project/Undertaking, or in any area reasonably close to where the Project/Undertaking is proposed to be carried out, to provide convenient access for potentially affected Aboriginal persons or groups and the public.

9. Conduct of Public Hearings

The Panel will establish rules of procedure for public hearings and will conduct the public hearings in a manner which will:

- promote and facilitate the participation of Aboriginal persons or groups, the public and interested parties in the project area,
- afford those Aboriginal persons or groups, the public and interested parties an opportunity to present their views on the potential Environmental Effects of the Project/Undertaking; and

- ensure a thorough examination of matters relevant to its mandate.

The Panel will determine how to engage the Proponent in the public hearings. The Panel will also determine interpretation requirements for the public hearings and any other activities associated with the EA.

10. Length of Public Hearings

The public hearings will be completed within 45 days from the start of the hearings.

11. Delivery of Panel Report

The Panel will deliver its report to Ministers within 90 days following the close of the public hearings. The report will take into account and reflect the views of all Panel members. The report will include:

- a description of the EA process, including public hearings
- the rationale, conclusions and recommendations of the Panel with respect to the nature and significance of the potential Environmental Effects of the Project/Undertaking,
- the Panel's recommendations concerning, as appropriate, any mitigation measures including, as pertinent, recommendations concerning the environmental management of the Project/Undertaking and follow-up programs
- a summary of any issues identified and comments and recommendations received from Aboriginal persons or groups, and
- a summary of the issues raised and any comments and recommendations received from the public, governments and interested parties.

Translation and Interpretation

The translation of documents in any language other than English shall be for convenience only. The English version of each document is authoritative. In the case of any inconsistency between the English document and a translated version, the English version will prevail.

Panel's Documents

The Panel's operational procedures, public notices pertaining to the Panel's meetings and hearings, detailed procedures for the conduct of the public hearings, and any information request or deficiency statement issued by the Panel will be translated into French, Innu-aimun, as well as other aboriginal language(s) that the Panel deems necessary to enable open and effective participation in the process by Aboriginal persons and groups. Reasonable measures will be taken to ensure that the translations will be made available, in written and/or audiovisual forms, on the Public Registry and at Public Information Centres in a timely manner following the public release of the English version by the Panel, and will be provided on request to individuals and groups.

The Executive Summary and Recommendations of the Panel report will be translated into French, Innu-aimun, as well as other aboriginal language(s) that the Panel deems necessary to convey its key findings and recommendations to Aboriginal persons and groups that have participated in the review process prior to public release of the Panel report. Such translations in written and/or audiovisual forms will be available on the Public Registry and at Public Information Centres at the same time as the English version of the Panel report to the public.

The Panel report will be translated in French and made available in a timely manner following Panel submission of the English version of the report. Translation of the remainder of the Panel report into aboriginal language(s) will be undertaken by the Governments and made available in a timely manner upon request from Aboriginal persons or groups or the public.

Proponent's Documents:

The Panel shall consult with the participating Aboriginal groups and the Proponent regarding which parts of the EIS and any other documentation or additional information prepared by the Proponent for the Panel for use during the Environmental Assessment of the Project/Undertaking will be translated into aboriginal language(s). As determined by the Panel, the Proponent shall translate those documents and shall ensure that all reasonable measures are taken to effect translations in a timely manner.

Translations of the parts of the EIS and other Proponent documents into aboriginal language(s) as determined in the manner outlined above shall be made available in written and/or audiovisual forms, on the Public Registry and at Public Information Centres

Interpretation:

The Panel shall consult with participating Aboriginal groups prior to making a determination of interpretation requirements from English to aboriginal language(s) and from aboriginal language(s) into English for any public meetings hosted by the Panel and the public hearings, including the technical and community hearings, and any other interpretation requirements, and appropriate interpretation services will be provided by the Panel.

PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 2

by

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and

JAMES L.H. SPRAGUE, B.A., LL.B.

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that matter is delayed or stretched unreasonably. The agency must, as well, avoid the impression of attempting to build the case for one party or another.

12.4 INTERVENTIONS

Intervenors are generally individuals or groups who do not meet the criteria to be a party but who still have a sufficient interest, or some expertise or view which the agency feels will benefit the proceeding to have represented. As the Supreme Court of Canada commented in the *Canadian Council of Churches v. Canada*[162] "[T]he views of the public litigant who cannot obtain standing need not be lost. Public interest organizations are, as they should be, frequently granted intervenor status. *The views and submissions of intervenors on issues of public importance frequently provide great assistance to the courts.*" [emphasis added.]

A statute may expressly give an agency the authority to grant intervener status to a person or group.[162.1] Otherwise an agency's authority to grant intervener status flows implicitly from the power to conduct a hearing or to hold an inquiry.[163] It appears that, at least in the case of a public officer, in order for an agency to grant such status the person seeking intervenor status must have the ability himself to receive the grant.[164]

There is no common law *right* to be an intervenor. Statute may, of course, grant such a right but in the absence of such a statutory provision, intervenors are added at the discretion of the agency. Furthermore, unlike a party, who is given certain rights by natural justice and fairness, the extent of an intervenor's participation is fixed by the agency (subject to statutory direction, of course). The

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162 (1992), 132 N.R. 241 (S.C.C.).

162.1 See, for example, section 33 of British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

163 *Nfld. Telephone Co. v. TAS Communications Systems Ltd.* (1987), 45 D.L.R. (4th) 570 (S.C.C.).

164 In *Nfld. Telephone Co. v. TAS Communications Systems Ltd.* (1987), 45 D.L.R. (4th) 570 (S.C.C.) the Supreme Court held that the Newfoundland Board of Commissioners of Public Utilities could not grant intervenor standing to the federal Director of Investigation and Research as the federal government had not given that officer the mandate to appear before provincial agencies. The Court held that "Whatever scope may be reasonably assigned to the implied power or discretion of the board to permit intervention, it cannot have been intended that the board should have authority to permit intervention by a public officer in his official capacity if the officer has been denied the necessary authority to intervene by his governing statute. . . . To permit intervention where a public officer is shown to lack the necessary authority to intervene would be to permit him to exceed his authority and thus would be contrary to a fundamental principle of public law." The Court had earlier held that the official required some statutory authority to intervene in the capacity of his office as that intervention would amount to "an assertion, in an adjudicative context, of the authority and expertise of a public official. In such a case, a public officer puts the weight of his opinion and knowledge acquired in the exercise of his official duties, on the adjudicative scales. He extends, on his own initiative, the effective reach and influence of his office and authority with potential direct legal effect." For a similar decision see *City of Edmonton v. Canadian Radio-television and Telecommunications Commission*, [1983] 1 F.C. 358 (C.A.).

degree of participation will be determined by the extent the agency feels the intervenor's participation will assist it in its mandate.[165] Sometimes two or more individuals or groups may bring before the agency essentially the same expertise or views. In that case the agency may require that they pool their resources and appear through a single spokesman.[165.1] However, it must be remembered that an intervenor is there to bring a view or an expertise before the agency which will be useful in determining the matter which is before the agency. An intervenor should not be given leave to speak to questions which are not raised by the underlying proceeding.[166]

Once notice has been given of the hearing, those who want to take part will give notice of their wish to participate in the hearing by filing with the tribunal a notice of intervention: see Appendix 12.4.

The notice of intervention should be precise and should set out:

(1) the style of cause (to allow the agency to identify the proceeding in question);

(2) a description of the intervenor (to allow the agency to know who is seeking the intervention and what he can bring to the proceeding);

(3) a description of how the intervenor can be impacted or affected by the matters before the agency;

(4) a brief description of the positions being taken by the intervenor for or against; and

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165 See for example, the description of the role of intervenors before the National Energy Board in c. 5.5(d)(iv) and the Ontario Energy Board in c. 5.4.

165.1 Of relevance to this point is the caution sounded by Lord Hoffman in the British House of Lords decision in *In Re E (a child)*, [2008] UKHL 66 (H.L.) respecting interventions in proceedings before the House of Lords. Those comments are also applicable to proceedings before Canadian agencies.

> It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organizations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.
>
> An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.

166 *Rudolph v. Canada (Minister of Employment & Immigration)* (1992), 139 N.R. 233 (Fed. C.A.).

(5) the address for service upon the intervenor.

Few agencies have a procedure to strike out a notice of intervention if it fails to disclose any substantial interest of the intervenor. I believe that most agencies should allow standing to most intervenors.[167] In the end, the agency will have to decide what weight should be given to the submissions. This practice is in the public interest.

Where an agency has no requirement for the filing of any supporting material in advance by the applicant, there will obviously be no requirement that material be filed with a notice of intervention. Many agencies have no requirement that an intervenor file any material. He only has to appear the day the hearing commences, having given notice of his intent to intervene. Many agencies do not even require a notice of intervention to intervene. Most agencies fall somewhere between the extremes of substantial pre-filings and no filings at all.[167a]

12.5 INTERROGATORIES

Once a notice calling a hearing has been given and the notices of intervention have been received, the tribunal may issue a procedural order advising all parties of the procedure, in terms of interrogatories and other preliminary matters.

Interrogatories are written questions directed by parties to each other, copies of which are filed with the tribunal and sent to or served on all other parties. Usually the procedural order, where interrogatories are part of a tribunal's practice, will described how a party may intervene and put interrogatories to opposing parties. Such a procedural order is attached as Appendix 12.5.

Interrogatories were introduced many years ago by some agencies such as the NEB and the OEB as a substitute for examination-for-discovery. Most boards can authorize (order) discovery, but it is not common to do so. The concept of interrogatories is that if a party does not understand material that has been filed, it may address questions in writing to another party. The interrogatories shall be answered by the other party in writing on or before a certain date, unless a motion is brought before the tribunal dispensing with a duty to answer the question. The practice, where there are interrogatories, is that the question and answers are numbered so that they can be easily associated with the party asking the question and the subject matter.

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167 For an interesting limitation on the authority of an agency to grant intervenor status see *Director of Investigations and Research Under the Combines Investigation Act v. Nfld. Telephone Co.*, [1987] 2 S.C.R. 466, 68 Nfld. & P.E.I.R. 1, 209 A.P.R. 1, where the Supreme Court of Canada held that an provincial agency could not grant a federal official intervenor status in its proceedings when Parliament had not given that office the mandate to intervene. The agency's provincially based power could not alter the mandate of the federal official.

167a Inventions are also discussed briefly earlier in chapter 9 under the heading "9.7(b) Intervening in Agency Proceedings".

CED Administrative Law VI.5.(l)

Canadian Encyclopedic Digest
Administrative Law
VI — Remedies for Unlawful Administrative Action
5 — Standing
(l) — Joinder and Intervention

VI.5.(l)

§642 If a person affected by a decision is not named as a party to the proceedings, there is generally[FN1] a right to apply to be joined as a party.[FN2] Indeed, if the relevant legislation or Rules of Court specify the proper parties,[FN3] the court has no overriding discretion to deny joinder to an applicant who comes within that category.[FN4]

§643 Another way of securing an audience before the courts in judicial review or statutory appeal proceedings is to apply for intervenor status. The availability and extent of such status depend on the terms of the relevant Rules of Court.[FN5] However, the Rules may not exclude a residual judicial discretion to accord intervenor status to persons who do not qualify under the Rules but whose participation is necessary to ensure justice.[FN6] Irrespective of the terms of the Rules, the Attorney General has a common law right to intervene in such proceedings,[FN7] which is confirmed by statute in British Columbia and Ontario.[FN8]

§644 Some Rules of Court recognize two categories of intervenor, intervenor party and amicus curiae or friend of the court.[FN9] The most significant differences between the two are the full participatory rights, including the right to appeal, conferred by the first and the discretionary character of participation and the lack of a right of appeal under the second.[FN10] An intervenor who lacks party status is normally not entitled to raise new issues which the parties do not.[FN11]

§645 Decisions about intervention are governed by whether the person who seeks intervenor status has a sufficient "interest"[FN12] in the proceedings and something to contribute to the resolution of the judicial review application that the parties or other intervenors[FN13] will not necessarily bring out and whether allowing in the intervention will unnecessarily increase the length, cost and complexity of the proceedings or take the presentation and defence of the application away from those who are parties.[FN14] The courts are hesitant to allow intervention for the first time on appeal, particularly if the proposed intervenor has no prior involvement in the process leading to the impugned decision,[FN15] but this consideration does not apply nearly so powerfully if status as a party or intervenor party is claimed at the appeal level.[FN16]

§646 The courts generally defer to a tribunal's decision to grant or deny participatory rights pursuant to its statutory discretion[FN17] and the tribunal is entitled to be heard on the issue in any subsequent judicial review application.[FN18] However, if an agency misinterprets the scope of its discretion to allow interventions in proceedings before it, that ruling stands to be set aside for error of law.[FN19]

§647 If the tribunal is not explicitly granted the discretion to decide participatory rights, both the tribunal and reviewing court make such determinations according to a combination of the principles of natural justice and standing and the law governing intervenors,[FN20] particularly if the statute uses terminology derived from jurisprudence on

standing, such as "aggrieved person"[FN21] and "a person with an interest".[FN22] A requirement that a person be "directly affected" in order to appeal a decision to an administrative tribunal imposes a stricter test for standing than at common law and the tribunal may deny a right of appeal to a public interest group intervened in the initial decision-making process.[FN23] Also, the use of the term "member of the public" excludes an incorporated body from commencing proceedings before a tribunal.[FN24]

§648 The issue of intervention may also arise from the perspective of whether a statutory authority or official has the capacity to intervene in the proceedings of another statutory body.[FN25]

FN1. *Canada (Attorney General) v. Aluminum Co. of Canada* (B.C.C.A.) (limitations on right to be joined in public law litigation; meaning of "affected").

FN2. *Simmonds v. Law Society (Prince Edward Island)* (P.E.I.T.D.); affirmed (C.A.) (lawyers proper parties in challenge to dismissal by law society of complaints against them; lawyers adversely affected, possessing independent interests that law society not necessarily representing and their participation not causing unnecessary delay or prejudice to original parties); *see also* Parties.

FN3. Federal Court Rules, 1998, SOR/98-106, R. 303(1).

FN4. *Canada Post Corp. v. C.U.P.W.* (Ont. H.C.) (Workers' Compensation Board joined as respondent in application for declaration outside Judicial Review Procedure Act because entitled to party status if proceedings brought under that Act).

FN5. *Society of Composers, Authors & Music Publishers of Canada v. Canada (Copyright Board)* (Fed. T.D.).

FN6. *Imperial Tobacco Ltd. v. Canada (Attorney General)* (Que. S.C.); affirmed (C.A.) (interpreting Quebec Code of Civil Procedure); *see also* Parties (Western).

FN7. *Energy Probe v. Canada (Atomic Energy Control Board)* (T.D.); reversed in part (C.A.); leave to appeal to S.C.C. refused (S.C.C.); *but see Molson Co. v. Moosehead Breweries Ltd.* (Fed. T.D.) (holding Attorney General to same discretionary consideration as private litigants).

FN8. Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, s. 16(1), (2); Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 9(4).

FN9. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, RR. 13.01-13.03; Nova Scotia Civil Procedure Rules, 1971, RR. 8.01, 8.02.

FN10. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (Ont. C.A.) (criteria for restricting applicant for intervenor status to "friend of the court"); *see also* Parties.

FN11. *Edmonton Friends of the North Environmental Society v. Canada (Minister of Western Economic Diversification)* (Fed. C.A.); *Nova Scotia (Attorney General) v. Ultramar Canada Inc.* (Fed. T.D.).

FN12. *MacKeigan v. Hickman* (N.S.C.A.); reversing (N.S. T.D.), affirmed (S.C.C.) (subject of royal commission having sufficient "interest" in proceedings to intervene as party in challenge by judges to decision to summon them to testify).

FN13. *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (C.A.); reversing in part (T.D.); *see also*

Reid v. Canada (Fed. C.A.); *Renaud v. Central Okanagan School District No. 23* (B.C.C.A.); *Guadagni v. British Columbia (Workers' Compensation Board)* (B.C.C.A.).

FN14. *Imperial Tobacco Ltd. v. Canada (Attorney General)* (Que. S.C.); affirmed (C.A.); *Society of Composers, Authors & Music Publishers of Canada v. Canada (Copyright Board)* (Fed. T.D.); *Canada (Attorney General) v. Aluminum Co. of Canada* (B.C.C.A.); *United Parcel Service Canada Ltd. v. Ontario (Highway Transport Board)* (Ont. Div. Ct.) (Ontario codifying principles in Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 13.01).

FN15. *Renaud v. Central Okanagan School District No. 23* (B.C.C.A.); *Guadagni v. British Columbia (Workers' Compensation Board)* (B.C.C.A.).

FN16. *Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.* (S.C.C.).

FN17. *Black Action Defence Committee v. Ontario (Coroner)* (Ont. Div. Ct.); *Stanford v. Regional Coroner (Eastern Ontario)* (Ont. Div. Ct.) (coroner's determination of entitlement to participate in inquest according to whether substantially or directly interested reviewable only for error of principle); *Hart v. 240953 Developments Ltd.* (Div. Ct.); *Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board)* (Alta. C.A.); *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)* (Alta. Q.B.).

FN18. *Bibeault v. McCaffrey.*

FN19. *Canada (Director of Investigation & Research) v. Air Canada* (Fed. C.A.); affirmed .

FN20. *Canadian Transit Co. v. Canada (Public Service Staff Relations Board)* (Fed. C.A.); *Re Torstar Corp.* (O.S.C.) (Ontario court intervention rules influencing commission in according applicants status as intervenors rather than parties).

FN21. *Riverlake Residents' Assn. v. Halifax (County)* (N.S. Mun. Bd.); *Backman v. Halifax (City)* (N.S. Mun. Bd.); *Northwest Arm Heritage Assn. v. Halifax (City)* (N.S. Mun. Bd.).

FN22. *Re Bambrick* (Nfld. T.D.).

FN23. *Friends of the Athabasca Environmental Assn. v. Alberta (Public Health Advisory & Appeal Board)* (Q.B.); affirmed (C.A.); *Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)* (Alta. Q.B.).

FN24. *North Sydney (Town) Chief of Police v. Nova Scotia (Advisory Council on the Status of Women)* (N.S.T.D.).

FN25. *Newfoundland Telephone Co. v. TAS Communications Systems Ltd.* (S.C.C.) (federal Director of Investigations and Research lacking power to intervene in proceedings before provincial public utilities board).

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the same equal opportunity as everyone to the fullest extent of their capacities. Concern over the welfare of the individual, no matter how genuinely held, is not enough and, indeed, without objective support might smack of paternalism which, however genuinely and sincerely motivated, is one of the very approaches to disabilities that the spirit and intent of human rights legislation is designed to discourage.

[85] Finally, it would be remiss to conclude this appeal without mention of the excellent presentations of both counsel. Each one, in turn, with appreciated candour, made appropriate concessions on points that had no need of pursuit, thereby assisting the focus of the appeal being directed to the actual questions in issue which were then addressed succinctly and thoroughly. The bench's appreciation of their efforts was conveyed to them at the conclusion of the hearing, and it is fitting at the determination of this appeal that it be re-iterated.

[86] Accordingly, this appeal is dismissed and the decision of the Board of Inquiry reaffirmed. The respondent is entitled to costs on a party and party basis.

Appeal dismissed.

Editor: Kelli A. Simmonds/vem

Labrador Inuit Association (applicant) v. Her Majesty The Queen in Right of the Province of Newfoundland, as represented by the Minister of Environment and Labour (respondent) and Voisey's Bay Nickel Company Limited (intervenor) and Nunavik Inuit, as represented by Makivik Corporation and Makivik Corporation (intended intervenors)
(1997 St. J. No. 1793)

Innu Nation (applicant) v. Her Majesty The Queen in Right of the Province of Newfoundland, as represented by the Minister of Environment and Labour and Voisey's Bay Nickel Company Limited (respondents) and Nunavik Inuit, as represented by Makivik Corporation and Makivik Corporation (intended intervenors)
(1997 St. J. No. 1809)

Indexed As: Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)

Newfoundland Supreme Court
Trial Division
Halley, J.
July 18, 1997.

Summary:

The Labrador Inuit Association and the Innu Nation both applied to determine whether a mining company's exploratory works were governed by a Memorandum of Undertaking between the Inuit, Innu and the province of Newfoundland. The Quebec Nunavik Inuit and their corporation applied under rule 54.03(4) for intervenor status, under rule 7.05 to be added as a party or under rule 7.06 to be added as a "friend of the court".

The Newfoundland Supreme Court, Trial Division, dismissed the application and ordered that the Nunavik Inuit and their corporation pay all parties their party and party costs plus their solicitor and client costs.

Practice - Topic 652

Parties - Adding or substituting parties - Adding or substituting plaintiffs - Circumstances when denied - The Labrador Inuit Association and the Innu Nation both applied to determine whether a mining company's exploratory works were governed by a Memorandum of Undertaking between the Inuit, Innu and the province of Newfoundland - The Quebec Nunavik Inuit and their corporation applied under rule 7.05 to be added as a party - The Newfoundland Supreme Court, Trial Division, held that the Nunavik Inuit were not entitled to party status, because they had no interest in the subject matter of the proceedings and there was nothing in common between the proceeding issues and the issues the Nunavik Inuit wished the court to consider - Given the delay in applying and the prejudice and costs to existing parties, the court would not have exercised its discretion in favour of the Nunavik Inuit in any event - See paragraphs 8 to 11.

Practice - Topic 686

Parties - Adding or substituting parties - Intervenors - Where applicant may be adversely affected - The Labrador Inuit Association and the Innu Nation both applied to determine whether a mining company's exploratory works were governed by a Memorandum of Undertaking between the Inuit, Innu and the province of Newfoundland - The Quebec Nunavik Inuit and their corporation applied under rule 54.03(4) for intervenor status - The Newfoundland Supreme Court, Trial Division, held that since the Nunavik Inuit were not parties to the Memorandum, and hence not "affected by the proceeding", they were not entitled to intervenor status - Given the delay in applying and the prejudice and costs to existing parties, the court would not have exercised its discretion in favour of the Nunavik Inuit in any event - See paragraphs 5 to 7.

Practice - Topic 687

Parties - Adding or substituting parties - Intervenors - Amicus curiae - The Labrador Inuit Association and the Innu Nation both applied to determine whether a mining company's exploratory works were governed by a Memorandum of Undertaking between the Inuit, Innu and the province of Newfoundland - The Quebec Nunavik Inuit and their corporation applied under rule 7.06 to be added as a "friend of the court" - The Newfoundland Supreme Court, Trial Division, dismissed the application, where the Nunavik Inuit would not be of any assistance to the court in the proceeding - Given the delay in applying and the prejudice and costs to existing parties, the court would not have exercised its discretion in favour of the Nunavik Inuit in any event - See paragraphs 12 to 16.

