

Bowen v. Canada (Attorney General), [1998] 2 FCR 395, 1997 CanLII 6383 (FC)

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Docket: T-729-97; T-734-97

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T-729-97

Dan Bowen and Bryn Thomas (*Applicants*)

v.

The Attorney General of Canada and the Minister of Canadian Heritage (*Respondents*)

T-734-97

Civil Air Rescue Emergency Services (Banff Chapter), Canadian Owners and Pilots Association, the Banff Flying Club, Bernie Schiesser and Howard Srigley (*Applicants*)

v.

The Minister of Canadian Heritage, the Minister of Transport, the Attorney General of Canada, and the Superintendent, Banff National Park (*Respondents*)

Indexed as: Bowenv. Canada (Attorney General) (T.D.)

Trial Division, Campbell J."Edmonton, October 9; Ottawa, November 7, 1997.

Environment " Closing of airstrips in Banff, Jasper National Parks " Airstrips under Parks Canada jurisdiction " Comprehensive environmental assessment required prior to decommissioning of either airstrip.

Air law " Closure of airstrips at Banff, Jasper National Parks " Flying club members argue for retention for emergency landings " Parks Canada argues modern advances in aviation rendered emergency landing strips obsolete " Decommissioning prohibited pending completion of comprehensive environmental studies.

In October 1996, the Minister of Canadian Heritage announced the decision to close the grass field airstrips in the Banff and Jasper National Parks. The matter had been under discussion for the past ten years. The airstrips are operated by Parks Canada, a department of the Ministry of Canadian Heritage responsible for National Parks, but have minimal services, facilities and maintenance. The

users" flying club members who keep their private planes at these airstrips" submitted the airstrips should remain open for aviation safety. Parks Canada wants them closed in the name of park enhancement. Modern airports with all-weather facilities and paved runways exist in Alberta at Springbank and Hinton, a short distance outside of Banff and Jasper National Parks respectively. The necessity for emergency landing strips had been rendered obsolete by advances in aviation.

In the Regulatory Impact Analysis Statement (RIAS) for the *National Parks Aircraft Access Regulations* dated April 2, 1997, it was stated that "Based on the recommendations of the Banff Bow Valley Study, the airstrip in Banff National Park will be closed For purposes of consistency, the airstrip in Jasper National Park will also be closed".

This was an application for judicial review to question the validity of the authority apparently exercised in making and ratifying the decision, the fairness of the process used in reaching the decision, and whether the decision was made in compliance with the *Canadian Environmental Assessment Act* (CEAA).

Held, any decision made by the respondents to decommission either the Banff or Jasper airstrip is quashed and the respondents are prohibited from making any decision to decommission either until separate comprehensive environmental studies are completed on each.

Any landing or take-off of aircraft, and any facility for this purpose, including the Banff and Jasper airstrips, are properly within a Parks Canada concern, and appropriately under Parks Canada jurisdiction.

On the evidence, no expectations of more consultation were created with respect to Banff. But regarding Jasper, the decision announced in October 1996 is substantively unrelated to the Jasper airstrip. Thus the statements made by the Minister at that time did create a legitimate expectation that, as far as Jasper is concerned, the process she outlined would be followed regarding any decisions with respect to that airstrip. The decision to close both the Banff and Jasper airstrips was tied to the tabling of the Banff-Bow Valley Study which relates to Banff only. The RIAS referred to above cited "for purposes of consistency" as the reason for closing the Jasper airstrip. There was no suggestion in the evidence that the rationale for the decision to close the Banff airstrip (because of its placement in an important wildlife corridor) applied to the Jasper airstrip. Thus Parks Canada did not meet its due process obligations.

A review of the applicable provisions revealed that a decision by the Governor in Council only triggers an assessment, albeit a comprehensive assessment, when certain action is taken "in relation to a physical work", and also only when such action is contrary to the national park's management plan. First, the critical decision maker herein was the Governor in Council. As a matter of law, the decision to change the *National Parks General Regulations* to give effect to the Minister's decision was the Governor in Council's, and without it, no change can occur. Accordingly, the decision made here was outside the purview of subsection 5(1) and within [subsection 5\(2\)](#) of the [CEAA](#). Second, the decision is "in relation to a physical work". It is true that the decision to close the airstrips is a land use decision, not one in relation to a physical work. But the decision to decommission the airstrip is action in relation to physical work, being the removal of structures and placing markings on the runway indicating that it has been decommissioned. While the land use change is a matter for the Governor in Council, the decommissioning dependant thereon was not. Thus subsection 5(1) governed and applied to Parks Canada which was the proponent of decommissioning. Under the Comprehensive Study List in [SOR/94-638](#), since each decommissioning is in relation to a physical work in a national park, a comprehensive study is required, but only if the decommissioning is contrary to the management plan for the park. Since each of the Banff and Jasper management plans provided that the "airstrip will be retained solely for emergency/diversionary landing purposes", the

decommissioning of the airstrips had the potential to change the status set out in each management plan, and there was, therefore, a conflict between the management plan and the proposed decommissioning of each airstrip. A comprehensive study was therefore required respecting any decision to decommission either the Banff or Jasper airstrips. And it must be done before any decision is made to decommission. The environmental effect to be considered encompasses "the effect of any such change in health and socio-economic conditions" in the VFR flight corridor that the airstrip serves between Alberta and British Columbia. Thus there needs to be considered whether the unavailability of the airstrip for emergency or diversionary use creates a significant adverse effect on public health and safety, by increasing the risk of accidents and consequently affecting the health and safety of VFR pilots and passengers who fly through the Banff area.

There was no purpose in acting to reverse the decision-making process which has taken place on the basis of a failure to meet the legitimate expectation identified. Such action would only result in yet another opportunity to make the representations which have been rejected in the past and would be rejected again.

However, discretion was exercised under [subsection 18.1\(3\)](#) of the *Federal Court Act* to enforce the legal requirement to complete a comprehensive environmental assessment prior to the decommissioning of either the Banff or Jasper airstrip. Any decision that might already have been made was made without jurisdiction to do so.

statutes and regulations judicially considered

Aeronautics Act, R.S.C., 1985, c. A-2.

Canadian Aviation Regulations, SOR/96-433 , s. 301.04(1),(4).

Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 2(1) "environmental assessment", "environmental effect", "federal authority", "project", 4(a), 5, 11, 16(1),(2), 59(g).

Comprehensive Study List Regulations, SOR/94-638 , s. 3, Sch., s. 1.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 18.1(3) (as enacted by S.C. 1990, c. 8, s. 5).

National Parks Act, R.S.C., 1985, c. N-14 , s. 7(1)(oo) (as enacted by R.S.C., 1985 (4th Supp.), c. 39, s. 5).

