

Noting that the Guidelines were not restricted to “new federal projects, programs and activities”, and stating that the process was not engaged every time a project had an environmental effect on an area of federal jurisdiction, the Court held that, in order for the process to be engaged within the meaning of the Guidelines, there first had to be a “proposal” which required “an initiative, undertaking or activity for which the Government of Canada has a decision making responsibility”. In the Court’s view, such a “decision making responsibility” existed wherever, by the terms of a federal statute enacted under the authority of section 91 of the Constitution Act, 1867, there was a legal duty or responsibility to act in relation to the proposal. If an “affirmative regulatory duty” was found to exist under relevant federal legislation, it was then a matter of identifying the “initiating department” assigned the task of performing the duty, and of deeming this entity the “decision making authority” for the proposal, thereby triggering the application of the Act.

Having regard to the foregoing interpretation, the Court held that, in this particular case, the Minister of Transport had the requisite “affirmative regulatory duty” to act under the Navigable Waters Protection Act, for, by the terms of this statute, his approval was required for any work that might substantially interfere with navigation. By contrast, the Court held that the Minister of Fisheries fell short of having the requisite “affirmative duty to act” since, under the Fisheries Act, he only possessed a “limited ad hoc legislative power.”

The Court went on to hold, however, that once the process had been triggered, as was the case here in light of the duties vested in the Minister of Transport under the Navigable Waters Protection Act, the scope of the assessment to be conducted was not restricted to the Minister’s immediate area of responsibility. Rather, as the initiating department, the Minister was required by the terms of the Guidelines to make an assessment of the environmental effect of the project on all other relevant areas of federal jurisdiction.

A majority of the Court accordingly ordered the Minister of Transport to conduct the requisite environmental impact assessment, not only as regards any effect the dam might have on the navigability of the Oldman River, but also the effect it might have on other areas of federal jurisdiction that were relevant in this case, such as fisheries, Indians and Indian lands.

While concurring with the majority of the Court on its interpretation of the application and scope of the Guidelines, Mister Justice Stevenson, in a dissenting opinion, did not agree that the Minister of Transport should be ordered to conduct the review in this particular case. Having regard to the doctrine of “crown immunity”, he stated that the province of Alberta, as a Crown entity, was not bound by the terms of the Navigable Waters Protection Act, and was not, therefore, obliged to obtain the approval of the Minister of Transport. As a result, the Minister did not have the requisite affirmative duty to act in this case, and could not, therefore, be an initiating department. Consequently, a writ of mandamus could not be issued against him.

This opinion was not shared by the other members of the Court. Noting that the provinces were among those bodies that were likely to engage in projects that might interfere with navigation, the majority of the Court stated that the province, while not expressly bound under the Act, was implicitly bound, as to hold otherwise would mean that the provinces could undermine the integrity of essential navigational networks in Canadian waters, thereby effectively emasculating the legislative purpose of the Act.