Practice - Topic 7454

Costs - Solicitor and client costs - Entitlement to - Improper, irresponsible or unconscionable conduct - The Labrador Inuit Association and the Innu Nation both applied to determine whether a mining company's exploratory works were governed by a Memorandum of Undertaking between the Inuit, Innu and the province of Newfoundland - The Quebec Nunavik Inuit and their corporation applied under rule 54.03(4) for intervenor status, under rule 7.05 to be added as a party or under rule 7.06 to be added as a "friend of the

court" - The Newfoundland Supreme Court, Trial Division, in dismissing the application, ordered that the Nunavik Inuit and their corporation pay all parties their party and party costs plus their solicitor and client costs, where the application was untimely, without any merit and was made in an improper manner - See paragraphs 19 to 27.

Cases Noticed:

A.M.S., Re (1993), 107 Nfld. & P.E.I.R. 350; 336 A.P.R. 350 (Nfld. T.D.), refd to. [para. 15].

Ward v. Canada et al. (1997), 153 Nfld. & P.E.I.R. 135; 475 A.P.R. 135 (Nfld. T.D.), refd to. [para. 15].

Young v. Young et al., [1993] 4 S.C.R. 3; 160 N.R. 1; 34 B.C.A.C. 161; 56 W.A.C. 161; [1993] 8 W.W.R. 513; 108 D.L.R.(4th) 193; 84 B.C.L.R.(2d) 1; 49 R.F.L.(3d) 117; 18 C.R.R.(2d) 41, refd to. [para. 22].

House of Haynes (Restaurant) Ltd. et al. v. Snook et al. (1995), 134 Nfld. & P.E.I.R. 23; 417 A.P.R. 23 (Nfld. C.A.), refd to. [para. 23].

Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd. et al. (1997), 150 Nfld. & P.E.I.R. 203; 470 A.P.R. 203 (Nfld. C.A.), refd to. [para. 24].

Statutes Noticed:

Rules of Court (Nfld.), Supreme Court Rules, rules 7.05, 7.06, 54.03 [para. 4].

Counsel:

Christopher Sullivan and Veryan Haysom, for the Labrador Inuit Association;

Lloyd Hoffer, for the Innu Nation;

Edward Roberts, Q.C., and Donald Burrage, for the Province of Newfoundland;

Ian Kelly, for Voisey's Bay Nickel Co.;

Jamie Smith, Peter Hutchings and Franklin Gertler, for the Nunavik Inuit and the Makivik Corp.

This application was heard on July 17, 1997, before Halley, J., of the Newfoundland Supreme Court, Trial Division, who delivered judgment on July 18, 1997, with the following written reasons on September 16, 1997.

I. Application

[1] Halley, J.: The Nunavik Inuit, as represented by the Makivik Corporation and the Makivik Corporation ("applicants") apply for an order under rule 54.03(4) of the **Rules of the Supreme Court, 1996** ("**Rules**") granting the applicants leave to intervene in these proceedings or, in the alternative, leave to join as a party under rule 7.05 or, in the further alternative, leave to take part in the proceedings as a "friend" of the court under rule 7.06.

II. Issues

[2] The issues are:

(a) Should the applicants be permitted to intervene in these proceedings?

(b) If not, should the applicants pay solicitor-client costs in addition to party-party costs?

III. Background

[3] The following are the facts:

(a) The Labrador Inuit Association ("Inuit") filed their application against Her Majesty the Queen in the Right of the Province of Newfoundland ("Province"), as represented by the Minister of the Environment and Labour ("Minister") on June 20, 1997.

(b) On June 26, 1997 a similar application was filed by the Innu Nation ("Innu") against both the Minister and Voisey's Bay Nickel Company Limited ("Company").

(c) On June 27, 1997 the Company successfully applied to intervene in the Inuit application under rule 7.05.

(d) The main issue raised in the Inuit and Innu applications was whether the Company's proposed exploratory support works were included in a Memorandum of Understanding executed by the Inuit, Innu, the Province and the federal government ("Memorandum").

(e) The Nunavik Inuit are an Aboriginal people who live in the Province of Quebec. The Makivik Corporation is a corporation which was incorporated by special Act of the National Assembly of Quebec. The company is owned by the Nunavik Inuit and has its head office in Kunjjuaq, Quebec.

(f) The applicants became aware of the intention of the Inuit and Innu to commence these proceedings "late in June and early in July of 1997 by brief press reports".

(g) On July 3, 1997 the parties appeared in court and it was agreed that the Inuit and Innu applications would be heard together and the evidence in one application would be read as evidence in the other.

(h) The hearing started on July 8, 1997 and concluded with legal arguments on July 11, 1997.

(i) On July 14, 1997 a solicitor on behalf of the applicants "faxed" a letter to the court advising that the applicants wanted to intervene in the proceedings. There was a request that "no order or judgment issue in these proceedings until the court has had the opportunity to hear the representations" of the applicants.

(j) The Deputy Registrar of this court issued a notice to the parties to attend a hearing on July 16, 1997 to consider the letter.

(k) At that hearing counsel for all parties advised the court that they were opposed to the applicants' application to join the proceedings.

(l) The applicants were instructed to file the appropriate application at the Registry of this court.

(m) The applicants filed their application on July 16, 1997 supported by affidavit and documentary evidence.

(n) The application was heard on July 17, 1997 and a decision was filed on July 18, 1997 dismissing the application. The applicants were ordered to pay the party-party costs and solicitor-client costs of the parties.

(o) These are the reasons for that decision.

IV. The Rules

[4] The following are the **Rules of Court** which were relied upon by the applicants to intervene in these proceedings:

> "54.03(1) An originating application shall be served upon every person who appears to be interested or likely to be affected by a proceeding under rule 54.
>
> "(2) The court may order an originating application to be served upon any interested person not served.

"(3) Where it is sought to quash a judgment, order, warrant or inquiry and on any application for an order in the nature of prohibition, an originating application shall also be served, at least seven days before the return date thereof, upon

(a) the Attorney General, and

(b) the person making the judgment or order, or issuing the warrant, or holding the inquiry.

"(4) A person, who has not been served with an originating application, upon showing that the person may be affected by the proceeding and, with the leave of the court, may take part in the proceeding as though served.

"7.05(1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto if

(a) that person claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the order therein, or otherwise;

(b) that person's claim or defence and the proceeding have a question of law or fact in common; or

(c) that person has a right to intervene under a statute or rule.

"(2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.

"(3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

"7.06. Any person may, with the leave of the court and without becoming a party to a proceeding, intervene in the proceeding as a friend of the court for the purpose of assisting it."

(a) Intervenor Status

[5] The applicants asked to intervene in these proceedings under rule 54.03(4) which provides that a party may take part in a proceeding if it can establish that it "may be affected by the proceeding".

[6] The Inuit and Innu claim that the Company cannot build a temporary road and temporary airstrip for exploratory purposes without an environmental assessment. These applications involve the interpretation of the words "mine site roads" and "an airstrip" which are contained in the definition of "Undertaking" which is set out in the Memorandum.

[7] Since the applicants are not parties to the Memorandum, a decision relating to the interpretation of the Memorandum will have no legal affect on the applicants. The applicants have, therefore, failed to establish that they should be granted intervenor status.

(b) Party Status

[8] Rule 7.05 permits an applicant to join in a proceeding as a party where the applicant claims an interest in the "subject matter" of the proceeding or if the applicants' claim has "a question of law or fact in common" with the issue(s) raised in the litigation.

[9] In considering whether an applicant should be a party the court must consider the scope of the intended intervention. Intervenors must take the litigation as framed by the parties. The parties must be permitted to define the issues which should be dealt with by the court. They should not be forced to deal with new or separate issues that concern only the intervenor. In other words, an intervenor must not be permitted to "highjack" the litigation.

[10] The issues which the applicants want to raise include an attack on the validity of the Memorandum, Aboriginal and treaty rights under Section 35 of the **Constitution Act**, (1982), a **Charter** argument and a determination as to whether "the Crown" includes the provincial government of this Province. The applicants have no interest in whether the exploratory support works are included in the definition of "Undertaking" as set out in the Memorandum.

[11] I find that the applicants do not have an interest in the subject matter of this hearing. In addition, there is nothing in common between these proceedings and the issues which the applicants want the court to consider.

(c) Friend Of The Court

[12] Rule 7.06 is the "amicus curiae" rule. It permits a party to intervene as a "friend of the court for the purpose of assisting it". This rule is generally brought into play by the court on its own initiative.

[13] The following are the situations where a court generally considers an "amicus curiae" application appropriate:

(1) Where there is a matter of importance before the court which could affect a significant class of persons. The Attorney-General of the Province is usually invited to join the litigation in such circumstances;

(2) Where the court requires help to avoid a possible injustice. In such cases the "friend" may refer the court to legal authority which may not have otherwise been brought to the court's attention;

(3) Where a party is unrepresented and justice demands legal assistance to prevent an injustice.

[14] There have been two cases in this jurisdiction where a "friend" of the court was permitted to join the litigation by the presiding judge.

[15] In **A.M.S., Re**, [1993] N.J. No. 83; 107 Nfld. & P.E.I.R. 350; 336 A.P.R. 350 (Nfld. T.D.), Green, J. (as he then was), on his own initiative, requested a lawyer to appear for a party "for the assistance of the Court". In **Ward v. Canada et al.** (1997), 153 Nfld. & P.E.I.R. 135; 475 A.P.R. 135 (Nfld. T.D.), Hickman, C.J.T.D., permitted the International Fund for Animal Welfare to join the proceeding as a friend of the court "for the purpose of rendering assistance to the court by way of argument".

[16] In this case I do not find that the applicants will be of assistance to the court in relation to the interpretation of the Memorandum. The application of the applicants to intervene as a "friend of the court" is dismissed.

(d) Discretion

[17] Rules 54.03, 7.05 and 7.06 provide that an intervention may only occur with "leave of the court". Even if the applicants' application had some merit the court must then determine whether the intervention would unduly delay or prejudice the adjudication of

the rights of the parties.

[18] The application of the applicants was made after the evidence was presented and counsel had completed their final legal arguments. The hearing of the application would cause a considerable delay in the determination of the legal rights of the parties. This would be highly prejudicial and costly to the parties. Under these circumstances I would have declined to permit the applicants to intervene at this stage of the proceedings even if the applicants' application was meritorious.

V. Costs

(a) Party - Party Costs

[19] Rule 55.02 provides that party-party costs are in the discretion of the court. Rule 55.03 directs that generally costs should "follow the event". In other words, the successful party should normally be awarded costs on a party-party basis. Rule 55.04 provides that the determination of the dollar value of the costs should be made by a taxing officer in accordance with the Scale of Costs set out in the **Rules**.

[20] In this case the applicants' application was dismissed and it is therefore ordered that the applicants shall pay to the other parties their party-party costs as taxed on the basis of one counsel each.

(b) Solicitor-Client Costs

[21] In some circumstances the court will award solicitor-client costs in addition to party-party costs.

[22] In **Young v. Young et al.**, [1993] 4 S.C.R. 3; 160 N.R. 1; 34 B.C.A.C. 161; 56 W.A.C. 161; [1993] 8 W.W.R. 513; 108 D.L.R.(4th) 193; 84 B.C.L.R.(2d) 1; 49 R.F.L.(3d) 117; 18 C.R.R.(2d) 41, at page 134 [S.C.R.], McLachlin, J., reviewed the circumstances where solicitor-client costs should be awarded and concluded that:

> "Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."

[23] The **Young** case was followed by our Court of Appeal in **House of Haynes (Restaurant) Ltd. et al. v. Snook et al.** (1995), 134 Nfld. & P.E.I.R. 23; 417 A.P.R. 23 (Nfld. C.A.). At paragraph 50 Marshall, J.A., concluded that the awarding of solicitor-client costs should be done by a court to "represent an expression of censure or chastisement and will engender a certain element of opprobrium".

[24] In **Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd. et al.**. [1997] N.J. No. 122; (1997), 150 Nfld. & P.E.I.R. 203; 470 A.P.R. 203 (Nfld. C.A.), the Court of Appeal upheld the award of solicitor-client costs at trial. Green, J.A., at paragraph 34 said:

> "Although the applications judge did not specifically advert to the principles in **Young** and **House of Haynes**, it is clear that he regarded the actions of counsel for Slaney with considerable disfavour. In imposing solicitor and own client costs, he was using them as a form of chastisement and a means of indemnifying the respondent against unnecessary costs associated with behaviour of counsel that fell within the principles enunciated."

[25] The Court of Appeal dismissed the Appeal and awarded solicitor-client costs on the appeal. Green, J.A., stated that:

"By pursuing in this appeal, counsel for Slaney is reiterating his continuing inability or unwillingness to recognize the fundamental obligations of counsel both to the court and a fellow solicitor. In the circumstance, this appeal ought not to have been brought. In persisting in it, Slaney has further delayed the matter and increased costs to the respondent, costs which the respondent in the circumstances ought to be insulated against. In the result, the appeal is dismissed with costs on a solicitor and own client basis in this court."

[26] The applicants became aware of the Inuit and Innu intentions to file these applications in "June and early in July of 1997". Even with that knowledge, the applicants failed to contact the Registry of this court. They also failed to engage a local solicitor to determine the status of these proceedings. Although the applicants could have filed an intervention application, they chose to instruct their solicitors to take the unprecedented step of sending a "fax" to the presiding judge demanding that no decision be filed until the applicants made representations to the court. Finally, the intervention application was without merit and it was untimely.

[27] On the basis of the manner and timing of the application and the fact that the application had no merit I find that it is appropriate to order the applicants to pay solicitor-client costs.

VI. Disposition

1. The application of the applicants is dismissed;

2. The applicants shall pay the parties their costs as taxed on a party-party basis (one counsel each) for this application;

3. The applicants shall also pay the parties their solicitor-client costs as taxed (one counsel each) for this application.

Application dismissed.

Editor: Steven C. McMinniman/vem

Isabel Sooley (applicant) v.
The Workers' Compensation Review Division (respondent)
(1997 St. J. No. 1533)

Indexed As: Sooley v. Workers' Compensation Review Division (Nfld.)

Newfoundland Supreme Court
Trial Division
Russell, J.
October 27, 1997.

Summary:

Sooley, a deli worker, experienced pain in her left arm in 1988. She sought, and received, workers' compensation benefits. In 1995 Sooley underwent a functional capacity assessment and a job site analysis. From this, the Workers' Compensation Commission stated that Sooley was capable of employment as a telemarketer. Accordingly, she would not be entitled to extended earning loss benefits after May, 1996. The Workers' Compensation Review Division, affirmed the decision. Sooley sought certiorari quashing the Review Division's decision.

The Newfoundland Supreme Court, Trial Division, dismissed the application.

Workers' Compensation - Topic 7126

Practice - Judicial review - Certiorari - Bars - Sooley, a deli worker, experienced pain in her left arm in 1988 - She sought, and received, workers' compensation benefits - In 1995 Sooley underwent a func-

2003 CarswellNfld 25, 222 Nfld. & P.E.I.R. 97, 29 C.P.C. (5th) 382, 663 A.P.R. 97

2003 CarswellNfld 25

Dalton v. Hutton

RONALD DALTON (PLAINTIFF) AND CHARLES HUTTON (FIRST DEFENDANT) AND HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND (SECOND DEFENDANT)

Newfoundland and Labrador Supreme Court (Trial Division)

Handrigan J.

Judgment: February 6, 2003
Docket: 200101T3259

Counsel: *Thomas O'Reilly, Q.C.*, for Applicant

William Morrow, for Plaintiff

Ernest Gittens, for First Defendant

Tanya Carter, for Second Defendant

Subject: Civil Practice and Procedure; Torts

Practice --- Parties — Intervenors — General

Plaintiff was wrongfully convicted of murdering his wife and spent ten years in jail — Conviction was subsequently overturned on appeal and plaintiff was acquitted at second trial — Forensic pathologist testified at both trials and gave opinion that plaintiff had assaulted and manually strangled wife, causing her death — Plaintiff commenced action against Crown and pathologist for damages for negligence — Crown brought motion to strike claim on basis of witness immunity — Public interest association dedicated to preventing and rectifying wrongful convictions brought application for intervenor status at hearing of Crown's motion — Application dismissed — Plaintiff's claim was private cause of action in which matter of witness immunity was raised in an interlocutory application — Association did not demonstrate sufficient interest in subject matter of interlocutory application, nor could it make useful contribution to determination of application.

Cases considered by *Handrigan J.*:

Ethyl Canada Inc. v. Canada (Attorney General), 1997 CarswellOnt 4039, 25 C.E.L.R. (N.S.) 210 (Ont. Gen. Div.) — considered

Labrador Inuit Assn. v. Newfoundland (Minister of Environment & Labour), 157 Nfld. & P.E.I.R. 164, 486

A.P.R. 164, 1997 CarswellNfld 165 (Nfld. T.D.) — considered

M. v. H., 20 O.R. (3d) 70, 9 R.F.L. (4th) 94, 33 C.P.C. (3d) 337, 1994 CarswellOnt 473 (Ont. Gen. Div.) — considered

Newfoundland (Minister of Government Services & Lands) v. Drew, 2000 CarswellNfld 90, 33 C.E.L.R. (N.S.) 247, 191 Nfld. & P.E.I.R. 82, 577 A.P.R. 82, [2000] 4 C.N.L.R. 239 (Nfld. T.D.) — considered

Norcan Ltd. v. Lebrock, [1969] S.C.R. 665, 5 D.L.R. (3d) 1, 1969 CarswellQue 51 (S.C.C.) — considered

Peixeiro v. Haberman, 25 C.C.L.I. (2d) 6, 20 O.R. (3d) 666, 33 C.P.C. (3d) 388, 1994 CarswellOnt 580 (Ont. Gen. Div.) — considered

Reference re Workers' Compensation Act, 1983 (Newfoundland), (sub nom. *Reference re ss. 32 & 34 of the Workers' Compensation Act)* 96 N.R. 231, [1989] 2 S.C.R. 335, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983)* 76 Nfld. & P.E.I.R. 185, (sub nom. *Reference re Sections 32 & 34 of the Workers' Compensation Act, 1983)* 235 A.P.R. 185, 1989 CarswellNat 740, 1989 CarswellNat 740F (S.C.C.) — considered

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), 29 F.T.R. 267, 41 Admin. L.R. 102, [1990] 1 F.C. 74, 1989 CarswellNat 594, 1989 CarswellNat 663 (Fed. T.D.) — considered

Schofield v. Ontario (Minister of Consumer & Commercial Relations), 28 O.R. (2d) 764, 112 D.L.R. (3d) 132, 19 C.P.C. 245, 1980 CarswellOnt 451 (Ont. C.A.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3

Generally — referred to

Manganese-based Fuel Additives Act, S.C. 1997, c. 11

Generally — referred to

Tobacco Products Control Act, R.S.C. 1985, c. 14 (4th Supp.)

Generally — referred to

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D

R. 7.05 — considered

R. 7.05(1)(a) — referred to

R. 7.05(1)(b) — referred to

R. 7.05(1)(c) — referred to

R. 7.06 — referred to

APPLICATION by public interest association for order to be added as intervenor at hearing of application to strike statement of claim in action for negligence against Crown.

***Handrigan J.*:**

What I have to Decide;

1 The Association in Defence of the Wrongfully Convicted ("AIDWYC") applied to be added as an intervenor in an application to strike a statement of claim which Ronald Dalton issued against Charles Hutton and the Government of Newfoundland and Labrador. Dalton sued Hutton and the Crown in negligence and the Crown has applied to strike his claim on the basis of witness immunity. The Crown took no position on AIDWYC's application to intervene, but Hutton is opposed. Should AIDWYC be allowed to intervene on the Crown's application to strike?

The Context:

— Dalton's claim:

2 Ronald Dalton issued a Statement of Claim against Charles Hutton and the Crown in this Court on November 30, 2001 seeking damages for negligence. Hutton is a medical practitioner and was employed by the Crown as its Chief Forensic Pathologist.

3 Ronald Dalton's former wife, Brenda, died on August 16, 1988 and Hutton concluded that Dalton had assaulted and manually strangled her, causing her death. Hutton expressed that opinion to the RCMP and Dalton was charged with murder. Dalton was convicted on December 15, 1989 and spent almost ten years in a federal prison for the offence. Dalton's murder conviction was overturned on appeal and a new trial was ordered. He was acquitted of murder on June 28, 2000, following the second trial.

4 Hutton testified at the two trials and stated his opinion that Dalton had caused his wife's death. Dalton claims that Hutton was negligent both when he expressed his opinion to the RCMP and each time that he testified. Dalton also claims that Hutton's negligence caused him to be wrongfully convicted of murder at the first trial. Dalton says that he suffered damages because of Hutton's negligence and that Hutton and the Crown are jointly and severally liable to him.

— Crown's application to strike:

5 Hutton and the Crown have defended the action and each denies the claim for damages. On February 14, 2002, the Crown issued an Interlocutory Application (Inter Partes) asking that Dalton's claim be dismissed because it "discloses no reasonable cause of action, is frivolous and vexatious, and is otherwise an abuse of process of this Honourable Court[FN1]." In effect the Crown maintains that Hutton as a "witness in a judicial proceeding . . . is immune from any

form of civil action in respect of evidence given by him during that proceeding and further that such immunity extends to cover the investigation leading to such testimony[FN2]."

— AIDWYC's bid to intervene:

Who is AIDWYC?

7 AIDWYC is a "national public interest organization dedicated to preventing and rectifying wrongful convictions[FN3]." It avows two "broad" objectives: "eradicating conditions that give rise to miscarriages of justice" and "participating in the review and, where warranted, correction of wrongful convictions." The association was founded in 1993 and incorporated in 2000. It is a voluntary, non-profit organization and had its genesis in the *Justice for Guy Paul Morin Committee*, which it succeeded. AIDWYC's board of directors includes "lawyers, journalists, academics and other interested members of the public" and its Honourary President is the Honourable Gregory T. Evans, former Chief Justice of the Supreme Court of Ontario and one of three commissioners of the Donald Marshall inquiry. Rubin ("Hurricane") Carter is the Executive Director.

8 AIDWYC has played a role in many *causes célèbres* involving alleged or accepted miscarriages of justice in Canada over the last decade. These include the cases involving David Milgaard, Guy Paul Morin, and Thomas Sophanow. In our own Province, AIDWYC appeared before this Court to assist Gregory Parsons with an application for acquittal on a charge of murdering his mother instead of the stay of proceedings the Crown had entered on Parsons' retrial.