National Parks Aircraft Access Regulations, SOR/97-150 , ss. 3(1),(4), 6.

National Parks General Regulations, SOR/78-213.

Regulations Amending the National Parks General Regulations, SOR/97-149.

cases judicially considered

applied:

Reference re Canada Assistance Plan (B.C.), 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525; (1991), 83 D.L.R. (4th) 297; [1991] 6 W.W.R. 1; 58 B.C.L.R. (2d) 1; 127 N.R. 161.

authors cited

Banff-Bow Valley Study. *Banff-Bow Valley: At the Crossroads: Summary Report*. Ottawa: Minister of Supply and Services Canada, 1996.

Four Mountain Parks Five Year Review. Ottawa: Parks Canada, 1994.

Hobby, B. J. *et al.* *Canadian Environmental Assessment Act: An Annotated Guide*. Aurora, Ont.: Canada Law Book, 1997.

Parks Canada. *In Trust for Tomorrow: A Management Framework for Four Mountain Parks*. Ottawa: Minister of Supply and Services Canada, 1986.

APPLICATION for judicial review of the decision to close the airstrips in Banff and Jasper National Parks. Any decision already made by to decommission either airstrip is quashed, and the respondents are prohibited from making any decision to decommission either airstrip until separate comprehensive environmental studies are completed on each.

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Deputy Attorney General of Canada for respondents (both files).

The following are the reason for order rendered in English by

Campbell J.: In the spring of this year, the Honourable Sheila Copps, Minister of Canadian Heritage, decided to close the airstrips in the Banff and Jasper National Parks. This decision is a seminal event in a long-standing dispute over the propriety of doing so. The applicants¹ have a direct interest in this decision as users of the airstrips involved, and, accordingly, have brought judicial review application to question the validity of the authority apparently exercised in making and ratifying the decision, the fairness of the process used in reaching the decision, and whether the decision was made in compliance with the *Canadian Environmental Assessment Act* [S.C. 1992, c. 37].²

I. Background

The airstrips in Banff and Jasper National Parks are naturally occurring grass fields in montane habitat on public lands in the Banff-Bow and Athabasca River valleys, respectively. The airstrips are operated by Parks Canada, which is a department of the Ministry of Canadian Heritage responsible for National Parks, but have minimal services, facilities and maintenance. Neither airstrip is certified as an airport or operated by the Department of Transport.

In recent times the grass field airstrips have primarily been used by the members of the Banff and Jasper Flying Clubs, which are comprised of individuals, including the applicants, who keep their

private planes at these airstrips free of charge without lease or licence of occupation from Parks Canada. From time to time some of these users may use their aircraft to participate in routine search and rescue training flights or in search activity for those who may be lost in areas located outside of the national park boundaries.

For more than ten years a fundamental conflict has existed between the users and Parks Canada as to whether the Banff and Jasper airstrips should be closed. The conflict arises from the very different perspective that each has about the airstrips. The users' perspective is that they should be kept open for aviation safety. The Parks Canada perspective is that they should be closed in the name of park enhancement. During the ten years preceding the decision being taken to close the airstrips, each has tried to see the other's perspective with no success. There is no question that each perspective is honestly held as being in the interests of the public at large. Thus, this case concerns a question of public, not private, interest.

While the applications under consideration here are not about the merits of each perspective, but whether a legal error was made in the implementation of the Park's perspective, the following description of the conflict helps to set the stage for the decision-making process which occurred.

A. The Parks Canada perspective³

The four contiguous mountain parks (Banff, Jasper, Yoho and Kootenay) together with three contiguous provincial parks in British Columbia, are designated as the UNESCO Rocky Mountain World Heritage Site. Parks Canada attempts to administer the mountain parks under its jurisdiction as a single ecological unit and has particular regard to the montane ecoregion.

In the Parks Canada 1986 report, *In Trust for Tomorrow: A Management Framework for Four Mountain Parks*, it was determined that:

. . . the Banff and Jasper airfields are anomalous facilities, and it is not appropriate to retain them. They will be removed or, if there is demonstrable need for emergency use, retained for that purpose only.⁴

The airstrips in Banff and Jasper National Parks originated in an earlier period of aviation technology in Canada. Modern airports with all-weather facilities and paved runways now exist in Alberta at Springbank and Hinton, a short distance by major highway outside of Banff and Jasper National Parks respectively. Springbank airport, as distinct from the Calgary International Airport, is located west of Calgary some 44 nautical miles by air from the Banff airstrip; Hinton airport is 22 nautical miles from the Jasper airstrip. Search and rescue activities conducted by the users, including routine training flights, can be conducted year round from either the Springbank or Hinton airports.

Parks Canada does not make use of the airstrips in Banff and Jasper National Parks for the administration of the national parks. Fixed-wing aircraft used for general park purposes such as game monitoring are based at the Springbank or Hinton airports. Helicopters used for search and rescue activities within the parks are not based at the airstrips in issue. Medical evacuation takes place in both parks by helicopter landing at the modern hospitals in the towns of Banff and Jasper. Where a fixed-wing aircraft is used for medical evacuation in Jasper National Park the nearby Hinton airport outside of the park boundary is used as the base for the aircraft.

The airstrips are not necessary for aviation and public safety or for search and rescue activities. Search and rescue activities can easily be conducted from the modern airports at Springbank or Hinton. With respect to aviation and public safety, Canada, as well as most other nations, does not require emergency or diversionary airstrips for use by light aircraft flying in Visual Flight Rules

conditions. Ready access to weather information, licensing of pilots and the reliability of modern aircraft have rendered the idea practically obsolete. Further, the Banff and Jasper airstrips are located in relatively stable areas for mountain weather.

In 1996, the Banff-Bow Valley Study identified significant development pressures on Banff National Park and recommended removal of the Banff airstrip as a means of mitigating development pressures and restoring the Cascade Wildlife Corridor. For the purposes of consistency, the same considerations were applied to the Jasper airstrip.

B. The users' perspective⁵

The Banff airstrip was opened in the mid 1930s, and one of the earliest recorded emergency landings was in 1949. Over the years, other air rescue incidents have arisen that demonstrate the use of the Banff airstrip for public safety purposes, including incidents in October 1990 and June 1992. In poor weather conditions making it impossible to transit the mountains leading to Golden in the west, Jasper in the north, Radium in the south, and out of the mountains to the east, Banff is the only safe meadow with at least 3,000 feet of landing space available anywhere along the Bow Valley corridor in which to land.