9 AIDWYC also has an international profile: It played a role in the case of Mme. Thi Hiep Nguygen, who was sentenced to death in Vietnam for trafficking in heroin. AIDWYC attempted to save Joseph Stanley Faulder from execution by arranging for three delegations to attend on then Governor of Texas, George W. Bush. Faulder, a Canadian citizen, was convicted of murder in Texas but was eventually executed.

AIDWYC's Application:

10 AIDWYC filed its application to intervene on June 25, 2002. It is interlocutory to the main action that Ronald Dalton has begun and is subsidiary to the Crown's application to strike Dalton's claim. AIDWYC does not want to intervene in the main action. It is concerned about the implications of the application to strike. It wishes to participate in that part of the proceedings, but not to go beyond it. AIDWYC's application is supported by a lengthy affidavit from Peter Meier, its President, in which he sets out AIDWYC's pedigree and states the reasons why AIDWYC should be permitted to intervene in this matter.

11 Peter Meier says that Ronald Dalton's case falls within AIDWYC's mandate because it is one of "wrongful conviction". He supports this claim by observing that the Newfoundland and Labrador Court of Appeal "expressly referred" to Dalton's case as such in a decision dated January 15 (sic), 2001[FN4]. He also claims that AIDWYC has a " . . . very real interest in eliminating wrongful convictions and ensuring that the reasons for wrongful convictions continue to be exposed". One of the ways that AIDWYC feels wrongful convictions could be eliminated is to hold "expert witnesses . . . accountable for their actions"[FN5]. Its "primary concern in seeking *standing* [in this matter] is to ensure that the reasons for wrongful convictions continue to be exposed and that authorities take steps to deal with the system's failures"[FN6] (underlining mine).

12 Peter Meier's affidavit does not say that Ronald Dalton is a member of AIDWYC, nor did Dalton say that he was a member of the Association in an affidavit that he filed on August 30, 2002. In his affidavit Dalton did say that " . . . I strongly support the work undertaken by the Applicant [AIDWYC], and support its Application pursuant to Rule 7.05 to be joined as an intervenor in order to address the issue of witness immunity"[FN7].

13 Neither AIDWYC nor Hutton called *viva voce* evidence on the application to intervene. There were, however, submissions from counsel for the three parties [viz. AIDWYC, the Crown and Charles Hutton] that wished to be heard on the application.

The Law:

— Rule 7.05:

14 AIDWYC has applied under Rule 7.05 of the *Rules of the Supreme Court of Newfoundland and Labrador, 1986*. I quoted from paragraph 34 of Peter Meier's affidavit in paragraph 11 of these reasons. Meier stated there that AIDWYC's primary concern in "seeking standing" was to expose the reasons for wrongful convictions and to ensure that the authorities take steps to deal with systemic failures to avoid wrongful convictions.

15 Rule 7.05 deals with applications for intervenor status and not for "standing". The concept of "standing" and the concerns expressed in paragraph 34 of his affidavit by Meier may be appropriate to royal commissions, legislative committees, commissions of inquiry and a variety of public hearings but it is not what Rule 7.05 contemplates. Rule 7.05 permits applications by persons who wish to intervene " . . . in a proceeding and become a party thereto . . . ".

16 Intervention is "with leave of the court" and leave may be granted if one of three criteria is met: the " . . . person has a right to intervene under a statute or rule"[FN8] — which does not apply here; the " . . . person's claim or defence and the proceeding have a question of law or fact in common"[FN9] — which does not apply here; or, the " . . . person claims an interest in the subject matter of the proceeding . . . whether as an incident to the relief claimed, enforcement of the order therein, or otherwise . . . "[FN10] — which does apply here. If AIDWYC is to be granted leave to intervene in the Crown's application to dismiss Ronald Dalton's claim it must bring itself within this criterion, and the burden of doing that lies on it. To assist in a better understanding of the onus that AIDWYC has to discharge, I will examine precisely what is contemplated by this part of Rule 7.05.

17 AIDWYC must show that it claims an interest in the subject matter [witness immunity] of the proceeding [the Crown's application to strike], whether as an incident to the relief claimed [dismissing Ronald Dalton's claim], "or otherwise". The issues that may arise in the main cause of action between Dalton and Hutton and the Crown may be engaged peripherally here but they are of indirect interest at best. The *res* that is of concern to me in reviewing AIDWYC's application is to determine whether it has shown that it has an interest in the doctrine of witness immunity as it relates to the application the Crown has taken to dismiss Ronald Dalton's claim. Before analyzing that question I will review the discussion of Rule 7.05 and analogous rules in cases in this and other jurisdictions.

— the cases:

18 There is a noticeable dearth of reported decisions from this jurisdiction considering the application of Rule 7.05. The most helpful one on this application is the decision by Barry, J. of this court in *Newfoundland (Minister of Government Services & Lands) v. Drew*[FN11]. Ken Drew and the other defendants owned seven cabins in an area the Government of Newfoundland and Labrador had designated as a wilderness reserve. The Crown brought an action in this court to remove the cabins. Drew and the others defended the action by claiming they were entitled to have the cabins in the reserve because of treaty and aboriginal rights, including hunting, fishing, trapping and usufructuary rights they allegedly hold as Indians of Mi'kmaq ancestry.

19 Abitibi-Consolidated Inc. is an international pulp and paper company which operates paper mills in Grand Falls and Stephenville, NL. Abitibi holds timber rights to a portion of the area over which Drew and the others assert their rights. Only a small part of the territory over which Abitibi has rights is included in the Wilderness Reserve. Abitibi claimed that its " . . . proprietary interests and rights to utilize timber would be negatively affected"[FN12] if the defendants succeeded in asserting their aboriginal and treaty rights. Abitibi also claimed that it had " . . . considerable

expertise in the matter of aboriginal and treaty rights because of its experience in other parts of Canada where it holds timber rights"[FN13]. Abitibi applied under rule 7.05 to be added as an intervenor in the action by the Crown against Drew and the others.

20 Barry, J. allowed Abitibi's application. He concluded that "Abitibi would likely be affected by the determination of the issues in a way not common to other citizens"[FN14]. Barry, J. found that " . . . this court will have to make findings of fact regarding the defendants' use of territory over which Abitibi holds certain rights"[FN15]. However, it was the likelihood that Abitibi would be involved in similar cases involving "alleged aboriginal or treaty rights" claimed by the Indian Band to which the defendants belonged that persuaded Barry, J. that Abitibi had a "*sufficient* interest in the subject matter of the proceeding to warrant considering it for intervention"[FN16] (my underlining).

21 Barry, J. was not prepared to exercise his discretion to allow Abitibi to intervene simply because he found that it had an interest in the proceedings. He was influenced by the fact that the issue before him involved " . . . a constitutional and public law issue which warrants a less rigid approach on the matter of intervention"[FN17] and that Abitibi had an expertise which allowed it to offer a "unique perspective on the issues"[FN18]. Abitibi's intervention would not "unduly delay or prejudice the parties"[FN19] and Abitibi would be subject to strict conditions governing its participation in the proceedings.

What Is A "Sufficient" Interest?

22 The "sufficiency" of the interest which the applicant claims is critical to the validity of its claim. Not any interest will justify the court exercising its discretion. Halley, J. of this court refused the Quebec Nunavik Inuit's application to intervene in proceedings between the Labrador Inuit Association and the Innu Nation and the Government of Newfoundland and Labrador in *Labrador Inuit Assn. v. Newfoundland (Minister of Environment & Labour)*[FN20]. The Labrador Inuit Association and the Innu Nation had both applied to determine whether a mining company's exploratory support works were covered by a Memorandum of Undertaking between the Inuit, the Innu, the Province of Newfoundland and Labrador, and the Government of Canada. The applicants were not parties to the MOU. Halley, J. found that the " . . . applicants have no interest in whether the exploratory support works are included in the definition of 'Undertaking' as set out in the Memorandum"[FN21]. He concluded that they did not have " . . . an interest in the subject matter of this hearing". There was, in Halley, J.'s view, " . . . nothing in common between these proceedings and the issues the which the applicants want the court to consider"[FN22]. Nor would Halley, J. allow the applicants to intervene as *amicus curiae* under Rule 7.06.

23 In *Norcan Ltd. v. Lebrock*[FN23] Pigeon, J. of the Supreme Court of Canada held that "any interest" is sufficient to support an application to intervene before that court, subject to the exercise of the court's discretion. Sopinka, J. reviewed Pigeon, J.'s comments twenty years later on a motion for leave to intervene in *Reference re Workers' Compensation Act, 1983 (Newfoundland)*[FN24]. Sopinka, J. said that he agreed with Pigeon, J. "that 'any interest' extends to an interest in the outcome of an appeal when a legal issue to be determined therein will be binding on other pending litigation to which the applicant is a party"[FN25].

24 Sopinka, J. allowed the motion to intervene in *Reference Re Workers' Compensation*, but said that the applicant's position was "usually a tenuous basis upon which to base an application for intervention . . . "[FN26]. He seemed to be influenced by the imbalance that would exist if he did not allow the intervention: "There is an aura of unfairness about this [the applicant was involved in litigation with the Attorney General of British Columbia, who could intervene as of right in the matter before the Supreme Court of Canada] which should be remedied by granting this application unless the other criteria dictate the contrary conclusion"[FN27].

25 The claim in *Peixeiro v. Haberman*[FN28] arose from a motor vehicle accident. The parties sought a pre-trial ruling on a motion to determine whether the action was statute-barred. The Lawyers' Professional Indemnity Company applied for leave to intervene on the motion as *amicus curiae*. LPIC was the sole insurer of lawyers in Ontario. Leave

was denied. MacPherson, J. found that LPIC's interest in the motion was not sufficient to allow LPIC to participate in the proceedings. He noted that "caution" should be exercised when granting leave to intervene in "private litigation"[FN29].

26 One of the three reasons that MacPherson, J. gave in support of his view that LPIC did not have a sufficient interest in the proceedings is based on a comment from Wilson, J.A. of the Ontario Court of Appeal, in *Schofield v. Ontario (Minister of Consumer & Commercial Relations)*[FN30]. MacPherson, J. repeated the comment in *Peixeiro*, *supra* to make his point: "[I]t seems to me that the fact that the decision of that *lis* may be applied subsequently by another Court as a precedent in resolving a *lis* between other parties is not a sufficient interest to justify a granting of status to one of those other parties"[FN31]. The other two reasons are specific to the facts of *Peixeiro*, *supra* and are not germane to the discussion of AIDWYC's application in this matter.

27 MacPherson, J. was satisfied that there would be no undue delay or prejudice to the other parties if he allowed LPIC's application. He was also satisfied that LPIC had a lot of experience in litigation involving limitation provisions and had "expertise" in the subject because of that experience. However, he was not satisfied that LPIC could make a "useful contribution" because the issue was "one which a competent lawyer who engages in proper research and preparation should be capable of addressing quite comfortably"[FN32]. The potential usefulness of the applicant's "contribution" is another issue that must be addressed, aside from the sufficiency of the applicant's interest in the proceedings.

Can The Applicant Make A Useful Contribution?

28 The Federal Court of Canada allowed the Canadian Cancer Society's application to intervene in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*[FN33] where the issue was the constitutionality of the *Tobacco Products Control Act* prohibiting advertising of tobacco products in Canada. The court acknowledged the wider latitude given for intervention in "public interest" litigation and concluded that the Society could make a useful contribution. The court was satisfied that the Attorney General did not have " . . . a monopoly to represent all aspects of public interest"[FN34]: " . . . [T]he applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General"[FN35].

29 The Ontario Court of Justice also allowed the Canadian Vehicle Manufacturer's Association and the Association of International Manufacturer of Canada to intervene in a constitutional challenge by a private corporation to the validity of the *Manganese-based Fuel Additives Act*[FN36]. The Government of Canada conceded that the automobile industry could " . . . provide important factual material with respect to the impact of MMT on automobile emission standards and on-board diagnostic systems, which the government of Canada indicates that it cannot provide with the same facility"[FN37]. In the same matter, even allowing for wider latitude for intervention in constitutional challenges, the Court restricted Pollution Probe's intervention to *amicus curiae* because, amongst other things, it failed to show that it could make a useful contribution to the proceedings[FN38].

30 The court was not convinced that the applicants to intervene could make a useful contribution in *M. v. H.*[FN39] M. and H., two women, had been in a same-sex relationship which ended. M. brought a claim against H. for support under the *Family Law Act*[FN40], and served a notice of constitutional question involving the definition of "spouse" in the *Act*. AG and RS were parties to other claims for the division of property accumulated while they were in same-sex relationships of 20 and 13 years duration. They applied to intervene in the motion and to make submissions on the constitutional question, arguing that as parties in factually similar proceedings, they had an interest in the subject matter of the proceeding. In particular, they argued that they might be adversely affected by the decision made on the constitutional question which was before the court in *M.v.H.*, *supra*.

31 Epstein, J. said that the applicants failed to present " . . . information as to what contribution they can make to the legal argument in this proceeding, over and above that which will be made by the parties"[FN41]. The only conceivable contribution that the applicants could make was to " . . . locate legislative facts that the plaintiff may have overlooked . . . "[FN42].

Will Intervention Unduly Delay Or Prejudice The Proceedings?

32 In *M. v. H.*, *supra* Epstein, J. concluded that there was a strong possibility of "very significant" prejudice to the parties if she allowed the applicants to intervene. She explained the nature of the possible prejudice: "An intervention adds to the costs and complexity of the litigation regardless of agreements to restrict submissions. It always constitutes an inconvenience that ought not to be imposed on the parties except under compelling circumstances, which do not exist in this case"[FN43].

33 Rouleau, J. of the Federal Court of Canada allowed the Canadian Cancer Society to intervene in *Rothmans, Benson & Hedges*, *supra* but only after he was convinced that "allowing the application . . . will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties"[FN44]. Barry, J. was of a similar view in *Newfoundland v. Drew*, *supra*. He rejected the possibility of undue delay or prejudice to the parties because the "intervention will not overwhelm the main issue or add to the complexity of the case"[FN45]. But he still thought it necessary to provide "appropriate conditions" to control Abitibi's intervention.

Synopsis Of The Case Law:

34 Applicants to intervene in proceedings must show: that they have a *sufficient* interest in the proceedings; that they can make a *useful* contribution; and, that their participation will not *unduly lengthen or delay* the proceedings nor *impose an injustice or excessive burden* on the parties. This is not much more than a re-statement of Rule 7.05 but it is useful to consider the criteria with the subtle modifications to them that emerge from the jurisprudence.

35 There is a clear demarcation between public and private litigation in how courts view applications for leave to intervene. Applicants who have no direct interest in the outcome of proceedings are more likely to get leave to intervene if the proceedings involve "public law issues". Public law issues are matters of broad public and societal concern, and include such things as health, environmental and aboriginal matters. There is an increased likelihood intervention will be permitted in proceedings engaging the *Canadian Charter of Rights and Freedoms*, especially where legislation that affects a broad spectrum of society is being challenged. In those cases it is not only likely that intervention will be permitted, but it is generally desirable that it be sought, so that as much fresh information and as many different perspectives can be brought to the discussion as possible.

36 Applicants for leave to intervene in private litigation find it more difficult to get leave. This is especially true where they have no direct interest in its outcome. The primary focus here is on the litigants. It is harder to bring fresh information or different perspectives to the issues raised in private litigation. Courts are cautious about granting leave if there is a risk the applicants will "hijack" the litigation or the issues they raise will add to its time, cost or complexity.

37 The undesirable consequences of permitting intervention can sometimes be controlled by limiting the participation of the intervenors in the proceedings but this is more often a balm than a panacea. *Amicus curiae* intervenors are impartial in their attitudes and altruistic in their motives. They are admitted to litigation as friends of the court with an expertise in, or perspective on, an issue that may be valuable to the judge.

Analysis:

— AIDWYC's interest in the proceedings:

38 AIDWYC does not have a direct interest in the litigation between Ronald Dalton and Charles Hutton and the Crown. That is self-evident and is conceded by the applicant. Dalton's claim is based on Hutton's alleged negligent misstatements. It is Dalton's bid to be compensated in damages for the losses that he says he suffered because he was the victim of Hutton's alleged negligence.

39 AIDWYC does claim that it has an interest in the subject matter of the proceedings. It says that it is " . . . a public interest organization dedicated to preventing and rectifying wrongful convictions". It regards Ronald Dalton's December 15, 1989 conviction of murdering his wife as an instance of "wrongful conviction". AIDWYC says that it is interested in " . . . ensuring that the Plaintiff [Ronald Dalton] can proceed with his action and, if found appropriate following a trial to receive compensation for the wrongful conviction"[FN46].

40 AIDWYC also says that the Government's application to dismiss Dalton's claim as vexatious and frivolous because of witness immunity " . . . raise[s] serious issues of national interest which effect (sic) the public's perception of both the criminal and civil justice systems"[FN47]. AIDWYC does not say how it will respond to the negative impact that success on the Crown's application might have on public perception of the justice system but it appears to believe that it has a mandate to act in the national interest in it.

41 Thus there are two aspects to AIDWYC's purported interest in the interlocutory proceedings that the Crown has initiated: To see that Ronald Dalton can proceed with his claim for compensation and to act in the "national interest" on the matter of witness immunity.

42 The issue between Ronald Dalton and Charles Hutton and the Crown is whether Hutton was negligent in the opinions that he gave to the police investigators about the cause of Brenda Young's death, and which he repeated in court during Dalton's two jury trials. The issue in the interlocutory application the Crown has taken to strike Dalton's action is Hutton's immunity from a tort action because he was a witness.

43 AIDWYC is not directly interested in the witness immunity issue either. Peter Meier, President of AIDWYC, filed an application in support of the application to intervene. I have already referred to it several times in these reasons. In his affidavit, Meier said that AIDWYC holds itself out to be a "national public interest organization dedicated to preventing and rectifying wrongful convictions. AIDWYC has two broad objectives: First, *eradicating the conditions that give rise to miscarriages of justice.* And second, participating in the review and, where warranted, correction of wrongful convictions. AIDWYC is an entirely voluntary, non-profit association dedicated to assisting *factually innocent* persons who have been wrongfully convicted" (underlining mine)[FN48].

44 The Dalton-Hutton litigation is a private cause of action, albeit one which has some notoriety. It involves issues that must be resolved between the parties and will have a direct impact on them alone. It is true that a decision on the issue of witness immunity in these proceedings may be offered as a precedent in other proceedings. But that alone does not change the complexion of the issue so that the cause moves into the realm in which AIDWYC operates. Nor does AIDWYC's concern about *stare decisis* differentiate it from any other member of the public who is viewing the proceedings and may feel that he will be affected by the outcome at some future time.

45 Epstein, J. addressed the peril of allowing intervention because of that concern in *M. v. H.*, *supra.* She concluded that "[t]he common law system would implode on itself"[FN49], if applications were allowed for that reason: "[The common law] . . . is built upon an incremental system of developing the law. An issue is determined between the parties and then, subsequently, an individual who has a case with the same issue pending asks the court hearing his or her matter to decide whether or not the precedent set is applicable. If the courts had previously interpreted or were to interpret Rule 13 [roughly equivalent to Rule 7.05] as giving intervention rights to individuals who might be affected, adversely or otherwise, solely by the legal precedent which the first case creates, then . . . there would be no principled way of excluding the second or the 500th case"[FN50].

46 AIDWYC has failed to demonstrate that it has a sufficient interest in the proceedings to warrant exercising the discretion conferred by Rule 7.05 to allow it to intervene in the proceedings. It has not shown that its interest in the issue of witness immunity which is raised by the Crown's application to strike is different than an interest that any member of the public might have in it. I will now consider what contribution, if any, AIDWYC might have made if I had found that it had a "sufficient interest" in the proceedings to allow it to intervene.

— AIDWYC's contribution to the proceedings:

47 The onus is on applicants to intervene to show that they can make a "useful contribution" to the proceedings. A "useful contribution" by an intervenor must be different than one which the parties themselves can provide. The contribution does not have to be unique but it should show another perspective on the issue and it must be of assistance to the court in resolving the issue. An intervenor with expertise in the area of concern will be more likely to persuade the court that it can make that kind of contribution. AIDWYC must demonstrate that it can make a useful contribution on the issue of witness immunity.

48 AIDWYC relies on Peter Meier's affidavit to support its claim that it can make a contribution. I have reviewed Meier's affidavit carefully to determine how AIDWYC feels it could make a contribution on the issue of witness immunity. Meier does not actually say that AIDWYC could make a contribution to that discussion. In fact, Meier never refers to the issue of witness immunity anywhere in his fourteen page affidavit. The closest he comes to the issue are his comments in paragraph 33. He claims that AIDWYC is concerned about holding "expert witnesses . . . accountable for their actions" and he submits that allowing expert witnesses to "testify with impunity . . . [will] potentially increase . . . the number of wrongful convictions".

49 Those declarations are consistent with AIDWYC's *raison d'etre* but they address concerns that are not appropriate to the issue that has been raised by the Crown in its application to dismiss Ronald Dalton's claim. I accept Meier's assertion that AIDWYC has extensive experience in addressing systemic failures that lead to wrongful convictions. But the background that Meier has provided does not assist me in determining how the Association could make a contribution on the doctrine of witness immunity. He does not say, for example, that AIDWYC has expertise in the law of evidence, the tort of negligence, or what constitutes privilege. Nor does he say that AIDWYC has had prior experience with the doctrine of witness immunity, or "litigation privilege" as it is sometimes called.

50 The question of witness immunity is not overly complex. As it is framed in the Crown's application, it involves an intimate understanding of a witness' interaction with the court, and an appreciation of his involvement in the investigative phase of the criminal process. It also requires counsel to be conversant with the law of evidence and the principles underlying the law of negligent misrepresentations. But these are matters, as MacPherson, J. said in *Peixeiro, supra* that a " . . . competent lawyer who engages in proper research and preparation should be capable of addressing quite comfortably"[FN51]. It does not involve the broad social policy considerations that AIDWYC's background suits it to bring to the discussion. Those considerations are *de rigeur* of the public interest cases where intervention is often permitted, but are malapropos of private litigation where other considerations prevail.

— whether AIDWYC's intervention would lead to undue delay or prejudice:

51 It is speculative for me to consider whether allowing AIDWYC to intervene would delay the proceedings or result in prejudice to the parties. I do not know how AIDWYC proposed to involve itself in the proceedings if it had been permitted to intervene. However, it appears that AIDWYC was interested in raising matters that were not pertinent to the issues that have to be addressed. To that extent its involvement would certainly have affected the proceedings adversely. I cannot say if the effect would have amounted to an undue delay or that it would have been prejudicial to the parties.

52 Ronald Dalton was not concerned about the impact of AIDWYC's involvement because he welcomed it. Charles

Hutton clearly thought otherwise. Hutton concluded his brief of argument against allowing intervention on this cautionary note: "Allowing the intervention will result in an unnecessarily lengthy trial, thus wasting judicial resources as well as prejudicing Charles Hutton". I do not have to decide this issue in light of my findings about the insufficiency of AIDWYC's interest in the proceedings or its inability to make a useful contribution.