The interprovincial flights by light aircraft through the Rocky Mountains *via* Jasper is on the Northern Visual Flight Rules navigation route and Jasper is a natural and important emergency and diversionary airstrip logistically placed among the major Roche Miette, Yellowhead and Columbia Icefields mountain passes. Weather conditions in the three mountain passes are often unpredictable, and emergency and diversionary use has been made of the Jasper airstrip in the past 12 years.

C. Attempts to reconcile the perspectives

For the past 10 years, both the Banff and Jasper National Parks have managed development according to management plans, which have included use provisions for the airstrips. These plans have been the subject of a wide consultative process in which the users have participated.

As mentioned above, the 1986 plan *In Trust for Tomorrow: A Management Framework for Four Mountain Parks* described the airstrips as "anomalous" and deemed it not appropriate to retain them unless a demonstrable need for emergency use could be shown. Even though this view did not change in the 1988 management plans for both Banff and Jasper National Parks, no doubt as a result of no small effort on the part of the users, both plans provided for the monitoring of the use of the airstrips as emergency and diversionary facilities to gather information on their need.

In 1994 the Government of Canada appointed the Banff-Bow Valley Task Force. The objectives of the Banff-Bow Valley Study were to assess the cumulative environmental effects of development and use in the entire Bow River watershed within Banff National Park, and specifically do the following:

. . . to develop a vision and goals for the Banff-Bow Valley that will integrate ecological, social and economic values; to complete a comprehensive analysis of existing information, and to provide direction for future collection and analysis of data to achieve ongoing goals; and to provide direction on the management of human use and development in a manner that will maintain ecological values and provide sustainable tourism.⁶

Prior to the Banff-Bow Valley Task Forces's involvement, a three-year monitoring program was established for the Banff and Jasper airstrips beginning in 1989, and then in 1992 the monitoring

program was extended, with the decision to close the airstrips deferred, so the issue could be included in the *Four Mountain Parks Five Year Review*.

The report developed as a result of the monitoring was delivered in 1994, after a review with interested parties, including the users. The results of all phases of the monitoring process did not, as far as Parks Canada is concerned, prove the need to keep the airstrips open. However, the users contest the results on the basis that the data is incomplete. In the end result, the decision regarding closure of the airstrip was then further deferred pending the outcome of the Banff-Bow Valley Study expected to be released in 1997.

The evidence makes it abundantly clear that during this lengthy review period, the users were very active in pressing their perspective, which apparently had effect since the decision to close the airstrips was continuously deferred.⁷

In the course of waiting for the result of the decision-making process, however, in August 1995 Parks Canada moved to change the regulations governing aircraft access to the national parks of Canada to require aircraft access permits to be issued at the discretion of the superintendent of the park concerned. In response to what was described by the official dealing with the issue as "a large degree of interest and representations",⁸ including that of the users, the regulatory proposal was not implemented, again, pending the outcome of the Banff-Bow Valley Study.

There is no doubt that throughout this piece the users have been on the defensive, and have been fighting a battle to keep the airstrips open against an offence which has slowly, but surely, proceeded in the direction of closing them. Accordingly, now that the decision has been made to do just that, and since the users have apparently to this point failed in making their merit arguments stick, they are left with challenging the respondents on the legality of the decision-making process to the fullest extent that the law will allow.

II. The Decision

The following is the critical evidence respecting the decision to close the Banff and Jasper airstrips.

A. The "Doré" letter

The users urge that the critical period in the decision-making process to be examined in this case begins with the holding back of the implementation of the regulation to require aircraft access permits in 1995. The users say that, in the letter written by Mr. Gerard Doré, Chief, Legislative and Regulatory Affairs, Parks Canada, stating an agreement to delay plans to implement the regulations requiring aircraft permits in national parks, the following critical representation was made:

Representations on the regulatory proposals, to date, have indicated that the status quo should be maintained with respect to the airstrips in Banff and Jasper for the time being. To this end, the provisions of the proposed National Parks Aircraft Access Regulations relating to the airstrips in Banff and Jasper will be deleted.⁹

The Jasper users say that following this statement there have been no valid reasons given for the closure of the Jasper airstrip. As is shown below, however, the Jasper airstrip closure has been linked by Parks Canada to the Banff airstrip closure. Thus, respecting the claims of both user groups, the decision-making process respecting Banff must be considered.

B. The Banff-Bow Valley Study recommendations

The next step in the decision-making process was the issuing of the report of the Banff-Bow Valley Task Force in October 1996. In it, the Task Force identified that the airstrip, along with adjacent facilities, restrains or prevents wildlife movement through the Cascade Mountain Corridor which is a significant wildlife movement feature. As a result, the Task Force recommended that the airstrip be closed by June 1997 because there is no need for an airstrip in Banff National Park.¹⁰

C. The speech of the Honourable Sheila Copps delivered October 7, 1996

In this address, which closely followed the release of the Banff-Bow Valley Study, Ms. Copps made the following statements:

I have already read the report, and I am prepared to act immediately on some of the recommendations. The actions I am about to announce flow directly from the report, and come directly from the people of the Bow Valley. . . .

We are going to beef up all our efforts to restore the wildlife corridor. To do that, we will proceed with plans to close and rehabilitate the airstrip, the bison paddock, and the cadet camp. The public and park horse corrals will be relocated as soon as a new location is found.¹¹ [Emphasis added.]

Regarding implementation of the Banff-Bow Valley Study, Ms. Copps made the following statements:

The Banff Bow Valley is also a place for open management. We need to make sure that the decisions made here are made in the open, are made with common sense, and conform with the *National Parks Act*. We need decisions that are fair and predictable.

That is why I have instructed that a clear and open development review process, as recommended by Task Force, be in place by the end of the year. I have also requested that a revised, comprehensive management plan, one that provides clear direction for this park, be tabled in Parliament by April 1997.

The Banff Bow Valley is a place of environmental stewardship. This place must lead the way, nationally and internationally, in ensuring that environmentally friendly practices are carried out by everyone that lives, visits and operates here.

I have instructed that Parks Canada improve sewage treatment immediately at all our facilities, and that we reduce, at source, our phosphate use.

And today I challenge every individual and both communities in the Bow Valley to work with us, and with the province, to develop excellence in environmental practices. Because let's face it "if we can't keep the park clean, then we can't keep the park.

Ladies and gentlemen, naturally there are parts of this report "as with all massive undertakings like this" where more public evaluation is needed before more decisions can be taken.

Today, I may be able to move on some of the report's recommendations, but, of course, I can't move on all of them. That job doesn't belong just to me "it belongs to all of us. And we can't do the entire job today" but it can start today.

Make no mistake "the time for decisions is now, and the time for action is now.

Today we have the report in our hands, and we must begin immediately to sit down with each other and assess it, and consider it, and determine the feasibility of all the recommendations.