Summary And Disposition:

53 AIDWYC has applied for intervenor status under Rule 7.05 of the *Rules of the Supreme Court of Newfoundland and Labrador, 1986*. It wants to intervene on an application taken by the Crown to dismiss Ronald Dalton's claim against it and Charles Hutton because of the doctrine of witness immunity. To succeed AIDWYC has to show that it has a sufficient interest in those proceedings, that it can make a useful contribution to them, and that its intervention will not result in undue delay of the proceedings or prejudice to the parties.

54 Ronald Dalton's claim against Charles Hutton and the Crown is for damages for negligence. It is a private cause of action, in which the matter of witness immunity has been raised in an interlocutory application. AIDWYC has not demonstrated that it has a sufficient interest in the subject matter of that application, nor that it can make a useful contribution to it. It is unclear whether AIDWYC's intervention would unduly delay the proceedings or cause prejudice to the parties. The application is dismissed. There will be no order as to costs.

> ... [i]t [LPIC] seeks to intervene as a friend of the court. This role, which has deep historical roots in the common law, connotes, in my view, an element of impartiality or altruism. My image of an intervenor who is admitted to litigation as a friend of the court is of a person or organization whose expertise in, or perspective on, an issue may be valubale to a judge.
>
> LPIC's intended role in this case does not fit that image. It is an insurer for a major professional organization. Its chief concern, in my view, is its own financial exposure in subsequent cases

: page 672.

Application dismissed.

FN1 See page 1 of the Interlocutory Application (Inter Partes) dated February 14, 2002, issued on the same date.

FN2 Ibid., paragraph 6.

FN3 All information that I have and relate about AIDWYC is found in an affidavit sworn by Peter Meier, the President of AIDWYC. He is a member in good standing of the Law Society of Upper Canada. He swore the affidavit on May 8, 2002 and it is attached to AIDWYC's application to intervene.

FN4 Ibid., paragraph 32.

FN5 Ibid., paragraph 33.

FN6 Ibid., paragraph 34.

FN7 See Ronald Dalton's affidavit dated August 29, 2002, which was filed on August 30, 2002.

FN8 Paragraph (c) of Sub-Rule 7.05(1).

FN9 Paragraph (b) of Sub-Rule 7.05(1).

FN10 Paragraph (a) of Sub-Rule 7.05(1).

FN11 (2000), 191 Nfld. & P.E.I.R. 82 (Nfld. T.D.).

FN12 Ibid., paragraph 8.

FN13 Ibid.

FN14 Ibid., paragraph 22.

FN15 Ibid.

FN16 Ibid., paragraph 28(1).

FN17 Ibid., paragraph 28(2)(a).

FN18 Ibid., paragraph 28(2)(b).

FN19 Ibid., paragraph 28(2)(c).

FN20 (1997), 157 Nfld. & P.E.I.R. 164 (Nfld. T.D.).

FN21 Ibid., paragraph 10.

FN22 Ibid., paragraph 11.

FN23 [1969] S.C.R. 665 (S.C.C.).

FN24 [1989] 2 S.C.R. 335 (S.C.C.).

FN25 Ibid., at page 340.

FN26 Ibid.

FN27 Ibid.

FN28 (1994), 20 O.R. (3d) 666 (Ont. Gen. Div.). It should be noted that this case involved an application to intervene as *amicus curiae*, which can be made under Rule 7.06 of our Rules. MacPherson, J. seemed to be influenced by the fact that he did not regard LPIC as having the status of *amicus curiae*:

FN29 Ibid., at page 670.

FN30 (1980), 28 O.R. (2d) 764 (Ont. C.A.).

FN31 See footnote 28, at page 671.

FN32 Ibid., at page 672.

FN33 (1989), [1990] 1 F.C. 74 (Fed. T.D.).

FN34 Ibid., at page 83.

FN35 Ibid., at pages 82-83.

FN36 S.C. 1997, c. 11.

FN37 *Ethyl Canada Inc. v. Canada (Attorney General)* (1997), 25 C.E.L.R. (N.S.) 210 (Ont. Gen. Div.), at page 214.

FN38 Ibid., at page 215-216.

FN39 (1994), 20 O.R. (3d) 70 (Ont. Gen. Div.).

FN40 R.S.O. 1990, c. F-3.

FN41 See footnote 39, at page 80.

FN42 Ibid.

FN43 Ibid.

FN44 See footnote 33, at page 83.

FN45 See footnote 11, at paragraph 27.

FN46 See paragraph 2 of AIDWYC's application to intervene filed on August 14, 2002.

FN47 Ibid., at paragraph 3.

FN48 See footnote 3, at paragraph 2.

FN49 See footnote 39, at pages 76-77.

FN50 Ibid.

FN51 See footnote 28, at page 672.

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PRACTICE AND PROCEDURE

BEFORE

Administrative Tribunals

VOLUME 3

by

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28.16(a) Additional Cases

No recent cases better attest to the principal that a statutory agency may only exercise the powers which are clearly given to it than two cases which came before the Supreme Court of Canada. *Newfoundland Telephone Company Limited v. Director of Investigation and Research, Combines Investigation Act*,[99.1] upholding the Newfoundland Court of Appeal's ruling in *Re Newfoundland Telephone Co. Ltd. and TAS Communications Systems Ltd.*[99.2] was issued simultaneously with the Supreme Court's judgment in *Canada Director of Investigation and Research, Combines Investigation Act v. New Brunswick Telephone Company Ltd.*[99.3] (overturning the New Brunswick Court of Appeal's decision in *Re Hunter and Board of Public Utilities of New Brunswick*).[99.4]

The Decisions

The issue in both the Newfoundland and New Brunswick cases was whether the Director of Investigation and Research under the Combines Investigation Act (the "Director") could intervene in hearings before a provincial public utilities board (section 27.1 of the Combines Investigation Act, R.S.C. 1970, c. C-23 (the "Act"), expressly authorized the Director to intervene before any *federal* "board, commission or other tribunal").

In *Re Newfoundland Telephone Co. Ltd.* the Newfoundland Court of Appeal held that the Director had no status to intervene before the Newfoundland Board of Commissioners of Public Utilities (a) because the Director was not statutorily authorized to do so, and (b) because in the court's opinion, the Director did not have sufficient interest in the subject matter of the application before the board. In this regard, it cited with approval the Nova Scotia Court of Appeal's decision in *Re Canadian Department of Consumer and Corporate Affairs; Maritime Telegraph & Telephone Co. Ltd. and Board of Commissioners of Public Utilities*[99.5] where Pace J.A., sitting in chambers, held that section 27.1 of the Act limited the Director's powers to intervene in appearances before federal bodies.

The New Brunswick Court of Appeal, in *Re Hunter* took a contrary view of the Director's powers to deprive the Director of the capacity to appear before a provincial tribunal such as the New Brunswick Board of Commissions of Public Utilities. Rather, he interpreted this provision as merely setting forth the level of administrative body before which the Director could intervene *as a matter of right*. Thus, while the Director had the indisputable prerogative to intervene before federal

99.1 [1987] 2 S.C.R. 466, 29 Admin. L.R. 22, 20 C.P.R. (3d) 19, 45 D.L.R. (4th) 570, 80 N.R. 321.

99.2 (1984), 11 Admin. L.R. 211, 8 D.L.R. (4th) 617, 1 C.P.R. (3d) 555, 47 Nfld. & P.E.I.R. 277, 139 A.P.R. 277 (Nfld. C.A.).

99.3 [1987] 2 S.C.R. 485, 29 Admin. L.R. 51, 45 D.L.R. (4th) 608, 20 C.P.R. (3d) 33, 80 N.R. 340, 85 N.B.R. (2d) 204, 217 A.P.R. 204.

99.4 (1984), 8 D.L.R. (4th) 454, 53 N.B.R. (2d) 343, 138 A.P.R. 343 (C.A.).

99.5 (1981), 21 C.P.C. 286, 125 D.L.R. (3d) 252, 59 C.P.R. (2d) 97, 47 N.S.R. (2d) 90, 90 A.P.R. 90.

bodies, regardless of their internal procedures, he could only appear before a provincial body with that body's permission. In order to obtain such permission, it was incumbent upon the Director to satisfy the provincial board that he had a valid interest in participating and could be of assistance in the proceedings before it. La Forest J.A. (as he then was), in separate reasons concurring in the result, categorically stated that a provincial board need not even consider the proposed intervenor's legal capacity; it need only examine whether the proposed intervenor's evidence could be of assistance to it.

The Supreme Court's decisions in *Newfoundland Telephone Company Limited* and *New Brunswick Telephone Company Limited*, both of which were authored by Mr. Justice Le Dain, upheld the reasoning of the Newfoundland Court of Appeal and overturned that of the New Brunswick Court of Appeal. Briefly stated, Le Dain J. held that a public officer requires statutory authority, express or implied, to intervene in an official capacity in proceedings before an administrative tribunal. Therefore, even if a board has complete power to designate the parties which may appear before it (as Le Dain J. was prepared to admit was the case, at least implicitly, with both the Newfoundland and New Brunswick Boards of Commissioners of Public Utilities), such a board cannot permit intervention by a public officer in an official capacity if that officer has been denied the necessary authority to intervene by its governing statute.[99.6] As Le Dain J. stated:

> To permit intervention where a public officer is shown to lack the necessary authority to intervene would be to permit him to exceed his authority and thus would be contrary to a fundamental principle of public law.[99.7]

An examination of section 27.1 of the Act convinced Le Dain J. that the Director did not have the statutory authority to intervene before provincial boards. He rejected Stratton J.A.'s assertion in *Re Hunter* that section 27.1 dealt solely with the Director's authority to intervene as a matter of right before federal boards and left appearances before provincial boards to the discretion of the body in question. Instead, he characterized section 27.1 as dealing exhaustively with the Director's power to intervene before administrative tribunals. According to Le Dain J., this right was restricted to *federal* boards, whether as of right (e.g. at the Director's own insistence or at the direction of the Minister) or by permission (e.g. with permission of the board itself). As he stated:

> [Section] 27.1...cannot have been intended, out of an abundance of caution, to be merely a specific statutory recognition of an authority that would exist apart from statute, and the limitation to federal boards, commissions or other tribunals, cannnot, because of the emphasis it is given by the definition of such boards, commissions and other tribunals, be assumed to have been a matter of inadvertence.[99.8]

99.6 Supra, note 99.1, N.R. p. 337.
99.7 Supra, note 99.1, N.R. p. 338.
99.8 Supra, note 99.1, N.R. p. 339.

As such, given that the Director lacked the requisite statutory authority to intervene before a provincial tribunal, Le Dain J. held that the Newfoundland and New Brunswick Boards of Commissioners of Public Utilities could not validly permit his intervention in the proceedings before them.

The Combines Investigation Act was replaced by the Competition Act, effective June 19, 1986.[99.9] Section 27.1's counterparts in the new Act are sections 97 and 98, which provide in pertinent part as follows:

> 97.(1) The Director, at the request of any federal board, commission or other tribunal or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.
> (2) For the purposes of this section, "federal board, commission or other tribunal" means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.
> 98.(1) The Director, at the request of any provincial board, commission or other tribunal, or on his own initiative with the consent of the board, commission or other tribunal, may make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunals entitled to take into consideration in determining the matter.
> (2) For the purposes of this section, "provincial board, commission or other tribunal" means any board, commission, tribunal or person that carries regulatory activities and is expressly charged by or pursuant to an enactment of the legislature of a province with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.

As a result of the insertion of section 98 into the Competition Act, there is no longer any controversy about the Director's capacity to intervene before a provincial board. This may now be done with the consent of the board itself. Note, however, that the Director does not have the capacity to intervene solely at his own insistence, as is the case with federal tribunals. It is equally the case that the Minister (of Consumer and Corporate Affairs) is not empowered to instruct the Director to intervene before provincial boards either.

The Competition Act was enacted prior to the Supreme Court's decisions in *Newfoundland Telephone Company Limited* and *New Brunswick Telephone Company Limited*, a fact which Le Dain J. acknowledged in his reasons for judgment.[99.10] However, Le Dain J. also recognized that the issue presented by these

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99.9 R.S.C. 1985, c.19 (2nd Supp.).
99.10 Supra, note 99.1, N.R. pp. 330–332.

cases was of general significance. Consequently, he constructed his opinion so as to transcend the narrow statutory context of the appeal, thereby establishing a general rule for the granting of standing to "statutory person".

Assessment

In annotations to the Newfoundland Court of Appeal's decision in *Re Newfoundland Telephone Co. Ltd.* and the New Brunswick Court of Appeal's decision in *Re Hunter*, Andrew J. Roman contends that the statutory authority of a public official to appear before an administrative tribunal should be irrelevant to that official's standing to intervene.[99.11] According to Roman, standing to appear before administrative tribunals must not be evaluated according to the same restrictive criteria pursuant to which standing to appear in court is judged. The reason for this is that administrative proceedings usually take place "in the context not of bipolar dispute resolution but a decision to be made in the public interest".[99.12] Thus, while the legal capacity of a public official to appear may be of importance for law suits, it is irrelevant in the regulatory context, and, as such, may be disregarded by a board so long as the board is of the opinion that its hearing processes would benefit from the appearance of such an official. Accordingly, it is Roman's view that:

> once it is acknowledged that the [public official] has an interest in such intervention, it is not necessary for this interest to be at the level of a statutory right in order to give the board jurisdiction to recognize it.[99.13]

Roman contends that it is not only the duty of an administrative tribunal to ensure that statutory officials conduct themselves within the law which created them. A board's only concern should be whether the proposed intervention would enable it to better achieve its statutory objects. Thus, a board should grant standing to *anyone* who has both a legitimate interest in the proceedings before it, and who will constructively contribute to a determination of the issues at hand. There is not much to argue with the assertion that access to participate in an administrative tribunal's proceedings should be liberally granted. Tribunals *should* be very reluctant to exclude members of the public from intervening in issues in which the "public interest" is at stake. By the same token, courts should also be loathe to override tribunal discretion in this regard.

Nonetheless, contrary to Roman's view, it is submitted that this consideration should *not* influence the ability of statutorily created officials to intervene before boards when such authority is not expressly, or implicitly, provided or in their empowering legislation. Statutory persons do not have a capacity or existence of their own. Their powers and duties are limited to those which are conferred by the statutes under which they operate. Thus, as Mifflin C.J.N. points out in *Re*

99.11 See 11 Admin. L.R. at 211 and 221.
99.12 Supra, p. 213.
99.13 Ibid.

Newfoundland Telephone Co. Ltd. (the Newfoundland Court of Appeal decision), to permit a board to grant standing to an official who has no statutory authority to intervene is to arrogate to that official a right which the empowering statute itself does not confer.[99.14] This, as Le Dain J. states in the Supreme Court's opinion, would be contrary to the fundamental principle of administrative law which holds that "statutory creatures" must be strictly confined to the boundaries of their legislative jurisdiction.[99.15] Furthermore, this limitation is especially important where the statutory official in question commands prestige, expertise and resources similar to those which are at the disposal of, for instance, the Director. When and in what context such influence may be brought to bear must, as Le Dain J. stated, remain "a matter of legislative policy and thus of statutory authority".[99.16] Accordingly, even if there is little doubt that a statutory official could be of assistance to a board's determination, the integrity of the system as currently structured requires that intervention be precluded unless sanctioned by statute. If, with experience, this comes to be viewed as an unwarranted impediment, and I do not think it is unwarranted, the appropriate remedy is legislative amendment. This is the precise avenue which the federal government adopted with respect to the Director, thereby anticipating the Supreme Court's view of the law as it currently stands.

28.17 CONDUCT OF A TRIBUNAL ON REVIEW

The courts, we know, can control their own procedure as can tribunals. The Supreme Court of Canada has imposed considerable constraints on tribunals appearing before it which seek to explain particular tribunal procedure. This practice is most unfortunate because a decision under review is not being defended by the tribunal; rather, the tribunal is explaining how it operates and that its procedure may be necessary and does respect legal safeguards.

Several Supreme Court of Canada decisions are noteworthy: see the *Transair*[100] case and the *Northwestern Utilities*[101] case. These cases analogize a tribunal appearing before the court from the perspective of standing/status to a judge appearing before the court to defend his judgment then under appeal.

With great respect, that analogy is not appropriate. In appeals from a lower court, the court is familiar with the court procedures below, developed over centuries. In the matter of reviews by the courts of tribunal decisions below, the

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99.14 Supra, note 99.2, D.L.R. p. 620.

99.15 Supra, note 99.1, N.R. p. 338.

99.16 Supra, note 99.1, N.R. p. 332.

100 *Canada Labour Relations Board and Transair Ltd.*, [1977] 1 S.C.R. 722.

101 *Re Northwestern Utilities Ltd.; Edmonton v. Public Utilities Bd.*, [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 12 A.R. 449, 89 D.L.R. (3d) 161. And that view was still very much alive as late as 2008: see *Brewer v. Fraser Milner Casgrain LLP*, 2008 CarswellAlta 554, 2008 ABCA 160 (Alta. C.A.) (required neutrality of agency means agency cannot appeal judicial review of its decision, other than on issues of jurisdiction).

NEWFOUNDLAND TELEPHONE COMPANY LIMITED v. TAS COMMUNICATIONS SYSTEMS LIMITED, DIRECTOR OF INVESTIGATION AND RESEARCH UNDER THE COMBINES INVESTIGATION ACT and BOARD OF COMMISSIONERS OF PUBLIC UTILITIES
(1982 No. 121)

Newfoundland Court of Appeal
Mifflin, C.J.N., Morgan and Gushue, JJ.A.
April 18, 1984.

Summary:

The Newfoundland Telephone Company applied to the Board of Commissioners of Public Utilities for an order allowing it to add a paging service to its operations. The Director of Investigation and Research under the Combines Investigation Act filed a notice of intervention, seeking to intervene to assist the Board in its determination. The telephone company objected, submitting that the Director lacked status to intervene. The Board dismissed the objection and allowed the Director to intervene. The telephone company appealed.

The Newfoundland Court of Appeal allowed the appeal, because the Director had neither the status to intervene nor a specific interest in the subject matter of the application.

(See also Director of Investigation v. Board of Commissioners of Public Utilities, (1984), 53 N.B.R.(2d) 343; 138 A.P.R. 343.)

PRACTICE - TOPIC 682

Parties - Adding parties - Intervenors - Re interest in subject matter - The Director of Investigation and Research under the Combines Investigation Act sought to intervene in a hearing before the Newfoundland Board of Commissioners of Public Utilities - The Director was not purporting to exercise any of his powers of investigation, but merely sought to assist the Board at the hearing - The Newfoundland Court of Appeal held that the Director had no specific interest in the subject matter of the hearing that would allow him to intervene - See paragraphs 11 to 16.

TRADE REGULATION - TOPIC 226

Regulatory bodies - Director, Combines Investigation - Status to intervene - The Newfoundland Court of Appeal held that the Director's powers and duties were restricted to those set out in the Combines Investigation Act - The court held that because the Act authorized the director to appear only before "any federal board, commission or other tribunal", the Director had no status to intervene in a hearing before a provincial board, commission or other tribunal - See paragraphs 7 to 16.

CASES NOTICED:

Maritime Telegraph and Telephone Co. Ltd. v. Board of Commissioners of Public Utilities et al. (1982), 47 N.S.R.(2d) 90; 90 A.P.R. 90; 125 D.L.R.(3d) 252, appld. [para. 12].

STATUTES NOTICED:

Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 8 [para. 7]; 27.1 [para. 9].

COUNSEL:

Evan Kipnis, for Newfoundland Telephone Company Ltd.;
Kenneth Templeton, for TAS Communications Systems Ltd.;
Edward Roberts, Q.C., for the Director of Investigation and Research under the Combines Investigation Act; and
Donald C. Dawe, Q.C., for the Board of Commissioners of Public Utilities.

This application was heard on December 5, 1983, before Mifflin, C.J.N., Morgan and Gushue, JJ.A., of the Newfoundland Court of Appeal.

On April 18, 1984, the judgment of the Court of Appeal was delivered and the following opinions were filed:

Mifflin, C.J.N. - see paragraphs 1 to 17;
Morgan, J.A. - see paragraphs 18 to 19;
Gushue, J.A. - see paragraphs 20 to 22.

[1] Mifflin, C.J.N.: On April 27, 1982, Newfoundland Telephone Company Limited, the appellant herein, filed an application with the Board of Commissioners of Public Utilities (the Board) for an order authorizing it to add to its range of services a "dial access to radio paging service" and for approval of the technical and operational specifications entitled "Newfoundland Telephone Paging Interface Standards". The hearing of the application was set for May 20, 1982.

[2] On May 17, 1982 the Director of Investigation and Research (the Director) under the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as amended, filed a Notice of Intervention with the Board.

[3] At the end of proceedings on the first day of the hearing, May 21, 1982, (the hearing having been postponed one day) the hearing was adjourned until June 3, 1982. On May 28, 1982 the appellant gave notice that at the resumption of the hearing it would raise an objection to the intervention of the Director on the grounds that he had no statutory capacity to appear before the Board and that his appearance was not relevant to the application.

[4] After the presentation of arguments on the right of the Director to intervene, the Chairman of the Board, on June 3, 1982, delivered the following oral ruling:

> The Board has listened to both counsel, the board has considered the matter prior to listening to counsel primarily because it received a letter of warning on May 28 from Chalker, Green & Rowe on behalf of the applicant and the question before the Board right now is whether or not the Director will have standing at this hearing. The Board in the past and the previous hearing ruled that the Director would have standing with the admonition that it would confine its investigation and information and evidence that it supplied to the narrow confines of the application before it. The Board will recognize the standing up of the Director as an Intervenor with the same admonition, that this matter is to consider the approving of the terms and conditions and rates for a new service entitled Dial Access to Radio Paging Service.

[5] The formal order of the Board, P.U. No. 29 (1982) filed on June 11, 1982, reads:

> WHEREAS at the public hearing into the application of Newfoundland Telephone Company Limited (the applicant) on June 3, 1982 counsel for the applicant objected to the intervention of the Director of Investigation and Research of the Government of Canada (the Director) on the grounds that under the rules of interpretation of statutes and under the *Combines Investigation Act* the Director cannot have any status before the Board and cannot be heard, and
>
> WHEREAS the Board considered the procedures to be followed were dictated by the *Public Utilities Act* and Regulations and past practice of this Board, and
>
> WHEREAS after hearing counsel for both the applicant and the Director the Board ordered that the said objections be dismissed and the Director be permitted to appear and be heard on this application.
>
> IT IS THEREFORE ORDERED THAT:
>
> The objection of the applicant to The Director of Investigation and Research of the Government of Canada being considered an intervenor in this application is dismissed and the said Director is hereby permitted to appear before the

Board on this application and be heard.

[6] This is an appeal from that order pursuant to leave granted by this court on June 24, 1982.

[7] The *Combines Investigation Act* (the Act) makes provision for the appointment of the Director by the Governor in Council. His duties are defined by the Act; and he has only those powers given to him by the Act. He is specifically charged with causing an "inquiry to be made into all such matters as he considers necessary to inquire into with the view of determining the facts" with respect to alleged offences under Part V of the Act. Section 8 of the Act states that the Director must cause such inquiry to be made (a) on application from six Canadian citizens, resident in Canada, of the full age of twenty-one years, who are of opinion that an offence under Part V has been or is about to be committed, (b) whenever he has reason to believe that any provision in Part V has been or is about to be violated, or (c) whenever he is directed by the Minister to inquire whether any provision in Part V has been or is about to be violated.

[8] Part V of the Act deals with offences in relation to competition. This part is criminal legislation and the basis of this part of the Act constitutionally is the power of Parliament to legislate in respect of criminal law under s. 92(27) of the *Constitution Act*.

[9] In 1975, by s. 9 of c. 76 (23-24 Elizabeth II), '*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend the Combines Investigation Act and the Criminal Code*', Parliament added to the Act s. 27.1, which gave the Director power to appear before "any federal board, commission, or other tribunal". Prior thereto, the Director was not specifically empowered to appear before any board, commission or tribunal. Section 27.1 reads:

> 27.1(1) The Director, at the request of any federal board, commission or other tribunal or upon his own initiative, may, and upon direction from the Minister shall, make representations to and call evidence before any such board, commission or other tribunal in respect of the maintenance of competition, whenever such representations or evidence are or is relevant to a matter before the Board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining such matter.
>
> (2) For the purposes of this section, "federal board, commission or other tribunal" means any board, commission, tribunal or person who is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product and includes an *ad hoc* commission of inquiry charged with any such responsibility but does not include a court.

[10] On the hearing before this court, the principal submission by counsel for the Director is:

> The Director, in intervening before the Board, was acting in his capacity as a natural person. He was not purporting to exercise any of the powers of investigation specifically conferred upon him by statute, either by the Act or by any other enactment of Parliament. He was, quite simply, exercising the right of any individual to appear before the Board and to ask to be heard. The Board, in the proper exercise of its own powers, consented to hear him. The Director is not a creature of statute. He is an officer who is appointed under the authority of a statute. As

such, he has a capacity and an existence of his own. To apply Lord Haldane's words, he is not a person whose legal existence is wholly derived from the words of a statute.

[11] In my opinion, this submission is not sound. The office of Director has been created by statute. His duties and powers are set forth in the Act which created his office. He does not have a capacity and an existence of his own. He has certain duties of investigation conferred on him by the Act and by the Act he has certain rights and powers to carry out these investigations. By his own admission he was not, in intervening before the Board, purporting to exercise any of these powers of investigation. This right to appear before "federal boards, commissions and other tribunals" is to make representations and call evidence in respect of the maintenance of competition, the very area of concern covered by the Act. The Director is not empowered by the Act to intervene before provincial boards, nor, in view of the admission already referred to, can it be said that in appearing before the Board that he was acting in a manner that was incidental to or consequential upon the discharge of the duties placed on him by Parliament. The effect of the decision of the Board is, in my view, tantamount to conferring on the Director a status which was not conferred on him by the Act creating his office. The Board in permitting the Director the right to intervene arrogated to him a right which was not given by the Act creating his office, duties and powers. This the Board cannot do.

[12] In *Maritime Telegraph and Telephone Co., Ltd. v. Board of Commissioners of Public Utilities et al.* (1982), 47 N.S.R.(2d) 90; 90 A.P.R. 90; 125 D.L.R.(3d) 252, the Director applied to intervene in an appeal by Maritime Telegraph and Telephone Company from a decision of the Board of Public Utilities made on the application of Air-Page Communications Limited. The Director had not intervened in the application before the Public Utilities Board. The application was made pursuant to r. 8.01 of the *Civil Procedure Rules* of Nova Scotia, which required that the Director had to show an interest in order to entitle him to intervene. In determining this interest, Pace, J.A., considered the powers of the Director to intervene and he found that they were circumscribed by s. 27.1(1) of the Act. He found that the Director did not have the statutory authority to intervene and that he had no claim or interest in the subject matter of the proceedings as defined by r. 8.01 of the *Civil Procedure Rules*. Even though it can be argued that his finding in relation to the authority of the Director to intervene is obiter, nevertheless in my view it is sound in law.

[13] In my opinion the Board, in defining and establishing the procedure on hearings before it, cannot confer a right on a statutory creature, such as the Director, which the statute itself does not confer. Nor indeed should the Board confer standing on any person, statutory, corporate or otherwise, who has not been able to show an interest in the specific application before it. We are not here dealing with the powers and duties of the Board to obtain whatever information it desires by examination or otherwise given by ss. 14, 15, 18, 35 and 113 of the *Public Utilities Act*. For the Board to discharge the obligations imposed on it by these sections intervention of the Director is not necessary. We are here dealing with the sole right of the Director to be made a party to proceedings. The Director admits that he has no specific interest in the subject matter and says that he desires only to be a guiding light to the Board.

[14] I have deliberately refrained from commenting on the hazards of permitting one charged with the investigation of criminal offences in respect of competition to appear, even if authorized and allowed to do so, as a party and to ex-

amine and cross-examine witnesses.

[15] I might add in passing that it seems to me not to be just and fair to the applicant and to parties with genuine interests to be saddled with the extra costs which they must bear on a solicitor and client basis which would inevitably flow from the additional time of a hearing caused by having unnecessary parties before the Board.

[16] In my view the Board has a discretion to permit parties to intervene, but that discretion is not untrammelled. Parties must show status and interest before being granted a right to intervene.

[17] It follows that the appeal is allowed with costs.

[18] Morgan, J.A.: I have had the advantage of reading the judgment of the Chief Justice in this matter. I agree with his conclusions and reasons therefor and there is nothing that I can usefully add.

[19] The appeal is accordingly allowed with costs.

[20] Gushue, J.A.: I have read and concur with the judgment of the Chief Justice in this matter. I agree with him, for his reasons, that the Director of Investigation and Research under the *Combines Investigation Act* was improperly permitted to intervene in the hearing before the Public Utilities Board.

[21] The Board has the power to permit interventions in its public hearings only for the purposes of the Act and in accordance with the Act's provisions. The intent and purpose of the relevant sections of the Act is to allow persons, corporate or individual, who have an interest in a rate increase or variation of service by a public utility to appear and express their viewpoint and concern in relation to that subject matter before the Board. If the Director's only reason for appearing is to assist the Board, no such interest has been demonstrated.

[22] Neither in my view does the Director have status under the *Combines Investigation Act* to intervene. Thus, being unable to demonstrate either status or interest, the intervention should not have been allowed.

Appeal allowed.

Editor: Steven C. McMinniman
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ANTHONY v. ANTHONY
(1983 No. 1137)

Newfoundland District Court
Judicial Centre of St. John's
Riche, D.C.J.
March 22, 1984.

Summary:
The husband purchased property in his own name in 1950. The purchase monies were provided by the husband's father. In 1957 a service station was built on the frontage of the lot, the matrimonial home on another portion of the lot, while the back 22 acres remained unused. The service station was operated by the husband and wife until 1966, and was thereafter leased until sold in 1975. The husband and wife divorced in 1970. The back 22 acres were sold in 1980. The wife brought an action against the husband claiming one-half of the proceeds of the two sales.

The Newfoundland District Court allowed the action in part, holding that the husband held one-half of the service station sale proceeds upon a resulting trust in the wife's favour, but that she had no interest in the back 22

Director of Investigation and Research under the *Combines Investigation Act* *Appellant (Intervener)*

v.

Newfoundland Telephone Company Limited *Respondent (Applicant)*

and

Newfoundland Board of Commissioners of Public Utilities *Respondent*

INDEXED AS: CANADA (DIRECTOR OF INVESTIGATION AND RESEARCH UNDER THE *COMBINES INVESTIGATION ACT*) *v.* NEWFOUNDLAND TELEPHONE CO.

File No.: 18880.

1986: May 29; 1987: November 19.

Present: Beetz, McIntyre, Lamer, Wilson and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND

Administrative law — Intervention in proceedings before administrative tribunal — Whether public officer whose office is created by statute requires statutory authority to intervene before administrative tribunal with permission of tribunal — Authority of tribunal to permit intervention — Competition Act, S.C. 1986, c. 26, ss. 97 (formerly Combines Investigation Act, R.S.C. 1970, c. C-23, s. 27.1, ad. 1974-75-76, c. 76, s. 9), 98 — Public Utilities Act, R.S.N. 1970, c. 322, ss. 14, 18, 23(g), 40, 60, 73, 81, 96 (as am. 1975-76, No. 56, s. 9), 113(2).

The Newfoundland Board of Commissioners of Public Utilities permitted the Director of Investigation and Research to intervene in the hearing of an application by the Newfoundland Telephone Co. despite the Company's objection that the Director lacked the statutory authority to intervene before a provincial board and that his appearance was not relevant to the Company's application. The Director's standing as an intervener was recognized on the understanding that he would confine his representations and evidence to the issue before the Board.

The Court of Appeal unanimously allowed the Company's appeal. At issue here were: (a) whether a public officer whose office has been created by statute requires statutory authority, express or implied, to intervene in

Directeur des enquêtes et recherches en vertu de la *Loi relative aux enquêtes sur les coalitions* *Appelant (Intervenant)*

c.

Newfoundland Telephone Company Limited *Intimée (Requérante)*

et

Newfoundland Board of Commissioners of Public Utilities *Intimée*

RÉPERTORIÉ: CANADA (DIRECTEUR DES ENQUÊTES ET RECHERCHES EN VERTU DE LA *LOI RELATIVE AUX ENQUÊTES SUR LES COALITIONS*) *c.* NEWFOUNDLAND TELEPHONE CO.

N° du greffe: 18880.

1986: 29 mai; 1987: 19 novembre.

Présents: Les juges Beetz, McIntyre, Lamer, Wilson et Le Dain.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE

Droit administratif — Intervention dans une instance devant un tribunal administratif — Un agent de l'État dont la charge a été créée a-t-il le pouvoir légal d'intervenir devant un tribunal administratif avec l'autorisation du tribunal? — Pouvoir du tribunal d'autoriser l'intervention — Loi sur la concurrence, S.C. 1986, chap. 26, art. 97 (anciennement Loi relative aux enquêtes sur les coalitions, S.R.C. 1970, chap. C-23, art. 27.1, aj. 1974-75-76, chap. 76, art. 9), 98 — Public Utilities Act, R.S.N. 1970, chap. 322, art. 14, 18, 23g), 40, 60, 73, 81, 96 (mod. 1975-76, No. 56, art. 9), 113(2).

La Newfoundland Board of Commissioners of Public Utilities avait autorisé le directeur des enquêtes et recherches à intervenir à l'audition d'une demande de la Newfoundland Telephone Co., en dépit de l'opposition de celle-ci, au motif que le directeur ne jouissait pas du pouvoir légal d'intervenir devant une commission provinciale et que sa comparution n'était pas pertinente au regard de la demande de la compagnie. La qualité pour agir à titre d'intervenant a été reconnue au directeur, étant entendu qu'il devait confiner ses observations et les preuves qu'il offrirait au litige dont la Commission était saisie.

La Cour d'appel, à l'unanimité, a accueilli l'appel formé par la compagnie. Les points suivants sont en cause: a) un agent de l'État dont la charge a été créée par la loi doit-il détenir, expressément ou implicitement,

his official capacity in proceedings before an administrative tribunal, with the permission of the tribunal, to make representations and adduce evidence with respect to the public policy for which he is responsible; (b) if so, whether an administrative tribunal may validly permit such intervention despite the lack of such authority; and (c) if not, whether the Director had statutory authority to intervene in proceedings before a provincial regulatory tribunal, with the permission of the tribunal, to make representations and adduce evidence with respect to the competition implications of an application by a provincial public utility for approval of an extension of its service.

Held: The appeal should be dismissed.

A public officer requires statutory authority, express or implied, to intervene in his official capacity in proceedings before an administrative tribunal, with the permission of the tribunal, to make representations and adduce evidence with respect to the public policy for which he is responsible. Such an action, although it does not have regulatory effects, may have consequences for the rights, obligations or interests of others. It is an assertion, in an adjudicative context, of the authority and expertise of a public official. In such a case, a public officer puts the weight of his opinion and knowledge, acquired in the exercise of his official duties, on the adjudicative scales. He extends, on his own initiative, the effective reach and influence of his office and authority with potential direct legal effect. Whether he should have the power or right to do so is a matter of legislative policy and thus of statutory authority.

There is no meaningful distinction to be drawn here between authority and capacity. Everything that a public officer, whose office has been created and defined by statute, does in his official capacity must find its ultimate legal foundation in statutory authority. Nothing that he does in his official capacity can be viewed as the exercise of a private right or liberty or as the exercise of the capacity of a natural person.

There is no decisive distinction to be drawn, in so far as the necessity of statutory authority is concerned, between intervention as of right and intervention with the permission of a tribunal. Both kinds of intervention are official acts having potential consequences for the parties to proceedings before an administrative tribunal. Intervention as of right merely has the additional quality of imposing upon the procedure of the tribunal.

le pouvoir légal d'intervenir en sa qualité officielle dans une instance se déroulant devant un tribunal administratif, avec l'autorisation du tribunal, afin de présenter des observations et des preuves relatives à l'intérêt public qu'il a la responsabilité de défendre? b) Dans l'affirmative, un tribunal administratif peut-il néanmoins valider autoriser une intervention en l'absence d'un tel pouvoir? c) Dans la négative, le directeur détient-il le pouvoir légal d'intervenir dans une instance se déroulant devant un tribunal réglementaire provincial, avec l'autorisation de ce tribunal, afin de présenter des observations et des preuves sur les conséquences, pour la concurrence, de la demande d'une entreprise de service public visant l'approbation de l'extension de son service.

Arrêt: Le pourvoi est rejeté.

La loi doit, expressément ou implicitement, conférer à un agent de l'État un pouvoir d'intervention, es qualité, dans une instance dont est saisi un tribunal administratif, pour lui permettre, avec l'autorisation du tribunal, de présenter des observations et des preuves au regard de l'intérêt public qu'il a la responsabilité de défendre. Une telle démarche, même si elle n'a pas d'effet réglementaire, peut avoir des conséquences pour les droits, les obligations ou les intérêts des tiers. C'est une affirmation, dans un contexte judiciaire, d'autorité et de compétence de la part d'un agent de l'État. Dans un tel cas, ce dernier met le poids de son opinion et de ses connaissances, acquises dans l'exercice de ses fonctions officielles, sur les plateaux de la balance de la justice. Il élargit, de sa propre initiative, la portée et l'influence effectives de sa charge et de son autorité, ce qui aura éventuellement un effet juridique direct. Qu'il doive ou non détenir ce pouvoir ou ce droit est une question de politique législative et par conséquent de pouvoir légal.

Il n'y a pas de distinction significative à tirer à cet égard entre pouvoir et capacité. Tout ce qu'un agent de l'État, dont la charge a été créée et définie par une loi, fait à titre officiel doit trouver son fondement juridique ultime dans l'autorité de la loi. Rien de ce qu'il fait à titre officiel ne saurait être considéré comme l'exercice d'un droit ou d'une liberté privés ni comme l'exercice par une personne physique de sa capacité d'agir.

Il n'y a pas de distinction décisive, dans la mesure où la nécessité d'un pouvoir légal est en cause, entre une intervention de plein droit et une intervention avec l'autorisation du tribunal. Les deux interventions constituent des actes officiels pouvant éventuellement avoir des conséquences pour les parties à l'instance dont est saisi le tribunal administratif. L'intervention de plein droit n'a qu'une caractéristique additionnelle, celle de prévaloir sur la procédure dont s'est doté le tribunal.

If a discretionary authority to permit intervention is not expressly conferred on the Board under the Act by the general power to "make all necessary examinations and inquiries" and the specific powers to conduct hearings in certain cases, it exists by implication as necessary to the effective exercise of these express powers.

Whatever scope may be reasonably assigned to the implied power or discretion of the Board to permit intervention, it cannot have been intended that the Board should have authority to permit intervention by a public officer in his official capacity if the officer has been denied the necessary authority to intervene by his governing statute. The question whether the officer has the necessary statutory authority, if raised by a party to the proceedings before the Board is a collateral one on which the Board cannot be expected to pronounce with finality, but it is one which limits the scope of the Board's discretion to permit intervention. To permit intervention where a public officer is shown to lack the necessary authority to intervene would be to permit him to exceed his authority and thus would be contrary to a fundamental principle of public law. There cannot be an implied power to effect such a result.

Section 27.1 deals exhaustively with the authority of the Director to intervene for the purposes indicated, either as of right or with the permission of a board, commission or other tribunal. It is a clear implication, that the Act, as it stood at the relevant time, denied the Director the necessary authority to intervene before a provincial board with the permission of the board. The maxim *expressio unius est exclusio alterius* applies. Section 27.1 cannot have been intended to be merely a specific statutory recognition of an authority that would exist apart from statute, and the limitation to federal boards, commissions or other tribunals, cannot, because of the emphasis it is given by the definition of such boards, commissions and other tribunals, be assumed to have been a matter of inadvertence.

Cases Cited

Considered: *Re Hunter and Board of Public Utilities of New Brunswick* (1984), 8 D.L.R. (4th) 454; *Re Maritime Telegraph & Telephone Co. and Board of Commissioners of Public Utilities* (1981), 125 D.L.R. (3d) 252; **referred to:** *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601.

Statutes and Regulations Cited

Civil Procedure Rules (Nova Scotia), r. 8.01.
Combines Investigation Act, R.S.C. 1970, c. C-23, s. 27.1.

Si le pouvoir discrétionnaire d'autoriser une intervention n'est pas expressément conféré à la Commission par la Loi, en vertu du pouvoir général de «procéder à tous les examens et enquêtes nécessaires» et des pouvoirs exprès de tenir des audiences dans certains cas, ce pouvoir existe néanmoins implicitement, lorsqu'il s'avère nécessaire à l'exercice des pouvoirs exprès.

Quelle que soit la portée que l'on puisse raisonnablement attribuer au pouvoir implicite ou discrétionnaire de la Commission, quand elle autorise une intervention, on ne peut avoir voulu qu'elle détienne le pouvoir d'autoriser l'intervention d'un agent de l'État, à titre officiel, si la loi qui le régit lui refuse l'autorité nécessaire pour intervenir. La question de savoir si l'agent a le pouvoir légal nécessaire, lorsqu'une partie à l'instance la soulève devant la Commission, n'est qu'un incident d'instance et on ne peut s'attendre à ce que la décision de la Commission à cet égard soit définitive; néanmoins elle restreint le pouvoir discrétionnaire de la Commission d'autoriser une intervention. Autoriser l'intervention, lorsqu'il est démontré que l'agent de l'État n'a pas le pouvoir nécessaire pour intervenir, ce serait l'autoriser à commettre un excès de pouvoir, ce qui est contraire à un principe fondamental du droit public. Aucun pouvoir implicite ne peut avoir ce résultat.

L'article 27.1 traite exhaustivement du pouvoir d'intervention du directeur pour les fins indiquées, soit de plein droit, soit avec l'autorisation de l'office, de la commission ou de quelque autre tribunal. Il en découle donc clairement que la Loi, dans la forme qu'elle revêtait à l'époque pertinente, refuse au directeur le pouvoir d'intervention nécessaire pour agir devant une commission provinciale, avec l'autorisation de celle-ci. La maxime *expressio unius est exclusio alterius* s'applique. On ne peut avoir voulu que l'art. 27.1 ne soit qu'une reconnaissance législative expresse d'un pouvoir existant indépendamment de la loi, et sa limitation aux offices, commissions ou autres tribunaux fédéraux ne saurait, vu l'importance qu'on y a accordé en définissant ces organismes, être considérées comme accidentelles.

Jurisprudence

Arrêts examinés: *Re Hunter and Board of Public Utilities of New Brunswick* (1984), 8 D.L.R. (4th) 454; *Re Maritime Telegraph & Telephone Co. and Board of Commissioners of Public Utilities* (1981), 125 D.L.R. (3d) 252; **arrêt mentionné:** *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601.

Lois et règlements cités

Civil Procedure Rules (Nouvelle-Écosse), art. 8.01.
Loi relative aux enquêtes sur les coalitions, S.R.C. 1970, chap. C-23, art. 27.1.

Competition Act, S.C. 1986, c. 26, ss. 97 (formerly *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 27.1, ad. 1974-75-76, c. 76, s. 9), 98.
Newfoundland Regulation 103/78.
Public Utilities Act, R.S.N. 1970, c. 322, ss. 14, 18, 23(g), 40, 60, 73, 81, 96 (as am. 1975-76, No. 56, s. 9), 113(2).
Public Utilities Act, R.S.N.B. 1973, c. P-27, ss. 5(1), 8, 22, 23, 24.

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Côté, Pierre-André. *The Interpretation of Legislation in Canada*. Cowansville, Que.: Yvon Blais, 1984.

APPEAL from a judgment of the Newfoundland Court of Appeal (1984), 8 D.L.R. (4th) 617, 47 Nfld. & P.E.I.R. 277, 139 A.P.R. 277, allowing an appeal from an order of the Newfoundland Board of Commissioners of Public Utilities, P.U. No. 29 (1982). Appeal dismissed.

W. J. Miller and *Bruce Russell*, for the appellant.

E. J. Kipnis, for the respondent Newfoundland Telephone Company Limited.

Ian F. Kelly, for the respondent Newfoundland Board of Commissioners of Public Utilities.

The judgment of the Court was delivered by

LE DAIN J.—This appeal raises the following questions: (a) whether a public officer whose office has been created by statute requires statutory authority, express or implied, to intervene in his official capacity in proceedings before an administrative tribunal, with the permission of the tribunal, to make representations and adduce evidence with respect to the public policy for which he is responsible; (b) if so, whether an administrative tribunal may validly permit such intervention despite the lack of such authority; and (c) if not, whether the Director of Investigation and Research under the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as amended by 1974-75-76, c. 76, had statutory authority to intervene in proceedings before a provincial regulatory tribunal, with the permission of the tribunal, to make representations and adduce evidence with respect

Loi sur la concurrence, S.C. 1986, chap. 26, art. 97 (anciennement *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, chap. C-23, art. 27.1, aj. 1974-75-76, chap. 76, art. 9), 98.
Loi sur les entreprises de service public, L.R.N.-B. 1973, chap. P-27, art. 5(1), 8, 22, 23, 24.
Newfoundland Regulation 103/78.
Public Utilities Act, R.S.N. 1970, chap. 322, art. 14, 18, 23g), 40, 60, 73, 81, 96 (mod. 1975-76, No. 56, art. 9), 113(2).