D. Environmental screening of February 28, 1997

In his affidavit, Mr. Zinkan describes how Parks Canada has complied with the [CEAA](#) as follows:

As the Responsible Authority within the [Canadian Environmental Assessment Act](#) the Department of Canadian Heritage undertook a screening of the decommissioning of the Banff and Jasper airstrips. The public were invited to comment on the screening by March 14, 1997. The Department of Canadian Heritage has considered public participation in its screening.¹²

The screening reports detailed the physical actions that would be taken to take the airports out of practical service with the focus being the environmental effects of so doing. The legal importance of this action in relation to the provisions of the [CEAA](#) will be considered below, but in the context of the decision-making process, the screening activity was an important event in the way it disclosed to the community in both Banff and Jasper the imminence of the closure of both airstrips.

The screening report for the Jasper airstrip was sent to the Jasper users on March 4, 1997 and the one for Banff was available to the public late in February. As described below, objections were received regarding the contemplated action on both airstrips.

E. The March 1997 letters

In separate but identical letters dated March 20, 1997, Ms. Copps confirmed, to each of the Jasper and Banff users, her decision to close the airstrips.¹³ The contents of each letter is as follows:

Thank you for your correspondence regarding the closure of the airstrip in Banff National Park.

On October 7, 1996, I set a new direction for Banff National Park, which is essential in ensuring a sustainable future for this jewel in Canada's system of national parks. The enclosed document clearly and strongly expresses my commitment to the direction needed to preserve and protect this natural legacy forever.

The decision to close the airstrip is taken with confidence that this determination best serves the long-term interests of the Park, and on March 19, 1997, the Government of Canada ratified the regulatory amendments to finalize its closure. Please find enclosed a chronology on the closure of the Banff and Jasper airstrips.

I am dedicated to this course of action and proud that my decision will play a vital role in the protection of our national treasures.

Yours sincerely,

Sheila Copps

F. The regulations

Paragraph 7(1)(oo) [as enacted by R.S.C., 1985 (4th Supp.), c. 39, s. 5] of the *National Parks Act* [R.S.C., 1985, c. N-14] authorizes the Governor in Council to make regulations, including regulations governing aircraft access to the national parks. On April 2, 1997, *Regulations Amending the National Parks General Regulations* (SOR/97-149) and *National Parks Aircraft Access*

Regulations (SOR/97-150) were published. Regulation SOR/97-149 repeals the aircraft use provisions of the *National Parks General Regulations* [SOR/78-213] in favour of SOR/97-150, which is a comprehensive regulation governing aircraft access to national parks.

Prior to SOR/97-149, the *National Parks General Regulations* prohibited the landing or taking off of an aircraft in a national park, except in a few select locations which included Banff and Jasper. The *National Parks Aircraft Access Regulations* (SOR/97-150) changed this scheme to allow aircraft access to a number of northern national parks and reserves, but also changed the access provisions to other parks to require a permit to land or take off. With respect to the impact of these Regulations on the status of the airstrips, the Regulatory Impact Analysis Statement for SOR/97-150 contains the following statement:

Based on the recommendations of the Banff Bow Valley Study, the airstrip in Banff National Park will be closed and, therefore, the landing or take-off of aircraft at this airstrip will not be authorized under the new regulations. For purposes of consistency, the airstrip in Jasper National Park will also be closed to conform with the recommendations of the 1988 management plan for that plan [*sic*]. [Emphasis added.]

With respect to the decision itself, the Regulatory Impact Analysis Statement for SOR/97-150 also contains these sentences:

The decision to close the Banff airstrip was publicly announced by the Honourable Sheila Copps in October 1996. Since the rationale for closing the Banff airstrip applies equally to the Jasper airstrip, the latter is to be closed as well.

Opposition to the closure of the airstrips from local flying clubs and their provincial and national associations, such as the Canadian Owners and Pilots Association, can be expected. The perceived importance of the airstrips for emergency and diversionary landings will be used as their justification. However, a joint Transport Canada-Parks Canada monitoring program issued in 1995 showed no significant requirement for the Banff and Jasper airstrips for emergency or diversionary use. [Emphasis added.]

III. Attacks on the Decision

Each of the applicants has chosen a different approach to attacking the decision rendered. The primary application of the Banff users is to quash the Ms. Copps decision,¹⁴ while the application of the Jasper users is to quash the Regulations.¹⁵

A. Decision-making authority

In their written and oral arguments, the applicants argued that the Regulations under scrutiny in this case are *ultra vires* the Governor in Council acting under the *National Parks Act* and that proper authority over the Banff and Jasper airstrips is found in the *Aeronautics Act* [R.S.C., 1985, c. A-2] administered by Transport Canada. However, the technical argument upon which this assertion was based wilted in the face of the careful research done by Mr. Kirk Lambrecht, counsel for the respondents, in preparation for his oral response.¹⁶

As a result, the applicants' arguments were reduced to an assertion that there is some conflict between Transport Canada's general jurisdiction over aerodromes in Canada, and Parks Canada's jurisdiction, by paragraph 7(1)(oo) of the *National Parks Act*, over control of aircraft access to national parks, including the use of the Banff and Jasper airstrips. In this respect it was argued that

paragraph 7(1)(oo) of the *National Parks Act* must be interpreted in the context of the *Aeronautics Act*, and thus must be interpreted as granting authority strictly over "control" of access by aircraft to sensitive locations in the national parks, and not over air traffic through a park, or the maintenance of aerodromes that are fundamentally for the safety and security of such traffic.

I find there is no conflict as asserted. The jurisdiction of Parks Canada is restricted to national parks, which are defined geographic areas within which special use considerations are in effect. In this respect, I find that any landing or take-off of aircraft, and any facility for this purpose, including the Banff and Jasper airstrips, are properly within a Parks Canada concern, and appropriately under Parks Canada jurisdiction.

B. Due process obligations

Since the Banff-Bow Valley Study was seen by all concerned to be an important event in determining the future of the mountain parks, and after its completion, the decision-making process would kick into high gear, I find that no due process issues arise up to the point where the study was tabled.

1. Who made the decision to close the airstrip, and when was it made?

The evidence proves that the political decision was made sometime before October 7, 1996 by Ms. Copps, informally announced by her on October 7th, ratified by the Governor in Council on March 19, 1997, formally announced in the letters of March 20th, and then published in the Regulations on April 2, 1997. From the words used, Ms. Copps confirmed on October 7, 1996, that the decision had already been made.¹⁷

It is clear from what Ms. Copps said on October 7, 1996 that the decision to close and rehabilitate the Banff airstrip was made before the speech was given. Thus, her references to the process to be followed regarding implementing the Banff-Bow Valley Study cannot be said to include this decision. In fact, she made it quite clear that this is so when she said:

Today, I may be able to move on some of the report's recommendations, but, of course, I can't move on all of them. That job doesn't belong just to me"it belongs to all of us. And we can't do the entire job today"but it can start today.