Doctrine citée

Côté, Pierre-André. *Interprétation des lois*. Cowansville, Qué.: Yvon Blais, 1984.

POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve (1984), 8 D.L.R. (4th) 617, 47 Nfld. & P.E.I.R. 277, 139 A.P.R. 277, qui a accueilli un appel interjeté d'une ordonnance de la Newfoundland Board of Commissioners of Public Utilities, P.U. No. 29 (1982). Pourvoi rejeté.

W. J. Miller et *Bruce Russell*, pour l'appelant.

E. J. Kipnis, pour l'intimée Newfoundland Telephone Company Limited.

Ian F. Kelly, pour l'intimée Newfoundland Board of Commissioners of Public Utilities.

Version française du jugement de la Cour rendu par

LE JUGE LE DAIN—Le pourvoi soulève les questions suivantes: a) un agent de l'État dont la charge a été créée par la loi doit-il détenir, expressément ou implicitement, le pouvoir légal d'intervenir en sa qualité officielle dans une instance se déroulant devant un tribunal administratif, avec l'autorisation du tribunal, afin de présenter des observations et des preuves relatives à l'intérêt public qu'il a la responsabilité de défendre? b) Dans l'affirmative, un tribunal administratif peut-il néanmoins validement autoriser cette intervention en l'absence d'un tel pouvoir? c) Dans la négative, le directeur des enquêtes et recherches nommé en vertu de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, chap. C-23, modifiée par 1974-75-76, chap. 76, détient-il le pouvoir légal d'intervenir dans une instance se déroulant devant un tribunal réglementaire provincial, avec

to the competition implications of an application by a provincial public utility for approval of an extension of its service.

The appeal is by leave of this Court from the judgment of the Newfoundland Court of Appeal on April 26, 1984, 8 D.L.R. (4th) 617, allowing the appeal from an order of the Newfoundland Board of Commissioners of Public Utilities on June 11, 1982, which permitted the Director to intervene in the hearing of an application by the respondent Newfoundland Telephone Company Limited, despite the objection of the Company to such intervention on the ground that the Director lacked the statutory authority to intervene before a provincial board. The appeal in this Court was heard at the same time as the appeal in *Canada (Director of Investigation and Research under the Combines Investigation Act) v. New Brunswick Telephone Co.*, [1987] 2 S.C.R. 485, in which, on the question whether a provincial board could properly permit the Director to intervene in proceedings before it, the New Brunswick Court of Appeal came to a conclusion different from that of the Newfoundland Court of Appeal. In this Court a common submission was made on behalf of the Director in the two appeals. It will therefore be necessary to refer to the *New Brunswick Telephone Co.* appeal in the course of these reasons.

I

On April 27, 1982, the Company applied to the Board for authorization of the addition to its services of a "Dial Access to Radio Paging Service" and approval of the related "Newfoundland Telephone Paging System Interface Standards". The hearing of the Company's application was set for May 20, 1982, and on May 17, 1982 the Director gave notice of his intention to intervene in the application and hearing. At the hearing, on June 3, 1982, the Company objected to the proposed intervention on the grounds that the Director did not have the "statutory power" to appear before the Board and that his appearance was not relevant to the Company's application. After argument on this issue, the Chairman of the Board indicated orally that the Board would recognize the "standing" of the Director as an intervener on the understanding

l'autorisation de ce tribunal, afin de présenter des observations et des preuves sur les conséquences, pour la concurrence, de la demande d'une entreprise provinciale de service public visant l'approbation de l'extension de son service.

Le pourvoi, qui a reçu l'autorisation de la Cour, est formé contre l'arrêt de la Cour d'appel de Terre-Neuve du 26 avril 1984, 8 D.L.R. (4th) 617, qui a accueilli l'appel interjeté de l'ordonnance de la Newfoundland Board of Commissioners of Public Utilities du 11 juin 1982, laquelle avait autorisé le directeur à intervenir à l'audition de la demande de l'intimée, Newfoundland Telephone Company Limited, en dépit de l'opposition de cette dernière à cette intervention, au motif que le directeur n'avait pas, de par la loi, le pouvoir d'intervenir devant une commission provinciale. La Cour a entendu ce pourvoi en même temps que l'affaire *Canada (Directeur des enquêtes et recherches en vertu de la Loi relative aux enquêtes sur les coalitions) c. New Brunswick Telephone Co.*, [1987] 2 R.C.S. 485, où, à la question de savoir si une commission provinciale peut autoriser le directeur à intervenir dans une instance dont elle est saisie, la Cour d'appel du Nouveau-Brunswick a donné une réponse différente de celle de la Cour d'appel de Terre-Neuve. Devant cette Cour, une thèse commune a été soutenue au nom du directeur dans les deux pourvois. Il sera donc nécessaire de se reporter au pourvoi formé par la *New Brunswick Telephone Co.* au cours des présents motifs.

I

Le 27 avril 1982, la compagnie a demandé à la Commission l'autorisation d'adjoindre à ses services un «service de téléappel par accès direct» ainsi que l'approbation des normes d'interface correspondantes relatives aux systèmes de téléavertissement de Terre-Neuve. L'audition de la demande de la compagnie a été fixée au 20 mai 1982 et, le 17 mai, le directeur notifiait son intention d'intervenir à l'audience. À l'audience, le 3 juin 1982, la compagnie s'est opposée à l'intervention projetée au motif que le directeur ne jouissait pas du [TRADUCTION] «pouvoir légal» de comparaître devant la Commission et que sa comparution n'était pas pertinente au regard de la demande de la compagnie. Après le débat sur cette question, le président de la Commission a déclaré que la Commission reconnaîtrait au directeur «qualité pour

that he would confine his representations and evidence to the issue before the Board. On June 11, 1982, the Board issued a formal order, P.U. No. 29 (1982), dismissing the objection of the Company and permitting the Director to appear and be heard before the Board on the Company's application.

The Company appealed from the Board's order to the Newfoundland Court of Appeal pursuant to s. 96 of *The Public Utilities Act*, R.S.N. 1970, c. 322, which, as amended by 1975-76, No. 56, s. 9, provides that an appeal lies from a decision of the Board to the Court of Appeal on any question of jurisdiction or law. The Court of Appeal unanimously allowed the Company's appeal, holding that in permitting the Director to intervene the Board improperly exercised its discretion to permit intervention because the Director lacked both the "status" under the *Combines Investigation Act* to intervene before a provincial board and an interest in the application before the Board. The Director had contended that he had the capacity of a natural person to intervene in proceedings before the Board. Mifflin C.J.N., with whom Morgan and Gushue JJ.A. concurred, held that, as the holder of an office created by statute, the Director, acting as such, had only such powers or rights as the statute creating his office conferred on him. Noting that s. 27.1 of the *Combines Investigation Act* expressly empowered the Director to make representations and adduce evidence before any federal board, commission or other tribunal, Mifflin C.J.N. held that the Act did not confer authority on the Director to intervene before a provincial board, at least when he was not, as he acknowledged, carrying out his investigative or other duties under the Act. The Court of Appeal further held that an intervener must have an interest in an application before the Board and that the Director's desire to be of assistance to the Board did not constitute a sufficient interest.

agir» à titre d'intervenant, étant entendu qu'il devrait confiner ses observations et les preuves qu'il présenterait au litige dont la Commission était saisie. Le 11 juin 1982, la Commission rendait une ordonnance formelle, P.U. No. 29 (1982), rejetant l'opposition de la compagnie et autorisant le directeur à comparaître et à se faire entendre devant la Commission au regard de la requête de la compagnie.

La compagnie a interjeté appel de l'ordonnance de la Commission à la Cour d'appel de Terre-Neuve sur le fondement de l'art. 96 de *The Public Utilities Act*, R.S.N. 1970, chap. 322, modifié par 1975-76, No. 56, art. 9, qui prévoit qu'il peut être interjeté appel d'une décision de la Commission à la Cour d'appel sur les questions de compétence ou de droit. La Cour d'appel, à l'unanimité, a fait droit à l'appel de la compagnie, jugeant qu'en autorisant le directeur à intervenir, la Commission avait indûment exercé son pouvoir discrétionnaire parce que le directeur n'avait pas, en vertu de la *Loi relative aux enquêtes sur les coalitions*, «qualité» pour intervenir devant une commission provinciale et, de plus, qu'il n'avait pas d'intérêt dans la demande dont la Commission était saisie. Le directeur avait soutenu qu'à titre de personne physique il jouissait de la capacité d'intervenir dans une instance se déroulant devant la Commission. Le juge en chef Mifflin de Terre-Neuve, aux motifs duquel les juges Morgan et Gushue ont souscrit, a jugé qu'à titre de titulaire d'une charge créée par la loi, le directeur n'avait, dans ses fonctions, que les pouvoirs ou les droits que lui confère la loi qui crée sa charge. Prenant acte que l'art. 27.1 de la *Loi relative aux enquêtes sur les coalitions* attribue expressément au directeur le pouvoir de présenter des observations et des preuves devant tout office, commission ou autre tribunal fédéral, le juge en chef Mifflin a conclu que la Loi ne lui avait pas attribué le pouvoir d'intervenir devant une commission provinciale, à tout le moins parce qu'il n'exerçait pas alors, comme il l'a reconnu, une fonction investigatrice ou quelque autre fonction en vertu de la loi. La Cour d'appel a en outre jugé que l'intervenant doit avoir un intérêt dans la demande dont la Commission est saisie et que le désir exprimé par le directeur de venir en aide à la Commission ne constituait pas un intérêt suffisant.

The Court of Appeal did not refer to the judgment of the New Brunswick Court of Appeal in the *New Brunswick Telephone Co.* case (*Re Hunter and Board of Public Utilities of New Brunswick* (1984), 8 D.L.R. (4th) 454), which had been rendered some two weeks earlier, but referred with approval to the decision of Pace J.A. of the Nova Scotia Court of Appeal, sitting in chambers, in the *Maritime Telegraph & Telephone Co.* case (*Re Maritime Telegraph & Telephone Co. and Board of Commissioners of Public Utilities* (1981), 125 D.L.R. (3d) 252). In that case, Pace J.A. had to consider whether the Director, who sought to intervene in an appeal to the Nova Scotia Court of Appeal from a decision of the Nova Scotia Board of Commissioners of Public Utilities, had "an interest in the subject matter of the proceeding", as required by r. 8.01 of the *Civil Procedure Rules* of Nova Scotia. The Director had not intervened in the application before the Board. In determining whether the Director had the requisite interest, Pace J.A. found it necessary to consider his powers under the *Combines Investigation Act*. He said at p. 253: "The powers of the Director to intervene are circumscribed by s. 27.1(1) of the Act. The Director is empowered to make representations before federal boards, commissions and tribunals. As far as I can ascertain, there are no similar powers bestowed upon the Director to intervene before provincial bodies and, even if there were, I would have grave doubts whether such legislation would be in the competency of the Parliament of Canada." He concluded on the issue before him as follows at p. 253: "In view of the foregoing, it is my opinion that the Director does not have the statutory authority to intervene and that he has no claim or interest in the subject-matter of the proceedings as defined by Rule 8.01 of the *Civil Procedure Rules* and the application should be dismissed."

In the *New Brunswick Telephone Co.* case, the Director sought to intervene in the hearing by the New Brunswick Board of Commissioners of Public

La Cour d'appel n'a pas mentionné l'arrêt de la Cour d'appel du Nouveau-Brunswick dans l'affaire *New Brunswick Telephone Co.* (*Re Hunter and Board of Public Utilities of New Brunswick* (1984), 8 D.L.R. (4th) 454) prononcé quelque deux semaines auparavant, mais elle s'est référée, en l'approuvant, à la décision du juge Pace de la Cour d'appel de la Nouvelle-Écosse, siégeant en son cabinet, dans l'affaire *Maritime Telegraph & Telephone Co.* (*Re Maritime Telegraph & Telephone Co. and Board of Commissioners of Public Utilities* (1981), 125 D.L.R. (3d) 252). Dans cette affaire, le juge Pace a eu à examiner si le directeur, qui voulait intervenir dans un appel, interjeté en Cour d'appel de la Nouvelle-Écosse, contre une décision du Nova Scotia Board of Commissioners of Public Utilities, avait [TRADUCTION] «un intérêt dans l'objet de l'instance», comme l'exigeait l'art. 8.01 des *Civil Procedure Rules* de la Nouvelle-Écosse. Le directeur n'était pas intervenu à l'audition de la demande devant la Commission. Pour décider si le directeur avait l'intérêt requis, le juge Pace a estimé nécessaire d'étudier ses pouvoirs en vertu de la *Loi relative aux enquêtes sur les coalitions*. Il dit, à la p. 253: [TRADUCTION] «Les pouvoirs d'intervention du directeur sont circonscrits par le par. 27.1(1) de la Loi. Le directeur a le pouvoir de se faire entendre devant les offices, commissions et tribunaux fédéraux. Dans la mesure où je puis l'établir, aucun pouvoir semblable n'a été attribué au directeur pour qu'il puisse intervenir devant des organismes provinciaux et, même si c'était le cas, j'entretiens des doutes sérieux quant à la compétence du Parlement du Canada d'adopter une disposition de ce genre.» Il statue sur le litige dont il a été saisi en ces termes, à la p. 253: [TRADUCTION] «Vu ce qui précède, je suis d'avis que le directeur ne détient pas le pouvoir légal d'intervenir et qu'il ne peut faire valoir aucune prétention ni aucun intérêt au regard de l'objet de l'instance, selon la définition donnée par l'art. 8.01 des *Civil Procedure Rules*; la demande est donc rejetée.»

Dans l'affaire *New Brunswick Telephone Co.*, le directeur voulait intervenir à l'audition, devant la Commission des entreprises de service public du

Utilities of an application by the New Brunswick Telephone Co. for confirmation by the Board of the Company's interpretation of clauses in its general tariff respecting the imposition of standard service charges. The question was whether the Company was required to impose standard service charges on the transfer of customers from one service to another pursuant to the Company's acquisition of the assets of certain businesses. The Director notified the Board that he wished to intervene because of a complaint he had received from a competing answering service concerning the Company's proposal not to impose standard service charges in such a case, and he referred to his "long standing interest in promoting competition in telecommunications services and ensuring that telephone companies do not engage in unfair competitive practices in these markets." The Company objected to the proposed intervention, and the Board ruled against the Director. Referring to the reasoning of Pace J.A. in the *Maritime Telegraph & Telephone Co.* case as compelling, the Board concluded that the Director did not have "the capacity to appear or be represented before this Board, as a party, or to intervene in any manner before this Board." The Director applied to the Court of Queen's Bench for judicial review of the Board's decision. Hoyt J. (as he then was) dismissed the Director's application. He said that while he had some reservation concerning the opinion of Pace J.A. in the *Maritime Telegraph & Telephone Co.* case as to the effect of s. 27.1 of the *Combines Investigation Act* on the authority of the Director to intervene before a provincial board, he was not disposed to disagree with it. He noted that the same issue was pending before the Newfoundland Court of Appeal. He also observed that the application could be dismissed on the further ground that, since the Director did not seek to have the hearing resumed to permit his participation, the question of his authority or capacity to intervene before the Board had become academic.

Nouveau-Brunswick, d'une demande de la New Brunswick Telephone Co. qui visait à obtenir de la Commission une confirmation de son interprétation des clauses de son tarif ordinaire sur les frais imposables pour son service de base. La compagnie était-elle obligée d'imposer ces frais pour le service de base aux clients transférés d'un service à un autre à la suite de l'acquisition, par la compagnie, des avoirs de certaines entreprises? Le directeur avait notifié la Commission qu'il désirait intervenir par suite de la plainte déposée par un service concurrent de secrétariat pour abonnés absents, au sujet du projet de la compagnie de ne pas imposer de frais de service de base pour ce genre de service, et il faisait valoir son [TRADUCTION] «intérêt, depuis toujours, à promouvoir la concurrence au sein des services de télécommunications et à s'assurer que les compagnies de téléphone ne se livrent pas à des pratiques de concurrence déloyale dans ces marchés.» La compagnie s'est opposée à l'intervention et la Commission a rejeté la demande du directeur. Qualifiant de décisif le raisonnement du juge Pace dans l'affaire *Maritime Telegraph & Telephone Co.*, la Commission a conclu que le directeur ne détenait pas [TRADUCTION] «la capacité de comparaître ni d'être représenté devant la Commission, que ce soit à titre de partie ou d'intervenant au litige dont elle est saisie.» Le directeur s'est adressé à la Cour du Banc de la Reine, pour obtenir un examen judiciaire de la décision de la Commission. Le juge Hoyt (maintenant juge d'appel) a rejeté la demande du directeur. Bien que, a-t-il dit, il eût quelques réserves concernant l'opinion du juge Pace dans l'arrêt *Maritime Telegraph & Telephone Co.* quant à l'effet de l'art. 27.1 de la *Loi relative aux enquêtes sur les coalitions* sur le pouvoir du directeur d'intervenir devant une commission provinciale, il n'était pas prêt à être en désaccord. Il a pris acte qu'un litige semblable était alors pendant devant la Cour d'appel de Terre-Neuve. Il a fait aussi observer que la demande pouvait être rejetée au motif supplémentaire que, puisque le directeur n'avait pas demandé la reprise de l'audition afin de pouvoir y participer, la question de son pouvoir ou de sa capacité à intervenir devant la Commission devenait purement théorique.

The New Brunswick Court of Appeal (Stratton, La Forest and Angers JJ.A.) unanimously allowed the appeal from this judgment and quashed the Board's decision. Stratton J.A. (as he then was), with whom Angers J.A. concurred, held that the Board and the Court of Queen's Bench were "in error in concluding that the Director did not have the power or capacity to appear or be represented before the Board." After referring to the distinction suggested by counsel for the Director between statutory authority to intervene as of right before a board and power or capacity to intervene with the permission of a board, Stratton J.A. concluded that s. 27.1 of the *Combines Investigation Act* did not prevent the Director from intervening before a provincial board with the permission of the board. He said at p. 457:

> In my view, s. 27.1 simply empowers the Director to intervene before federal boards or commissions as of right regardless of their internal procedures. But in proceedings such as the present one, where the Director seeks to intervene before a provincial board, he does not intervene as of right but rather must request the Board to permit an intervention in the same way the Board would consider interventions from any interested party. In deciding whether to permit the Director to intervene, the Board need look no further than its own rules of practice and procedure to resolve the issue. Generally speaking, in determining whether the Director may intervene, a board or commission must simply be satisfied that the Director has a valid interest in participating and can be of assistance in the proceedings.

After noting that the *Public Utilities Act* empowered the Board to "make all necessary examinations and inquiries" and that while the Board had not adopted rules of procedure, as it was empowered to do, the practice of the Board was "to permit a wide range of interests to intervene before it in proceedings of public concern", Stratton J.A. defined the scope of the Board's discretion to permit intervention as follows at p. 458:

La Cour d'appel du Nouveau-Brunswick, formée des juges Stratton, La Forest et Angers, a accueilli à l'unanimité l'appel formé contre ce jugement et a cassé la décision de la Commission. Le juge Stratton (maintenant Juge en chef), aux motifs duquel le juge Angers souscrit, a estimé que la Commission et la Cour du Banc de la Reine ont [TRADUCTION] «eu tort de conclure que le directeur n'avait ni les pouvoirs ni la capacité l'autorisant à comparaître ou à se faire représenter devant la Commission.» Après avoir rappelé la distinction, qu'avait fait valoir l'avocat du directeur, entre le pouvoir légal d'intervenir de plein droit devant une commission et le pouvoir ou la capacité d'intervention avec l'autorisation d'une commission, le juge Stratton a conclu que l'art. 27.1 de la *Loi relative aux enquêtes sur les coalitions* n'interdit pas au directeur d'intervenir devant une commission provinciale, avec l'autorisation de celle-ci. Il dit, à la p. 457:

> [TRADUCTION] À mon avis, l'art. 27.1 autorise simplement le directeur à intervenir de plein droit devant les offices ou commissions fédérales indépendamment de leur procédure interne. Mais, dans une instance comme celle-ci, si le directeur veut intervenir devant une commission provinciale, il n'intervient pas de plein droit, mais il doit plutôt, comme toute autre partie ayant un intérêt, demander à la Commission l'autorisation d'intervenir. Pour décider d'autoriser le directeur à intervenir, la Commission n'a qu'à se reporter à son propre règlement intérieur et à ses règles de procédure pour résoudre la question. D'une manière générale, pour décider si le directeur peut intervenir, l'office ou la commission doivent simplement s'assurer que le directeur possède un intérêt valide à participer à l'instance et que sa présence peut être utile.

Après avoir relevé qu'aux termes des pouvoirs conférés par la *Loi sur les entreprises de service public*, la Commission «procède à tous les examens et à toutes les enquêtes nécessaires» et que, si la Commission n'a pas adopté de règlement intérieur, comme elle a le pouvoir de le faire, elle a pour pratique [TRADUCTION] «d'autoriser un large éventail d'intérêts divers à intervenir devant elle dans les affaires d'intérêt public», le juge Stratton décrit la portée du pouvoir discrétionnaire de la Commission en matière d'intervention en ces termes, à la p. 458:

Since there is no statutory restriction on the Board's right to hear any interested party, and in view of its practice, it is my opinion that the Board has authority to hear such persons as it determines can be of assistance to it in the performance of its function.

La Forest J.A. (as he then was), in separate reasons concurring in the result, held that the Board erred in refusing the Director permission to intervene on the ground that he lacked the capacity to intervene before a provincial board because the Board was not required to consider the capacity of a proposed intervener in exercising its discretion whether to permit intervention, but only whether the proposed intervener could be of assistance to the Board. He said at p. 459:

In undertaking its duties (the board not having made any rules to the contrary), it may, in my view, allow anyone to participate in a hearing if it believes this may assist it in the performance of its functions. It is really not specifically concerned with the capacity of a proposed intervenor. The board need simply determine whether or not a proposed intervention will assist it in performing its functions and it must exercise its discretion on that basis.

. . .

In the present case, however, it failed to exercise its discretion to hear the director because it believed it could not under the law do so because he did not have the capacity to participate in the hearing. In so doing, I think, the board was in error, and the director, being aggrieved by the failure of the board to exercise its discretion, I would dispose of the appeal as proposed by my brother Stratton.