2. What due process expectations were created by the decision?

The applicants argue that, in view of the "Doré letter", and by Ms. Copps statements on October 7, 1996, that the respondents created a legitimate expectation that more consultation would follow the release of the Banff-Bow Valley Study, and, therefore, there is a breach of due process in the fact that this did not occur.

Recently, the Supreme Court of Canada in *Reference Re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525 held, at pages 557-558 that with respect to "legitimate expectation":

There is no support in Canadian or English cases for the position that the doctrine of legitimate expectations can create substantive rights. It is a part of the rules of procedural fairness which can govern administrative bodies. Where it is applicable, it can create the right to make representations or to be consulted. It does not fetter the decision following the representations or consultation.

Thus, if the evidence shows that expectations of consultation were created, failure to meet the expectations can amount to a breach of due process. However, on the basis of the above analysis of the evidence, I find it is clear that no expectations were created with respect to Banff.

But regarding Jasper, the decision announced on October 7th is substantively unrelated to the Jasper airstrip. Thus, the statements made by Ms. Copps at that time do create a legitimate expectation that, as far as Jasper is concerned, the process she outlined would be followed regarding any decisions to do with that airstrip.

It is clear that Parks Canada has viewed the airstrips in Banff and Jasper as on the same footing, since the decision to close both was tied to the tabling of the Banff-Bow Valley Study which relates to Banff only. Indeed, even in the letters of March 20th, no reason is stated for the closure of the Jasper airstrip. The first mention of the rationale comes in the Regulatory Impact Analysis Statement to [SOR/97-150](#) as quoted above, which cites "for purposes of consistency" as the reason.

Due process objections were voiced before the Jasper March 20th letter was written, in the form of responses to the Environmental Screening Report which was provided to the Jasper users. For example, this letter, sent on Jasper Tourism and Commerce letterhead, clearly expresses the concerns being held about substance and process:

March 14, 1997

Hon. Sheila Copps

Minister

Canadian Heritage

House of Commons

Ottawa, Ont.

Dear Ms. Copps:

Re: Proposed Closure of Jasper Airstrip

Jasper Tourism and Commerce has been informed of Parks Canada initiative to have regulatory changes made effecting operations of the Jasper airstrip. We do not agree with the process that has been followed, public consultation overall, is questionable, as we have not been well informed of any with Jasper business community or aviation affiliates, locally or nationally.

We urge you to work with the aviation community before continuing with analysis of environmental impact and re-address the need for emergency and diversion landings. Closure of the Jasper Airstrip would be very detrimental to our area.

Yours truly,

Doreen VanAsten

General Manager

In the context of an "open management" process as announced by Ms. Copps on October 7, 1996, it is no small wonder that the Jasper applicants are unhappy with the conclusion that the Jasper airstrip

should be closed merely to be consistent. In addition, the assertion in the Regulatory Impact Analysis Statement to [SOR/97-150](#) that "[s]ince the rationale for closing the Banff airstrip applies equally to the Jasper airstrip, the latter is to be closed as well" appears to be unfounded on the evidence. The Banff-Bow Valley Study recommended that the Banff airstrip be closed because of its placement in an important wildlife corridor. There is no suggestion in the evidence that the same situation applies to the Jasper airstrip.

Given the cursory way that the specific circumstances of the Jasper airstrip was dealt with in the decision-making process, it is not difficult to see how people in Jasper would be very concerned that the process for decision making touted by Ms. Copps in her October 7th speech was not followed and they object accordingly.

I find that in the statements of Ms. Copps, Parks Canada created its own expectations for the decision-making process for Jasper. I further find that Parks Canada did not follow them, and accordingly, did not meet its due process obligations. The effect to be given to these findings is set out in Part IV below.

C. Compliance with CEAA

1. The scheme under [CEAA](#)

Paragraph 4(a) states the purposes of [CEAA](#) as:

4. . . .

(a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;

Section 5 sets out the general circumstances in which a project may require an environmental assessment. Subsection 5(1) reads in part as follows:

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

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

Under subsection 2(1), the definitions of "environmental assessment", "project" and "federal authority" are as follows:

2. (1) . . .

"environmental assessment" means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;

. . .

"project" means

. . .

"federal authority" means

(a) a Minister of the Crown in right of Canada,

(b) an agency of the Government of Canada or other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs,

(c) any department or departmental corporation set out in Schedule I or II to the *Financial Administration Act*, and

(d) any other body that is prescribed pursuant to regulations made under paragraph 59(e),

but does not include the Commissioner in Council, or an agency or body of the Yukon Territory or the Northwest Territories a council of the band within the meaning of the *Indian Act*, The Hamilton Harbour Commissioners constituted pursuant to *The Hamilton Harbour Commissioners' Act*, The Toronto Harbour Commissioners constituted pursuant to *The Toronto Harbour Commissioners' Act, 1911*, a harbour Commission established pursuant to the *Harbour Commissions Act* or a Crown corporation within the meaning of the *Financial Administration Act*;

If the Governor in Council is the decision maker, subsection 5(2), not subsection 5(1), is the governing provision. Paragraph 5(2)(a) reads:

5. . . .

(2) Notwithstanding any other provision of this Act,

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

Paragraph 59(g) provides that:

59. The Governor in Council may make regulations

. . .

(g) prescribing the provisions of any Act of Parliament or any regulation made pursuant to any such Act that confer powers, duties or functions on the Governor in Council, the exercise or performance of which require an environmental assessment under subsection 5(2); [Emphasis added.]

The regulation of concern in this case under paragraph 59(g), is SOR/94-638 [*Comprehensive Study List Regulations*], which sets out the following provisions:

3. The projects and classes of projects that are set out in the schedule are prescribed projects and classes of projects for which a comprehensive study is required. [Emphasis added.]

This Regulation then states the following under the heading "Comprehensive Study List, Part 1, National Parks and Protected Areas":

1. The proposed construction, decommissioning or abandonment in relation to a physical work in or on a national park, national park reserve, national historic site or historic canal that is contrary to its management plan. [Emphasis added.]