II

Section 27.1 of the *Combines Investigation Act*, referred to in the judgments of the Nova Scotia, New Brunswick and Newfoundland Courts of Appeal on the issue of the Director's authority to intervene, was added to the Act in 1975 by S.C. 1974-75-76, c. 76, s. 9, and reads as follows:

27.1 (1) The Director, at the request of any federal board, commission or other tribunal or upon his own initiative, may, and upon direction from the Minister

[TRADUCTION] Puisqu'il n'existe aucune restriction législative au droit de la Commission d'entendre toute partie intéressée, et vu son mode de fonctionnement, je suis d'avis que la Commission a le pouvoir d'entendre toute personne qu'elle juge susceptible de lui être utile dans l'exercice de sa fonction.

Le juge La Forest (maintenant juge de cette Cour), dans des motifs distincts mais concordants quant au résultat, conclut que la Commission a eu tort de refuser la permission d'intervenir au directeur en invoquant son incapacité à cet égard devant une commission provinciale, puisque la Commission n'avait pas à examiner la capacité d'un éventuel intervenant dans l'exercice de son pouvoir discrétionnaire d'autoriser ou non l'intervention, mais qu'on lui demandait seulement de rechercher si l'intervenant éventuel pouvait être utile à la Commission. Il dit, à la p. 459:

[TRADUCTION] Dans l'exercice de ses fonctions (la Commission ne s'étant dotée d'aucune règle contraire), elle peut, à mon avis, autoriser qui elle veut à participer à une audience, si elle croit que cela peut lui être utile dans l'exercice de ses fonctions. Elle n'a pas vraiment à s'intéresser d'abord à la capacité de l'éventuel intervenant. Elle n'a qu'à se demander si oui ou non une intervention éventuelle peut lui être utile dans l'exercice de ses fonctions et elle doit exercer son pouvoir discrétionnaire sur cette base.

. . .

En l'espèce, toutefois, elle n'a pas exercé son pouvoir discrétionnaire d'entendre le directeur, car elle croyait qu'elle ne pouvait pas le faire en droit, parce qu'il n'avait pas la capacité de participer à l'audience. Ce faisant, je pense, la Commission a eu tort et le directeur, subissant un préjudice par suite de ce non-exercice du pouvoir discrétionnaire de la Commission, je suis d'avis de statuer sur l'appel comme le propose mon collègue le juge Stratton.

II

L'article 27.1 de la *Loi relative aux enquêtes sur les coalitions*, auquel se réfèrent les arrêts des cours d'appel de la Nouvelle-Écosse, du Nouveau-Brunswick et de Terre-Neuve, sur la question du pouvoir d'intervention du directeur, a été inséré dans la Loi en 1975 par S.C. 1974-75-76, chap. 76, art. 9, et est ainsi conçu:

27.1 (1) Le directeur peut, à la requête de tout office, toute commission ou tout autre tribunal fédéral ou de sa propre initiative, et doit, sur l'ordre du Ministre, présen-

shall, make representations to and call evidence before any such board, commission or other tribunal in respect of the maintenance of competition, whenever such representations or evidence are or is relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining such matter.

(2) For the purposes of this section, "federal board, commission or other tribunal" means any board, commission, tribunal or person who is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product and includes an *ad hoc* commission of inquiry charged with any such responsibility but does not include a court.

Effective June 19, 1986, s. 27.1 of the *Combines Investigation Act* was replaced by s. 97 of the *Competition Act*, which was enacted by S.C. 1986, c. 26, and reads as follows:

97. (1) The Director, at the request of any federal board, commission or other tribunal or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

(2) For the purposes of this section, "federal board, commission or other tribunal" means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.

At the same time there was added to the Act a s. 98, respecting intervention by the Director before provincial boards, commissions or other tribunals, which reads as follows:

98. (1) The Director, at the request of any provincial board, commission or other tribunal, or on his own initiative with the consent of the board, commission or other tribunal, may make representations to and call evidence before the board, commission or other tribunal

ter des observations et des preuves relativement au maintien de la concurrence à un office, une commission ou un autre tribunal, chaque fois que ces observations ou preuves ont trait à une question dont est saisi cet office, cette commission ou cet autre tribunal et aux facteurs que celui-ci ou celle-ci a le droit d'examiner en vue de régler cette question.

(2) Aux fins du présent article, «office, commission ou autre tribunal fédéral» désigne tout office, toute commission, tout tribunal ou toute personne qui sont expressément chargés, par un texte législatif du Parlement ou en application d'un tel texte, de prendre des décisions ou de faire des recommandations afférentes, directement ou indirectement, à la production, la fourniture, l'acquisition ou la distribution d'un produit et s'entend également d'une commission d'enquête spéciale ayant un tel mandat mais non d'une cour.

À compter du 19 juin 1986, l'art. 27.1 de la *Loi relative aux enquêtes sur les coalitions* a été remplacé par l'art. 97 de la *Loi sur la concurrence*, adoptée par S.C. 1986, chap. 26, qui se lit ainsi:

97. (1) Le directeur peut, à la requête de tout office, de toute commission ou de tout autre tribunal fédéral ou de sa propre initiative, et doit, sur l'ordre du Ministre, présenter des observations et des preuves relativement au maintien de la concurrence à un office, une commission ou un autre tribunal, chaque fois que ces observations ou preuves ont trait à une question dont est saisi cet office, cette commission ou cet autre tribunal et aux facteurs que celui-ci ou celle-ci a le droit d'examiner en vue de régler cette question.

(2) Aux fins du présent article, «office, commission ou autre tribunal fédéral» désigne tout office, toute commission, tout tribunal ou toute personne qui exerce des activités de réglementation et qui est expressément chargé, par un texte législatif du Parlement ou en application d'un tel texte, de prendre des décisions ou de faire des recommandations afférentes, directement ou indirectement, à la production, la fourniture, l'acquisition ou la distribution d'un produit.

En même temps, était ajouté à la Loi un art. 98, relatif aux interventions du directeur devant les offices, commissions ou autres tribunaux provinciaux, ainsi conçu:

98. (1) Le directeur, à la demande de tout office, de toute commission ou de tout autre tribunal provincial ou de sa propre initiative avec le consentement de l'office, de la commission ou du tribunal en question, peut présenter des observations et soumettre des éléments de

in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

(2) For the purposes of this section, "provincial board, commission or other tribunal" means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of the legislature of a province with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.

The future significance of the issue of the Director's authority to intervene before a provincial board with the permission of the board would appear to have been removed by s. 98 of the *Competition Act*, which came into force after the present appeal was argued. Indeed, this issue, as well as the others in the appeal, may have been rendered academic by the fact that in neither the Newfoundland nor the New Brunswick case did the Director appear to seek a resumption of the hearing before the Board in order to participate but rather an opinion from the Court as to whether he required statutory authority to intervene before a provincial board, with the permission of the board, and if so, whether he had such authority under the *Combines Investigation Act*. In view, however, of the possible general significance of the issues in the appeal, despite their rather special or narrow statutory context, I have proceeded on the assumption that the Court should exercise its discretion to decide them, to the extent necessary for the disposition of the appeal.

III

The first issue in the appeal is whether a public officer requires statutory authority, express or implied, to intervene in his official capacity in proceedings before an administrative tribunal, with the permission of the tribunal, to make representations and adduce evidence with respect

preuve devant cette office, cette commission ou ce tribunal en ce qui concerne la concurrence dans tous les cas où ces représentations ou ces éléments de preuve, selon le cas, sont pertinents aux questions soumises à l'office, à la commission ou au tribunal en question ainsi qu'aux facteurs que cet office, cette commission ou ce tribunal peut prendre en considération dans l'étude de ces questions.

(2) Aux fins du présent article, «office, commission ou autre tribunal provincial» s'entend de tout office, de toute commission, de tout tribunal ou de toute personne qui exerce des activités de réglementation et qui est expressément chargé par un texte législatif de la législature d'une province, ou en application d'un tel texte, de prendre des décisions ou de faire des recommandations afférentes, directement ou indirectement, à la production, à la fourniture, à l'acquisition ou à la distribution d'un produit.

L'importance que pourrait revêtir à l'avenir la question du pouvoir du directeur d'intervenir devant une commission provinciale, avec l'autorisation de celle-ci, disparaît vu l'art. 98 de la *Loi sur la concurrence*, entré en vigueur après l'audition du présent pourvoi. D'ailleurs, cette question, ainsi que tout ce que le pourvoi met en cause, pourrait ne revêtir qu'un intérêt théorique, puisque ni dans le cas de Terre-Neuve ni dans celui du Nouveau-Brunswick le directeur ne paraît avoir demandé une reprise de l'audience devant la Commission afin d'y participer; il a plutôt recherché un avis de la cour sur le point de savoir s'il devait détenir le pouvoir légal pour intervenir devant une commission provinciale, avec l'autorisation de celle-ci, et, en ce cas, si la *Loi relative aux enquêtes sur les coalitions* lui attribuait ce pouvoir. Vu néanmoins l'importance générale des points en litige, malgré leur contexte législatif plutôt particulier, voire étroit, j'ai présumé que la Cour devait, dans l'exercice de son pouvoir discrétionnaire, en décider dans la mesure nécessaire pour statuer sur le pourvoi.

III

Le premier point en l'espèce est de savoir si la loi doit, expressément ou implicitement, conférer à un agent de l'État un pouvoir d'intervention, es qualité, dans une instance dont est saisi un tribunal administratif, pour lui permettre, avec l'autorisation du tribunal, de présenter des observations et

to the public policy for which he is responsible. In my opinion, the answer to that question must be in the affirmative. Such an action, although it does not have regulatory effects, may have consequences for the rights, obligations or interests of others. It is an assertion, in an adjudicative context, of the authority and expertise of a public official. In such a case, a public officer puts the weight of his opinion and knowledge, acquired in the exercise of his official duties, on the adjudicative scales. He extends, on his own initiative, the effective reach and influence of his office and authority with potential direct legal effect. Whether he should have the power or right to do so is a matter of legislative policy and thus of statutory authority.

I do not think there is a meaningful distinction to be drawn in this respect between authority and capacity. In so far as this issue is concerned, they can be treated as synonymous. Everything that a public officer, whose office has been created and defined by statute, does in his official capacity must find its ultimate legal foundation in statutory authority. Nothing that he does in his official capacity can be viewed as the exercise of a private right or liberty, or, as was contended by counsel for the Director before the Newfoundland Court of Appeal, the exercise of the capacity of a natural person. The Director did not seek to intervene as a private individual. He sought to intervene, as his notice of intervention clearly indicates, in his official capacity as the "Director of Investigation and Research, an officer appointed by the Governor-General-in-Council under the authority of the Combines Investigation Act". As such, he sought to bring the authority and expertise of his office to bear on the issues and interests involved in the application before the Board.

Nor do I think that there is a decisive distinction to be drawn, in so far as the necessity of statutory authority is concerned, between intervention as of right and intervention with the permission of a tribunal. Both kinds of intervention are official acts having potential consequences for the parties to proceedings before an administrative tribunal. Intervention as of right merely has the additional

des preuves au regard de l'intérêt public qu'il a la responsabilité de défendre. À mon avis, la réponse à cette question doit être affirmative. Une telle démarche, même si elle n'a pas d'effet réglementaire, peut avoir des conséquences sur les droits, les obligations ou les intérêts des tiers. C'est une affirmation, dans un contexte judiciaire, d'autorité et de compétence de la part d'un agent de l'État. Dans un tel cas, ce dernier met le poids de son opinion et de ses connaissances, acquises dans l'exercice de ses fonctions officielles, sur les plateaux de la balance de la justice. Il élargit, de sa propre initiative, la portée et l'influence effectives de sa charge et de son autorité, ce qui aura éventuellement un effet juridique direct. Qu'il doive ou non détenir ce pouvoir ou ce droit est une question de politique législative et par conséquent de pouvoir légal.

Je ne pense pas qu'il y ait une distinction significative à tirer à cet égard entre pouvoir et capacité. Dans ce contexte, on peut les considérer comme synonymes. Tout ce qu'un agent de l'État, dont la charge a été créée et définie par une loi, fait à titre officiel doit trouver son fondement juridique ultime dans l'autorité de la loi. Rien de ce qu'il fait à titre officiel ne saurait être considéré comme l'exercice d'un droit ou d'une liberté privés ni, comme l'a soutenu l'avocat du directeur devant la Cour d'appel de Terre-Neuve, comme l'exercice de la capacité d'une personne physique. Le directeur n'a pas voulu intervenir à titre de personne privée. Il a voulu intervenir, comme son avis d'intervention l'indique clairement, à titre officiel, à titre de [TRADUCTION] «directeur des enquêtes et recherches, agent nommé par le gouverneur général en conseil en vertu des pouvoirs que lui confère la Loi relative aux enquêtes sur les coalitions». En tant que tel, il a voulu faire jouer l'autorité et la compétence de sa charge sur les questions et les intérêts en jeu dans la demande dont la Commission était saisie.

Je ne pense pas non plus que soit décisive la distinction, dans la mesure où la nécessité d'un pouvoir légal est en cause, entre une intervention de plein droit et une intervention avec l'autorisation du tribunal. Les deux interventions constituent des actes officiels pouvant éventuellement avoir des conséquences pour les parties à l'instance dont est saisi le tribunal administratif. L'interven-

quality of imposing upon the procedure of the tribunal.

IV

The second and closely related issue in this appeal is whether the Board could validly permit the Director to intervene if he did not have the required statutory authority to do so. This question requires consideration of the nature and scope of the Board's authority or discretion to permit intervention. *The Public Utilities Act* of Newfoundland does not contain any explicit provision with respect to intervention. Section 14 of the Act sets out the general powers of the Board as follows: "The Board shall have the general supervision of all public utilities, and may make all necessary examinations and enquiries and keep itself informed as to the compliance by public utilities with the provisions of law and shall have the right to obtain from any public utility all information necessary to enable the Board to fulfil its duties." Other sections of the Act, such as ss. 40, 60, 73 and 81, make specific provision for hearings by the Board, but again make no reference to intervention. Section 18 of the Act empowers the Board to make rules and regulations with respect to its practice and procedure, and *Newfoundland Regulation 103/78* provides for various aspects of the practice and procedure in proceedings before the Board, but contains no reference to intervention. Section 23(g) of the Act provides that the Board may "generally do all things which the Board deems necessary, convenient or advisable for or incidental to the exercise of any of the powers, functions and duties of the Board", and s. 113(2) makes further express provision for the implied powers, which would otherwise exist by virtue of the well established rule of statutory construction, as follows: "The Board hereby created has, in addition to the powers in this Act specified, mentioned and indicated, all additional, implied and incidental powers which may be proper or necessary to carry out, effect, perform and execute all the said powers herein specified, mentioned and indicated."

tion de plein droit n'a qu'une caractéristique additionnelle, celle de prévaloir sur la procédure dont s'est doté le tribunal.

IV

Le second point litigieux étroitement relié au premier dans le pourvoi est de savoir si la Commission pouvait validement autoriser le directeur à intervenir s'il n'avait pas le pouvoir légal de le faire. Ceci nous oblige à étudier la nature et la portée du pouvoir légal ou discrétionnaire de la Commission d'autoriser une intervention. *The Public Utilities Act* de Terre-Neuve ne comporte aucune disposition expresse en matière d'intervention. L'article 14 de la Loi énonce les pouvoirs généraux de la Commission: [TRADUCTION] "La Commission assume la supervision générale de toutes les entreprises de service public; elle peut procéder à tous les examens et enquêtes nécessaires et elle se tient au courant pour savoir si les entreprises de service public respectent les dispositions de la loi; elle a le droit d'obtenir des entreprises de service public toutes les informations nécessaires pour lui permettre d'exercer ses fonctions." D'autres articles de la Loi, tels les art. 40, 60, 73 et 81, prévoient expressément la tenue d'audience par la Commission, sans, ici encore, qu'il soit fait mention de l'intervention. L'article 18 confère à la Commission le pouvoir d'adopter un règlement intérieur de procédure et le *Newfoundland Regulation 103/78* régit divers aspects de la pratique et de la procédure suivies dans les affaires devant la Commission, mais il ne comporte aucune référence à l'intervention. L'alinéa 23g) de la Loi prévoit que la Commission peut [TRADUCTION] "en général, faire tout ce que la Commission estime nécessaire, convenable ou opportun dans l'exercice de l'une de ses attributions, fonctions et obligations ou tout ce que cet exercice implique", et le par. 113(2) confère encore plus expressément les pouvoirs implicites qui lui seraient autrement reconnus, en vertu de la règle d'interprétation des lois bien établie, dans les termes suivants: [TRADUCTION] "La Commission créée par les présentes détient, outre les pouvoirs spécifiés, mentionnés ou indiqués dans cette loi, tous les pouvoirs additionnels, implicites et corollaires nécessaires ou utiles à l'exercice, à l'accomplissement, à la mise en œuvre et à l'exécution de tous ces pouvoirs.»

There is also an absence of express reference to intervention in the *Public Utilities Act*, R.S.N.B. 1973, c. P-27, which is applicable in the *New Brunswick Telephone Co.* appeal. Section 5(1) of the New Brunswick Act provides for the general powers of the Board of Commissioners of Public Utilities, in terms similar to those of s. 14 of the Newfoundland Act, as follows: "The Board shall have general supervision of all public utilities and shall make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the provisions of this Act." Sections 22 to 24 of the New Brunswick Act make provision for hearings by the Board but contain no specific reference to intervention. As Stratton J.A. noted in his reasons for judgment, s. 8 of the Act empowers the Board to make rules and regulations with respect to practice and procedure before the Board, but no such rules or regulations have been adopted. Thus in New Brunswick, as in Newfoundland, there is no express provision of law either conferring authority on the Board to permit intervention or restricting the scope of any such authority as may arise by implication.

Il n'y a en outre aucune référence expresse à l'intervention dans la *Loi sur les entreprises de service public*, L.R.N.-B. 1973, chap. P-27, applicable dans le cas du pourvoi de la *New Brunswick Telephone Co.* Le paragraphe 5(1) de la Loi du Nouveau-Brunswick confère à la Commission des entreprises de service public ses pouvoirs généraux en des termes analogues à ceux de l'art. 14 de la loi terre-neuvienne: «La Commission assure la surveillance générale de toutes les entreprises de service public et procède à tous les examens et à toutes les enquêtes nécessaires et se tient au courant pour savoir si les entreprises de service public respectent les dispositions de la présente loi.» Les articles 22 à 24 de la Loi du Nouveau-Brunswick régissent les audiences de la Commission, mais ne comportent aucune référence expresse à l'intervention. Comme le juge Stratton le signale dans ses motifs de jugement, l'art. 8 de la Loi confère à la Commission le pouvoir d'adopter un règlement intérieur de procédure, mais aucun règlement de ce genre n'a été adopté. Ainsi, au Nouveau-Brunswick comme à Terre-Neuve, aucune disposition expresse de la loi ne confère à la Commission le pouvoir d'autoriser une intervention ni ne restreint la portée de tout pouvoir implicite éventuel de ce genre.

If a discretionary authority to permit intervention is not expressly conferred under the New Brunswick and Newfoundland Acts by the general power to "make all necessary examinations and inquiries" and the specific powers to conduct hearings in certain cases, it exists, in my opinion, by implication as necessary to the effective exercise of these express powers. Cf. *Interprovincial Pipe Line Ltd. v. National Energy Board*, [1978] 1 F.C. 601, at p. 608. The question whether a proposed intervener must have an interest in the particular application before the Board of the kind suggested by the Newfoundland Court of Appeal or whether it is sufficient, as was held by the New Brunswick Court of Appeal, that a proposed intervener may be of assistance to the Board in the determination of the issues raised by an application, does not arise for decision unless the Director had the required authority to intervene, with the permission of the Board, or the Board could properly

Si le pouvoir discrétionnaire d'autoriser une intervention n'est pas expressément conféré par les lois du Nouveau-Brunswick et de Terre-Neuve, en vertu du pouvoir général de «procéder à tous les examens et enquêtes nécessaires» et des pouvoirs exprès de tenir des audiences dans certains cas, ce pouvoir existe néanmoins, à mon avis, implicitement, lorsqu'il s'avère nécessaire à l'exercice effectif des pouvoirs exprès. Cf. *Interprovincial Pipe Line Ltd. c. Office national de l'Énergie*, [1978] 1 C.F. 601, à la p. 608. Quant à savoir si un éventuel intervenant doit avoir un intérêt dans la demande particulière dont la Commission est saisie comme le laisse entendre la Cour d'appel de Terre-Neuve ou, au contraire, s'il suffit, comme l'a jugé la Cour d'appel du Nouveau-Brunswick, que la présence de l'intervenant éventuel soit d'une utilité quelconque à la Commission pour trancher les questions soulevées par la demande, cela n'a pas à être décidé à moins que le directeur ne détienne le pouvoir

permit intervention by the Director despite a lack of such authority. It was contended by counsel for the Company that the questions whether a proposed intervener required an interest in the application before the Board and whether the Director had a sufficient interest were not in issue in the appeal, but in view of the two grounds for judgment in the Newfoundland Court of Appeal the Director cannot succeed in the present appeal unless he succeeds on both the ground of statutory authority and the ground of interest. It will therefore be necessary to consider the question of interest if the Director is found to have the requisite statutory authority to intervene in the proceedings before the Board, with the permission of the Board.

The question that must be confronted now is whether it would be a proper or valid exercise of the Board's discretion to permit intervention if the Director did not have the requisite statutory authority to intervene. On this question, as I have indicated, opinions in the Newfoundland and New Brunswick Courts of Appeal differed. The Newfoundland Court of Appeal was unanimously of the view that the Board improperly exercised its discretion in permitting the Director to intervene when, in the Court's opinion, he lacked the statutory authority to do so. As Mifflin C.J.N. put it at p. 620: "The effect of the decision of the Board is, in my view, tantamount to conferring on the Director a status which was not conferred on him by the Act creating his office. The Board in permitting the Director the right to intervene arrogated to him a right which was not given by the Act creating his office, duties and powers. This the Board cannot do." To similar effect, he said at p. 621: "In my opinion the Board, in defining and establishing the procedure on hearings before it, cannot confer a right on a statutory creature, such as the Director, which the statute itself does not confer." As I read the reasons for judgment of Stratton J.A., with whom Angers J.A. concurred, in the *New Brunswick Telephone Co.* case, he was of the view that either the Director did not require statutory authority to intervene in proceedings before a provincial board, with the permission of

requis pour intervenir, avec l'autorisation de la Commission, ou que la Commission ne puisse, à bon droit, autoriser l'intervention du directeur en l'absence de ce pouvoir. L'avocat de la compagnie a fait valoir que ni la question de la nécessité pour un éventuel intervenant d'avoir un intérêt dans la demande dont la Commission est saisie ni celle de l'existence d'un intérêt suffisant du directeur n'étaient en cause dans le pourvoi, mais, vu le double motif qui soutient l'arrêt de la Cour d'appel de Terre-Neuve, le directeur ne saurait avoir gain de cause en l'espèce à moins qu'il ne l'ait à la fois au regard du pouvoir accordé par la loi et au regard de l'intérêt pour agir. Il sera donc nécessaire d'étudier la question de l'intérêt du directeur s'il est constaté qu'il détient le pouvoir légal requis pour intervenir dans l'instance dont la Commission est saisie, avec l'autorisation de la Commission.

La question à laquelle on est alors confronté est de savoir si la Commission exerce validement son pouvoir discrétionnaire en autorisant l'intervention lorsque le directeur ne détient pas le pouvoir légal requis pour intervenir. Sur cette question, comme je l'ai dit, les avis des cours d'appel de Terre-Neuve et du Nouveau-Brunswick diffèrent. La Cour d'appel de Terre-Neuve a, à l'unanimité, été d'avis que la Commission avait indûment exercé son pouvoir discrétionnaire en autorisant le directeur à intervenir, puisque, de l'avis de la cour, il n'avait pas le pouvoir légal de le faire. Comme le juge en chef Mifflin le dit, à la p. 620: [TRADUCTION] «L'effet de la décision de la Commission équivaut, à mon avis, à conférer au directeur un statut que la loi créant sa charge ne lui a pas conféré. En autorisant le directeur à intervenir, la Commission lui a attribué un droit que la loi qui institue sa charge, ses obligations et ses pouvoirs ne lui avait pas donné. La Commission ne pouvait faire cela». Dans le même sens il dit, à la p. 621: [TRADUCTION] «À mon avis, la Commission, en établissant la procédure applicable à ses audiences, ne saurait conférer un droit à la création d'une loi, comme le directeur, que la loi elle-même ne lui confère pas.» Selon mon interprétation des motifs du juge Stratton, auxquels a souscrit le juge Angers, dans l'arrêt *New Brunswick Telephone Co.*, il était d'avis que ou bien le directeur n'avait pas à détenir un pouvoir légal l'autorisant à inter-

the board, or the Director had the necessary authority, but there is also a possible suggestion in his reasons that in any event the Board was not required to consider the question of the Director's authority to intervene in exercising its discretion whether to permit intervention. I have already quoted the following words, which may be understood in this sense, from the reasons for judgment of Stratton J.A. at p. 457: "In deciding whether to permit the Director to intervene, the Board need look no further than its own rules of practice and procedure to resolve the issue. Generally speaking, in determining whether the Director may intervene, a board or commission must simply be satisfied that the Director has a valid interest in participating and can be of assistance in the proceedings." In any event, this was clearly the view of La Forest J.A., as indicated by the passages from his reasons for judgment which I have quoted above.

On this issue, I am in respectful agreement with the conclusion of the Newfoundland Court of Appeal in the case at bar. Whatever scope may be reasonably assigned to the implied power or discretion of the Board to permit intervention, it cannot have been intended that the Board should have authority to permit intervention by a public officer in his official capacity if the officer has been denied the necessary authority to intervene by his governing statute. The question whether the officer has the necessary statutory authority, if raised by a party to the proceedings before the Board is, of course, a collateral one on which the Board cannot be expected to pronounce with finality, but it is one which limits the scope of the Board's discretion to permit intervention. To permit intervention where a public officer is shown to lack the necessary authority to intervene would be to permit him to exceed his authority and thus would be contrary to a fundamental principle of public law. There cannot be an implied power to effect such a result. It is therefore necessary, in my opinion, to consider whether the Director had statutory authority to intervene in proceedings before a provincial board, with the permission of the board.

venir dans une instance dont une commission provinciale était saisie, avec l'autorisation de la commission, ou bien le directeur détenait le pouvoir nécessaire; mais il est possible aussi que ses motifs laissent entendre que, de toute façon, la Commission n'avait pas à s'interroger sur un éventuel pouvoir d'intervention du directeur en exerçant son pouvoir discrétionnaire d'autoriser ou non l'intervention. J'ai déjà cité le passage suivant des motifs de l'arrêt du juge Stratton, qui peut être interprété en ce sens, à la p. 457: [TRADUCTION] «Pour décider d'autoriser le directeur à intervenir, la Commission n'a qu'à se reporter à son propre règlement intérieur et à ses règles de procédure pour résoudre la question. D'une manière générale, pour décider si le directeur peut intervenir, l'office ou la commission doivent simplement s'assurer que le directeur possède un intérêt valide à participer à l'instance et que sa présence peut être utile.» Quoi qu'il en soit, c'était clairement là l'opinion du juge La Forest, comme l'indique l'extrait de ses motifs déjà cité.

Sur ce point, je partage, avec égards, la conclusion de la Cour d'appel de Terre-Neuve en l'espèce. Quelle que soit la portée que l'on puisse raisonnablement attribuer au pouvoir implicite ou discrétionnaire de la Commission, quand elle autorise une intervention, on ne peut avoir voulu qu'elle détienne le pouvoir d'autoriser l'intervention d'un agent de l'État, à titre officiel, si la loi qui le régit lui refuse le pouvoir nécessaire pour intervenir. La question de savoir si l'agent a le pouvoir légal nécessaire, lorsqu'une partie à l'instance la soulève devant la Commission, n'est, bien entendu, qu'un incident d'instance et on ne peut s'attendre à ce que la décision de la Commission à cet égard soit définitive; néanmoins elle restreint le pouvoir discrétionnaire de la Commission d'autoriser une intervention. Autoriser l'intervention, lorsqu'il est démontré que l'agent de l'État n'a pas le pouvoir nécessaire pour intervenir, ce serait l'autoriser à commettre un excès de pouvoir, ce qui est contraire à un principe fondamental du droit public. Aucun pouvoir implicite ne peut avoir ce résultat. Il est donc nécessaire, à mon avis, de se demander si le directeur avait le pouvoir légal d'intervenir dans une instance dont est saisie une commission provinciale, avec l'autorisation de celle-ci.

V

This issue turns on the construction and effect to be given to the former s. 27.1 of the *Combines Investigation Act*, which is quoted in Part II of these reasons. In my respectful opinion, the terms of s. 27.1 do not support the conclusion that the only reason for the provision and for its limitation to intervention before federal, as distinct from provincial, boards, commissions or other tribunals, is that it purports only to confer authority to intervene as of right. The statutory duty imposed on the Director, upon direction from the Minister, to make representations and adduce evidence, for the purposes indicated, before a federal board, commission or other tribunal undoubtedly imports an authority to intervene as of right, for otherwise the Director could be prevented from performing his duty. The authority conferred on the Director to act on his own initiative to make representations and adduce evidence before a federal board, commission or other tribunal should also probably be construed as an authority to intervene as of right, but it may also be understood as including authority to intervene with the permission of a board, commission or other tribunal, assuming, for the reasons I have stated, the necessity of such authority. The authority to intervene, at the request of a board, commission or other tribunal, need not be and should not be construed as an authority to intervene as of right. The terms of s. 27.1 thus purport to deal exhaustively with the authority of the Director to intervene for the purposes indicated, either as of right or with the permission of a board, commission or other tribunal. It is therefore a clear implication, in my opinion, that the Act, as it stood at the relevant time, denied the Director the necessary authority to intervene before a provincial board with the permission of the board. In effect, I am of the view that this is a clear case for application of the maxim *expressio unius est exclusio alterius*. I am mindful of the reservations and cautions that have been expressed with reference to this maxim on several occasions in this Court (see Côté, *The Interpretation of Legislation in Canada* (1984), at pp. 262-66), but its application in the present case does not appear to me to encounter them. In particular, s. 27.1, for the reasons I have indicated, cannot have been intend-

V

Ce point est fonction de l'interprétation et de l'effet donnés à l'ancien art. 27.1 de la *Loi relative aux enquêtes sur les coalitions*, cité à la partie II des présents motifs. À mon humble avis, les termes de l'art. 27.1 ne justifient pas la conclusion que la seule raison de la disposition et de sa limitation à l'intervention devant les offices, commissions ou autres tribunaux fédéraux, et non provinciaux, est qu'elle vise seulement à conférer un pouvoir d'intervention de plein droit. L'obligation que la loi impose au directeur, sur l'ordre du Ministre, de présenter des observations et des preuves, pour les fins indiquées, à un office, à une commission ou à un autre tribunal, présuppose indubitablement un pouvoir d'intervention de plein droit, car autrement le directeur ne pourrait faire son devoir. Le pouvoir, qui est conféré au directeur de présenter des observations et des preuves, de sa propre initiative, devant un office, une commission ou un autre tribunal fédéral, devrait probablement aussi être interprété comme un pouvoir d'intervention de plein droit, mais on peut aussi comprendre qu'il inclut un pouvoir d'intervention sur autorisation de l'organisme, présumant, pour les raisons que j'ai données, qu'il soit nécessaire de détenir un tel pouvoir. Le pouvoir d'intervention, à la demande d'un office, d'une commission ou d'un autre tribunal, n'a pas à être, et ne devrait pas être, interprété comme un pouvoir d'intervention de plein droit. Les termes de l'art. 27.1 traiteraient donc exhaustivement du pouvoir d'intervention du directeur pour les fins indiquées, soit de plein droit, soit avec l'autorisation de l'office, de la commission ou d'un autre tribunal. Il en découle donc clairement, à mon avis, que la Loi, dans la forme qu'elle revêtait à l'époque pertinente, refuse au directeur le pouvoir d'intervention nécessaire pour agir devant une commission provinciale, avec l'autorisation de celle-ci. En fait, je suis d'avis qu'il s'agit d'une affaire où, clairement, la maxime *expressio unius est exclusio alterius* s'applique. Je sais bien que la Cour a exprimé des réserves et des mises en garde au sujet de cette maxime à plusieurs reprises (voir Côté, *Interprétation des lois* (1982), aux pp. 285 à 288), mais elles ne me paraissent pas viser son application en l'espèce. En particulier, pour les raisons que j'ai déjà données, on ne peut avoir

ed, out of an abundance of caution, to be merely a specific statutory recognition of an authority that would exist apart from statute, and the limitation to federal boards, commissions or other tribunals, cannot, because of the emphasis it is given by the definition of such boards, commissions and other tribunals, be assumed to have been a matter of inadvertence.

In conclusion, then, it is my opinion that the Director lacked the necessary statutory authority to intervene before the Board, with the permission of the Board, and the Board could not validly permit his intervention. I would accordingly dismiss the appeal, with costs to the respondent Newfoundland Telephone Company Limited.

Appeal dismissed with costs.

Solicitor for the appellant: The Attorney General of Canada, Ottawa.

Solicitors for the respondent (applicant) Newfoundland Telephone Company Limited: Chalker, Green & Rowe, St. John's.

Solicitors for the respondent Newfoundland Board of Commissioners of Public Utilities: Curtis, Dawe, Russell, Bonnell, Winsor & Stokes, St. John's.

voulu que l'art. 27.1, par excès de prudence, ne soit qu'une reconnaissance législative expresse d'un pouvoir existant indépendamment de la loi, et sa limitation aux offices, commissions ou autres tribunaux fédéraux ne saurait, vu l'importance qu'on y a accordé en définissant ces organismes, être considérée comme accidentelle.

En conclusion, donc, je suis d'avis que le directeur ne détenait pas, de par la loi, le pouvoir nécessaire pour intervenir devant la Commission, avec son autorisation, et que la Commission ne pouvait validement autoriser une telle intervention. Je suis par conséquent d'avis de rejeter le pourvoi avec dépens à l'intimée Newfoundland Telephone Company Limited.

Pourvoi rejeté avec dépens.

Procureur de l'appelant: Le procureur général du Canada, Ottawa.

Procureurs de l'intimée (requérante) Newfoundland Telephone Company Limited: Chalker, Green & Rowe, St. John's.

Procureurs de l'intimée Newfoundland Board of Commissioners of Public Utilities: Curtis, Dawe, Russell, Bonnell, Winsor & Stokes, St. John's.

National Energy Board

Reasons for Decision

TransCanada PipeLines Limited

GH-3-96

November 1996

Facilities

1.4 PanCanadian's Section 71 Application

By application dated 15 August 1996, PanCanadian Petroleum Limited ("PanCanadian") applied to the Board, pursuant to subsections 71(3) and 71(2) of the NEB Act, for orders of the Board requiring TransCanada:

(a) to provide adequate and suitable facilities for PanCanadian to transport up to 1 409 $10^3m^3/d$ (49.7 MMcfd) from Empress, Alberta to Niagara Falls, Ontario, commencing 1 November 1997; and

(b) to receive, transport, and deliver gas offered by PanCanadian to TransCanada.

PanCanadian stated that it believed that TransCanada was reluctant to advance its application due to the present wording of TransCanada's Queuing Procedures and the filing guidelines published by the Board. PanCanadian submitted that the overall aim in the evolution over the last ten years of TransCanada's Queuing Procedures was to improve access to markets while at the same time provide reasonable assurance that TransCanada's demand charges would be paid. PanCanadian believed that it supplied the necessary evidence proving adequate long-term supply capability, a ten-year term market, as well as interruptible transportation capacity.

By letter dated 22 August 1996, after examining PanCanadian's request for approval, the Board decided to refer PanCanadian's section 71 application to the GH-3-96 proceeding. Subsequently, on 24 September 1996, PanCanadian withdrew its application stating that, since the filing of the application, PanCanadian has continued to communicate with TransCanada in order to find a way to accommodate its need for service and to better understand the process employed by TransCanada which resulted in the denial of PanCanadian's request for service. Although these discussions had not resolved all of PanCanadian's concerns, PanCanadian was of the view that the parties would be able to reach a resolution or understanding without the need for regulatory involvement.

1.5 Other Matters

Two parties, 417 Auto Wreckers Limited and PanEnergy Marketing Limited Partnership, requested revisions to the issues in the GH-3-96 proceeding. The List of Issues for the GH-3-96 proceeding is included in Appendix I.

1.5.1 417 Auto Wreckers Limited

In support of his request for intervenor status in the GH-3-96 proceeding, 417 Auto Wreckers Limited ("Mr. Leroux"), by letter dated 16 September 1996, indicated that he intended to appear at the hearing and proposed to question TransCanada on several issues listed in his letter. By letter dated 20 September 1996, the Board advised Mr. Leroux that he had been granted intervenor status. The Board further advised Mr. Leroux that only matters relevant to the GH-3-96 proceeding would be heard and that certain of the issues that Mr. Leroux intended to pursue were not found to be relevant to the proceeding. By letter dated 23 September 1996, Mr. Leroux submitted a revised list of issues and stated that the Board was not allowing him to address issues relevant to landowners affected by TransCanada's expansion program. By letter dated 1 October 1996, the Board advised Mr. Leroux that, in order to allow parties an opportunity to comment on the inclusion of any proposed revisions to the issues, the Board had decided to hear argument on this as a preliminary matter at the hearing.

Mr. Leroux, subsequently, did not appear at the hearing, which commenced on 7 October 1996 in Winnipeg, Manitoba.

1.5.2 PanEnergy Marketing Limited Partnership

By letter dated 19 September 1996, PanEnergy Marketing Limited Partnership ("PanEnergy Marketing") requested an amendment to Issue 8 of the List of Issues to include the obligation of TransCanada to commence the construction and installation of each of the additional facilities certified by the Board in accordance with the construction schedules set forth in TransCanada's application. However, by letter dated 1 October 1996 PanEnergy Marketing advised the Board that it was withdrawing its request.

1.6 Environmental Screening

The Board conducted an environmental screening of the applied-for facilities in compliance with section 18 of the *Canadian Environmental Assessment Act* ("CEAA"). The Board ensured that there was no duplication in the requirements under the CEAA and the Board's own regulatory process.

Ontario Energy Board

Commission de l' énergie de l' Ontario

Ontario

EB-2009-0120

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S. O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application by Yellow Falls Power Limited Partnership for and Order granting leave to construct a transmission line connecting a 16 megawatt waterpower project to transmission system of Hydro One Networks Inc.

PROCEDURAL ORDER NO. 1

Yellow Falls Power Limited Partnership (the "Applicant" or "YFP") has filed an application with the Ontario Energy Board (the "Board") dated April 27, 2009 under section 92 of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B. The Applicant has applied for an order of the Board granting leave to construct transmission facilities connecting a 16 megawatt ("MW") run-of-the river waterpower project located at Yellow Falls to the transmission system owned by Hydro One Network Inc. ("Hydro One").

The Application has been assigned Board File No. EB-2009-0120.

The proposed transmission facilities consist of 25 kilometers of 115 kilovolt ("kV") overhead transmission line, a customer transformer station stepping up voltage from 13.8 kV to 115 kV, and a customer switching station at the point of interconnection with Hydro One's transmission system (collectively, the "Project").

The Applicant has released the Final Environmental Assessment Report (the "EA") for the Project in February, 2009, which is filed in support of this application. The EA has not yet received final approval from the Ministry of the Environment.

According to the application, the proposed facilities will be constructed and paid for by the Applicant, and therefore, there will be no rate impacts on Ontario's electricity consumers.

The Board issued a Notice of Application and Written Hearing on May 28, 2009. The Applicant has served and published the Notice as directed by the Board.

The Board received a request from Mark Massicotte for Observer Status on June 19, 2009, and on July 3, 2009 a letter of comment was received from Lehman and Associates on behalf of TransCanada informing the Board that it has no objection to the proposed application. However, the letter listed various requirements which the Applicant is to comply with in regard to the Project, and also requested that a copy of the Board decision be sent to its offices. Accordingly, the Board will list Lehman and Associates on behalf of TransCanada as an observer in this proceeding.

Wabun Tribal Council Request

The Board received a request for Intervention from the Wabun Tribal Counsel ("WTC") on June 23, 2009. In a correspondence dated July 8, 2009, WTC also requested eligibility for an award of costs.

WTC's request for intervenor status described various concerns regarding the Project, largely related to the EA that has been filed with the application, and what WTC views as a failure by the Crown to adequately consult with it. WTC also requested that an oral hearing be held instead of a written hearing.

The Board will grant WTC intervenor status and cost eligibility, but subject to the restrictions described below.

EA and the Duty to Consult

The Board's jurisdiction to consider issues in a s. 92 leave to construct case is limited by s. 96(2) of the *Ontario Energy Board Act, 1998*:

> *In an application under section 92,* ***the Board shall only consider the interests of consumers with respect to prices and the reliability and quality of electricity service*** *when, under*

> *subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection is in the public interest. (Emphasis added)*

This limitation means that, generally speaking, the Board does not have the jurisdiction to explore issues related to the EA approval. However, it is important to note that both the Leave to Construct and the EA approvals are required before the Project may proceed. Should this Board approve the leave to construct application, its order will be conditional on all necessary permits and authorizations being acquired, including a completed EA.

To the extent that there are Aboriginal consultation issues arising within the scope of the EA process, it is the Board's view that it is not appropriate to consider those issues in this proceeding. Given the limits on the Board's jurisdiction imposed by s. 96(2), it is the Board's view that the EA is clearly the preferable forum where Aboriginal consultation issues relating to environmental matters can be considered and addressed.

The Board will therefore not consider any submission in this proceeding relating to matters that are within the scope of the EA. Similarly, the Board will not require the Applicant to answer interrogatory questions on matters within the scope of the EA.

The extent of WTC's cost eligibility will also be restricted to matters directly within the scope of this proceeding. The Board will make no award of costs for costs related to the EA. Further information on what activities are eligible for costs, as well as forms and related materials, can be found in the Board's Practice Direction on Cost Awards, which is available on the Board's website.

Written Hearing

The Board has considered WTC's request for an oral hearing, but has determined that a written hearing is appropriate in this case.

The Board considers it necessary to make provision for the following items related to the Application. The Board may issue further procedural orders (relating, for example, to intervenor evidence and final submissions) from time to time.

THE BOARD ORDERS THAT:

1. Wabun Tribal Council and Board staff who wish information from the Applicant that is in addition to the evidence pre-filed with the Board and that is relevant to the hearing shall request the information by means of written interrogatories filed with the Board and delivered to the Applicant on or before **August 7, 2009**. All interrogatories and responses must include a reference to the section of the application which identifies the specific evidence on which the interrogatory is based.

2. Wabun Tribal Council and Board staff shall, on or before **August 7, 2009** indicate if it is their intention to file evidence.

3. The Applicant shall, no later than **August 17, 2009** file with the Board and deliver to all Intervenors, a complete response to each of the interrogatories.

4. All filings to the Board noted in this Procedural Order must be in the form of 2 hard copies and **must be received by the Board by 4:45 p.m. on the stated dates**. An electronic copy of the filing must also be provided. If you already have a user ID, the electronic copy of your filing should be submitted through the Board's web portal at www.errr.oeb.gov.on.ca. If you do not have a user ID, please visit the "e-Filing Services" page on the Board's website at www.oeb.gov.on.ca and fill out a user ID password request. For instructions on how to submit and naming conventions, please refer to the RESS Document Guidelines also found on the "e-Filing Services" webpage. If the Board's web portal is not available, the electronic copy of your filing may be submitted by e-mail at Boardsec@oeb.gov.on.ca . Those who do not have internet access are

required to submit the electronic copy of their filing on a CD or diskette in PDF format.

ISSUED at Toronto on July 24, 2009

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX 'A'

TO

PROCEDURAL ORDER NO. 1

Addresses of Applicant and Intervenor

EB-2009-0120

July 24, 2009

Appendix "A"

Yellow Falls Power Limited Partnership
Leave to Construct
EB-2009-0120

APPLICANT AND INTERVENOR

Applicant	Rep. and Address for Service
Yellow Falls Power Limited Partnership	**Yellow Falls Power Limited Partnership** c/o Mr. Scott Hossie, Ontario Manager - Environmental Canadian Hydro Developers, Inc. 34 Harvard Road Guelph, ON, N1G 4V8 Tel: (519) 826-4645 Fax: (519) 826-4745 Email: shossie@canhydro.com
Counsel for the Applicant	**Counsel to Yellow Falls Power Limited Partnership** Blake, Cassels & Graydon LLP Barristers & Solicitors Box 25, Commerce Court West 199 Bay Street, Suite 2800 Toronto ON M5L 1A9 Attn: Sharon Wong Tel: 416 863-4178 Fax: 416 863-2653 Email: sw@blakes.com

Intervenors	Rep. And Address for Service
1. Wabun Tribal Council (WTC)	Mr. Jason Batise Wabun Tribal Council Technical Services Advisor 313 Railway Street Timmins ON P4N 2P4 Tel: 705 268-9066 Email: jbatise@wabun.on.ca