Thus, a decision by the Governor in Council only triggers an assessment, albeit a comprehensive assessment, when certain action is taken "in relation to a physical work", and also only when such action is contrary to the national park's management plan.¹⁸

While "physical work" is not defined in the [CEAA](#), I agree with the respondents' argument that it means "physical activity by humans and concrete results".¹⁹

2. In this case as a matter of law, who is the critical decision maker *vis à vis* [CEAA](#)?

The following comment in *Canadian Environmental Assessment Act: An Annotated Guide* provides the analytical framework for answering the question:

This definition [of federal authority] describes, in some detail, what entities are a federal authority for the purposes of the Act. The concept of federal authority is crucial to the environmental assessment process since it identifies the persons or bodies whose participation in a project may trigger the requirement for an environmental assessment. All Ministers, departments and agencies of the Government of Canada are federal authorities. Federal authorities may also include other bodies created by statute and accountable through a Minister to Parliament, or other bodies prescribed by regulation made under s. 59(e).

The Governor in Council is not a federal authority within the meaning of the definition. It should be noted that pursuant to s. 5(2) of the Act, projects requiring the approval of the Governor in Council may trigger the application of the Act if such approval, or any other action taken by the Governor in Council for the purpose of enabling the project to proceed, is given pursuant to a provision listed in Schedule II of the *Law List Regulations*, *SOR/94-636*. In this case, the federal authority exercises its normal responsibilities short of the final project decision. With the recommendations of the federal authority, the Governor in Council will make his or her decision about the project.²⁰ [Emphasis added.]

On the evidence, the decision to close the Banff and Jasper airstrips was made by Ms. Copps, but to implement this plan, regulatory amendments were necessary. Thus, the practical importance to be attached to the Regulations is nothing more than stated by Ms. Copps in her letters of March 20th, that is, the Regulations are merely a ratification of her decision as a necessary step to finalize the closure of the airports.

The applicants argue that since the critical decision at the base of the decision-making process is Ms. Copps', and since no environmental assessment was done before she made the decision, that decision and all subsequent decisions, including the Regulations, are void for failure to comply with a jurisdictional precondition.

However, as the respondents have argued, regardless of whether the approval of the Regulations is a routine step in which the Governor in Council has no practical involvement, as a matter of law, the decision to change the *National Parks General Regulations* to give effect to Ms. Copp's decision is the Governor in Council's, and without it, no change can occur.

Thus, even though Ms. Copps made the decision to effectively close the Banff and Jasper airstrips, since this decision required the approval of the Governor in Council to put it into effect, I find that as a matter of law, the Governor in Council is the critical decision maker who took the vital action for the purpose of enabling the closure. Accordingly, the decision made here is outside the purview of subsection 5(1) and within [subsection 5\(2\)](#) of [CEAA](#).

3. Is the decision of the Governor in Council a decision "in relation to a physical work"?

To trigger an environmental assessment, the answer to this question must be "yes". Regarding the answer, the respondents argue that with respect to ending use of the airstrips, it is possible to split the decision to "close" the airstrips from the decision to "decommission" the airstrips. On this basis, it is argued that it is possible to make and ratify a decision to close the airstrips as a "land use" decision, thus not attracting the need to do an environmental assessment before the decision is made, because a change in land use is not a change "in relation to a physical work" being the humanly constructed aspect of the airstrips themselves. That is, a land use decision is distinct from a subsequently contemplated decision to decommission the airstrip, which is action "in relation to a physical work" being the removal of structures and placing markings on the runway indicating that it has been decommissioned.²¹ As the argument goes, it is only this latter situation that triggers the requirement to do a comprehensive assessment before the action is taken.

Accordingly, the respondents further argue that following the analysis just cited, it has complied with the requirements of [CEAA](#) since the Cabinet ratification of March 19, 1997 is the land use decision respecting the airstrips, which does not under any condition require an environmental assessment, and the decision to decommission, which is action in relation to a physical work, has already been the subject of an environmental screening.

In the opinion of the respondents, the required trigger for a comprehensive assessment has not occurred since the decommissioning of either airstrip is not contrary to their respective management plans.

In view of the terms of paragraph 5(2)(a), I consider the Crown's "two-decision" argument compelling. Thus, by the Governor in Council passing the regulations, the land use question is settled. As a result, free aircraft access to the Banff and Jasper airstrips has ended. Thus, I find that the decision of the Governor in Council is not a decision "in relation to a physical work" under section 1 of the Comprehensive Study List of [SOR/94-638](#). However, it is clear that the decommissioning of either airstrip is an action taken "in relation to a physical work" as specified in that provision.

While the land use change is a matter for the Governor in Council as described, the decommissioning dependant thereon is not. Thus, subsection 5(1) governs and applies to Parks Canada which is the proponent of the decommissioning. In this respect, the type of assessment depends on whether the decommissioning contemplated is on the Comprehensive Study List in [SOR/94-638](#). If it is, a comprehensive study is required. If not, only a screening need be done.

Under section 1 of the Comprehensive Study List, since each decommissioning is in relation to a physical work in a national park, a comprehensive study is required, but only if the decommissioning is contrary to the management plan for the park concerned.

4. Is decommissioning of the Banff and Jasper airstrips contrary to their respective management plans?

The critical date which determines which plan governs the [CEAA](#) requirements of the decision reached is March 19, 1997, being the date that the Governor in Council ratified the decision made by Ms. Copps. At that time, the 1988 management plans for Banff and Jasper were in effect, and, accordingly, I find it is the terms of these plans that must be considered.²²

Regarding the terms of the management plans, the respondents argue that since the 1988 plan for Banff was based on the 1986 report *In Trust for Tomorrow: A Management Framework for Four*

Mountain Parks, the management plan should include statements found in the previous study. I do not agree with this submission because, while this might work in favour of the respondents' position on this issue, the potential for conflict on other issues remains. I find, therefore, that the intention expressed by the phrase "contrary to the management plan" in section 1 of the Comprehensive Study List in [SOR/94-638](#) is to judge a contemplated action "in relation to a physical work" according to the actual terms of the relevant management plan and nothing more.

Each of the 1988 Banff and Jasper management plans includes the following provision:

The . . . airstrip will be retained solely for emergency/ diversionary landing purposes. Its future requirement for these purposes will be monitored over the next three years. A final decision will be made at the end of this three year period. [Emphasis added.]

I find that the underlined portion of the just-quoted paragraph is the provision of each management plan which governs the status of the related airstrips during the life of the plan as written. According to this provision, the "retention" of the airstrips must mean that they will be kept in a form suitable for the approved emergency and diversionary use. As described above, the decommissioning of the airstrips has the potential to change the status set out in each management plan, and I find there is, therefore, a conflict between the management plan and the proposed decommissioning of each airstrip.

Therefore, I find that a comprehensive study is required respecting any decision to decommission either the Banff or Jasper airstrips. I also find that the fact that screening assessments have already been done is an irrelevant consideration as far as the law is concerned, although undoubtedly, the results will be of practical assistance in the development of the required comprehensive studies.

5. When does the comprehensive study need to be done?

Regarding the timing of the assessment, [section 11](#) of [CEAA](#) reads as follows:

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.

I find that in observance of this provision, the comprehensive environmental study must be carried out before any decision is made to decommission.

6. What needs to be investigated?

The primary need is addressed by [paragraph 16\(1\)\(a\)](#) of [CEAA](#) as follows:

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; [Emphasis added.]

Under subsection 2(1), "environmental effect" is defined as follows:

"environmental effect" means, in respect of a project,

Regardless of whether I am right that a comprehensive study needs to be done, or whether only a screening will suffice, I agree with the applicants' argument that a liberal interpretation should be given to the "health and socio-economic conditions" aspects of the definition of environmental effects to be investigated under paragraph 16(1)(a). The users' argument, which deserves weight, is as follows:

An "environmental effect" includes any change that the closure and decommissioning of the Banff airstrip will cause in the environment. This encompasses "the effect of any such change in health and socio-economic conditions" in the VFR flight corridor that the airstrip serves between Alberta and British Columbia. The unavailability of the airstrip for emergency or diversionary use creates a significant adverse effect on public health and safety, by increasing the risk of accidents and consequently affecting the health and safety of VFR pilots and passengers who fly through the Banff area.²³

In final response to this health and safety concern, in argument counsel for the respondents emphasized that by the following quoted subsections 3(1) and (4) and section 6 of Regulation [SOR/97-150](#), aircraft access to the airstrips is still possible for safety reasons even after decommissioning, thus the applicants' argument for keeping the airstrips open loses weight:

AIRCRAFT ACCESS PERMITS

3. (1) Subject to subsection (4), the superintendent [of a national park] may issue an aircraft access permit to any person who applies.

...

(4) The superintendent shall, before issuing a permit, take into account

(a) the natural and cultural resources of the park;

(b) the safety, health and enjoyment of visitors or residents of the park; and

(c) the preservation, control and management of the park.

...

6. Notwithstanding anything in these Regulations, the superintendent may authorize the take-off and landing of an aircraft anywhere in a park for the purposes of

(a) natural or cultural resource management and protection directly related to the administration of the park;

(b) any other management or control function directly related to the administration of the park;

(c) public safety; or

(d) law enforcement.

But, purely as a practical matter, I heard in the oral argument for the Banff applicants that the decommissioning of the airstrips, which involves marking them with an "x" visible from the air, will inhibit their use by pilots who have an emergency need to do so. As I understand the point, pilots are trained to avoid airfields with such markings.

While no precise evidence has been tendered to support this argument within the many expressed safety concerns of the applicants, because it has been made in response to a suggested ameliorating effect of the possible application of [SOR/97-150](#), an issue of some importance is raised regarding the Banff and Jasper airstrips which should be investigated from a safety perspective. The question is, if the grass fields which have been used as active airstrips are now taken out of such service by regulatory change but left undeveloped for other purposes as expressly intended, what harm would be caused by keeping them in a condition that would allow them to be used, within the superintendent's discretion generally or specifically exercised, for safety purposes as argued by the applicants?

IV. Relief

Regarding Parks Canada's failure to meet the due process obligations it established as identified in Part III B above in relation to the Jasper airstrip, I have come to the conclusion that there has not been a breach of due process that warrants the exercise of my discretion.

In this respect, I find weight should be given to the respondents' argument that there has been an overwhelming mass of consultation about the decision to close the airstrips and there is no point in having more. It is very clear that Parks Canada was well aware of the objections of Jasper users and residents regarding the closure of the airstrip at each step of the decision-making process. With respect to the Governor in Council's decision made on March 19, 1997, it is clear that Parks Canada correctly predicted the objections which have been voiced to its passage by both Banff and Jasper users. The following portion of the Regulatory Impact Analysis Statement to [SOR 97-150](#) makes this clear:

Opposition to the closure of the airstrips from local flying clubs and their provincial and national associations, such as the Canadian Owners and Pilots Association, can be expected. The perceived importance of the airstrips for emergency and diversionary landings will be used as their justification. However, a joint Transport Canada-Parks Canada monitoring program issued in 1995 showed no significant requirement for the Banff and Jasper airstrips for emergency or diversionary use.²⁴

It is also clear that Parks Canada is determined to proceed with implementing its perspective. Given this reality, I do not believe that there is any purpose in acting to reverse the decision-making process which has taken place on the basis of a failure to meet the legitimate expectation identified. This is so because such action would only result in yet another opportunity to make the representations which have been rejected in the past and, I have no doubt, would be rejected again. Accordingly, on this ground of complaint proved by the Jasper users, I choose not to exercise the discretion provided to me by subsection 18.1(3) [as enacted by S.C. 1990, c. 8, s. 5] of the [Federal Court Act](#) [R.S.C., 1985, c. F-7].

However, I am willing to exercise my discretion to enforce the legal requirement to complete a comprehensive environmental assessment prior to the decommissioning of either the Banff or Jasper airstrip. It is unclear whether a formal decision has yet been made to decommission the airstrips. However, I find that because a comprehensive environmental assessment is required before this decision can be made, any decision that might already have been made is made without jurisdiction to do so.

Therefore, for the reasons given, under [paragraph 18.1\(3\)\(b\)](#) of the [Federal Court Act](#) I hereby quash any decision already made by the respondents to decommission either the Banff or Jasper airstrip, and prohibit the respondents from making any decision to decommission either the Banff or Jasper airstrip until separate comprehensive environmental studies are completed on each.

As no special reasons to do so exist, I make no order as to costs.

¹ As the applicants' concern stems from their experience as users of the airstrips, and the interests that they express are the same for both the Banff and Jasper airstrips, these separate applications were heard together. Given this unity of concern, both sets of applicants may be referred to hereinafter as "the users" except where it is appropriate to discern between them.

² Hereinafter referred to as "[CEAA](#)".

³ This statement of the perspective is found in the respondents' written argument and is based on the affidavit of June 16, 1997 of Mr. Charles Zinkan, Acting Director, Mountain Parks, Parks Canada, Department of Canadian Heritage (respondents' application record).

⁴ At para. 24.

⁵ The perspective for Banff is found in the affidavit of Mr. Howard Srigley, Sector Commander of Civil Air Rescue Emergency Services, Banff Sector (Banff application record). The perspective for Jasper is found in the affidavit of Mr. Dan Bowen, President of the Jasper Flying Club (Jasper application record).

⁶ *Banff-Bow Valley: At the Crossroads: Summary Report*, Zinkan affidavit, *op.cit.*, Exhibit 14, at p. 9.

⁷ Zinkan affidavit, *op.cit.*, at paras. 33-48.

⁸ The letter in which this is stated has been referred to as the "Doré letter", since it was written by Mr. Gerard Doré, Chief, Legislative and Regulatory Affairs, National Parks, Parks Canada. This letter is referred to below for a statement which it contains which the users say constitutes a representation that has been breached.

⁹ Jasper application record, at p. 25.

¹⁰ Zinkan affidavit, *op.cit.*, at para. 57.

¹¹ Zinkan affidavit, *op.cit.*, Exhibit 51.

¹² Zinkan Affidavit, *op.cit.*, at para. 65.

¹³ The Banff letter was addressed to Mr. Bernie Schiesser, President, Banff Flying Club (Banff Application Record, at p. 1), and the Jasper letter was addressed to Mr. K. A. McNeil, Vice-President, Western Canadian Owners and Pilots Association (Jasper application record, at p. 11).

Respecting the Banff airstrip, Ms. Copps letter was preceded by a letter to Mr. Schiesser from Mr. Zinkan dated March 19, 1997, wherein Mr. Zinkan gave notice that the regulatory changes had been effected and that all equipment and structures had to be removed from the Banff airstrip by May 17, 1997, "after which the airstrip will be decommissioned" (Banff application record, at p. 150).

¹⁴ In detail, the request is as follows:

1. An order in the nature of *certiorari* to quash the decision of the respondent Minister of Canadian Heritage to implement regulations to close the Banff Aerodrome (airstrip) such decision referred to in a letter dated March 20, 1997 and communicated to and received by the applicant Bernie Schiesser on April 2, 1997.
2. An order in the nature of *certiorari* to quash the subsequent and directly related action of the respondent Park Superintendent by letter dated March 19, 1997, to remove all aircraft, equipment, structures and/or material stationed at the Banff airstrip on or before May 17, 1997.
3. A declaration that the respondents will permit and continue to permit the Banff airstrip to remain open for the purposes of public safety, including interprovincial flights by light aircraft through that portion of the Rocky Mountains on the Visual Flight Rules (VFR) navigation route, for emergency use, civilian search and rescue, and related safety training exercises, notwithstanding the registration pursuant to the *National Parks Act*, of the *National Parks Aircraft Access Regulations* and the *Regulations Amending the National Parks General Regulations* on March 19, 1997, which Regulations the applicants seek to have declared unlawful.
4. An interim injunction, or a stay, of the effect of the Regulations closing the Banff airstrip, until such time that the trial of this judicial review action can be heard and proper evidence presented and arguments made by the applicants regarding aviation and public safety and rescue operations that depend on the viability of the Banff airstrip.

The body that is to be reviewed is the respondent Minister of Canadian Heritage for her decision to implement the impugned Parks Regulations to close and decommission the airstrip, and the respondent Her Majesty the Queen and affiliated servants of Her Majesty for the passing and registration of said Parks Regulations and any related action taken pursuant to such Regulations.

¹⁵ In detail, the request is as follows:

1. An order in the nature of *certiorari* to quash the regulation contained in the Regulations of Canada, SOR/97-149 and 97-150 made on March 19, 1997 and published in the *Canada Gazette* Part II on April 2, 1997, and all related decisions at the ministerial level including orders in council, as relate to the closure of the Jasper Aerodrome located at Jasper (Henry House), located at latitude 52 degrees, 59 minutes, 55 seconds North, longitude 118 degrees, 03 minutes, 39 seconds West (hereinafter the Jasper airstrip).
2. An interim and permanent injunction preventing the respondents together with all agents and servants of the respondents from taking actions towards decommissioning and closure of the Jasper airstrip.
3. An interim and permanent order in the nature of prohibition to prevent the respondents together with all agents and servants of the respondents from taking actions towards decommissioning and closure of the Jasper airstrip.
4. A declaratory judgment declaring all regulations, orders in council, ministerial decisions and all others ensuing therefrom, toward closing and decommissioning the Jasper airstrip to be null and void.
5. Such further orders as this Honourable Court shall deem meet in the circumstances.

¹⁶ It is interesting to note as a practical matter that on the record Transport Canada has confirmed the aerodromes in Banff and Jasper are owned and operated by Heritage Canada, and that the decision

respecting their closure falls within that department's jurisdiction. (Zinkan affidavit, *op.cit.*, Exhibit 68).

¹⁷ Since the decision was not formally communicated to the users until the March 20, 1997 letters, I find that no issues arise as to the timing of the filing of the originating notices of motion under consideration.

¹⁸ An environmental assessment can be either a "comprehensive study" or a "screening", with both required to be conducted by considering certain factors outlined in [s. 16\(1\)](#) of [CEAA](#), but a comprehensive study is required to consider additional factors outlined in [s. 16\(2\)](#)

¹⁹ This phrase is taken from Hobby, Ricard, Bourry and de Pencier, *Canadian Environmental Assessment Act: An Annotated Guide* (Canada Law Book, May 1997), at p. II-20.

²⁰ *Ibid.*, at p. II-14.

²¹ [S. 301.04\(1\)](#) of the *Canadian Aviation Regulations (SOR/96-433)* Part III, Subpart 1 "Aerodromes, says that "When an aerodrome is closed permanently, the operator of the aerodrome shall remove all of the markers and markings installed at the aerodrome", and [s. 301.04\(4\)](#) says that "the operator of the aerodrome shall place closed markings, as set out in Schedule 1 to this Subpart, on the runway". The Schedule requires that the runway be marked with a large "x" visible from the air.

²² Regarding Banff, although a new management plan was put into effect in April of this year, the respondents have not asserted that the decision was taken pursuant to this new plan. Accordingly, it is irrelevant to this discussion.

With respect to the Jasper airstrip, on the evidence it is clear that the Jasper 1988 management plan is the relevant plan. Knowledge of this fact, and confirmation of this understanding on the part of Parks Canada is expressed in the letter from Parks Canada to the Jasper Flying Club dated March 4, 1997. Included with that letter was a copy of the environmental screening report which had been completed, and in which the following statement is made:

The decision to close the airstrip is founded on policy, and is the conclusion of direction and subsequent studies identified in the Park Management Plan (1988). Accordingly, the screening addresses closure and decommissioning only, and does not review the environmental implication of continued operation of the facility. (Letter from Mr. Ron Hooper, Superintendent, Jasper National Park, to the Jasper Flying Club, c/o Dan Bowen, Dan Bowen affidavit of May 5, 1997, Exhibit A, Jasper application record, at p. 34.)

²³ Banff application record, at p. 224.

²⁴ Jasper application record, at p. 29.

