2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

Schwarz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)

The Schwarz Hospitality Group Limited, Applicant and The Minister of Canadian Heritage and Superintendent Banff National Park, Respondents

The Schwarz Hospitality Group Limited, Applicant and The Attorney General of Canada, Respondent

Federal Court of Canada — Trial Division

Gibson J.

Heard: January 23-24, 2001
Judgment: February 23, 2001
Docket: T-1552-98, T-34-00

Counsel: *Judson E. Virtue*, for applicant

Kirk N. Lambrecht, for respondents

Subject: Public; Property; Environmental

Public authorities --- Provincial boards and commissions — Park boards and commissions

Leaseholder operated historic mountain lodge in Banff National Park — Leaseholder applied to upgrade facilities for year-round operation and submitted redevelopment proposal — Redevelopment plan was conditionally approved following public review and hearing by Advisory Development Board — Minister of Canadian Heritage later announced new measures to protect ecological integrity of national parks, including imposition of one-year development moratorium on all commercial accommodation facilities — Leaseholder applied for judicial review, seeking declaration that moratorium was of no force and effect against redevelopment proposal and order of mandamus directing park superintendent to make decision regarding proposal — Application granted in part — Issue of validity of moratorium was moot because moratorium had expired — Officials of Parks Canada created legitimate expectation in leaseholder throughout moratorium by encouraging leaseholder to continue to invest time, energy, and money in refining proposal — Leaseholder had reasonable expectation that proposal would be reviewed and decision taken from it, and order of mandamus was issued directing same.

Environmental law --- Statutory protection of environment — Environmental assessment — Practice and procedure

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

Leaseholder operated historic mountain lodge in Banff National Park — Leaseholder applied to upgrade facilities for year-round operation and submitted redevelopment proposal — Redevelopment plan was conditionally approved following public review and hearing by Advisory Development Board — Minister of Canadian Heritage later announced new measures to protect ecological integrity of national parks — New Canada National Parks Act was enacted but not proclaimed in force — Leaseholder submitted final environmental assessment report to Parks Canada but received notice that future development would be reviewed according to requirements of both Canadian Environmental Assessment Act and Canada National Parks Act — Leaseholder applied for judicial review, seeking order of mandamus directing park superintendent to make decision regarding proposal — Application granted — Canadian Environmental Assessment Act established that superintendent owed legal duty to leaseholder to take decision from environmental assessment filed with redevelopment proposal — Pending legislative policy in Canada National Parks Act could not be unilaterally invoked by superintendent to delay or avoid fulfiling statutory duties imposed by Canadian Environmental Assessment Act — Order of mandamus was issued directing superintendent to fulfil obligations in relation to assessment submitted by leaseholder — Canadian Environmental Assessment Act, S.C. 1992, c. 37.

Cases considered by *Gibson J.*:

Apotex Inc. v. Canada (Attorney General) (1993), 51 C.P.R. (3d) 339, 162 N.R. 177, [1994] 1 F.C. 742, 18 Admin. L.R. (2d) 122, *(*sub nom. *Apotex Inc. v. Merck & Co.)* 69 F.T.R. 152 (note) (Fed. C.A.) — applied

Apotex Inc. v. Canada (Minister of National Health & Welfare) (1999), 3 C.P.R. (4th) 1, 181 D.L.R. (4th) 404, 252 N.R. 72, 177 F.T.R. 320 (note) (Fed. C.A.) — referred to

Baker v. Canada (Minister of Citizenship & Immigration), 174 D.L.R. (4th) 193, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — considered

Borowski v. Canada (Attorney General), [1989] 3 W.W.R. 97, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, 92 N.R. 110, 75 Sask. R. 82, 47 C.C.C. (3d) 1, 33 C.P.C. (2d) 105, 38 C.R.R. 232 (S.C.C.) — considered

Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage) (2001), 37 C.E.L.R. (N.S.) 1, 266 N.R. 169, [2001] F.C.J. No. 18 (Fed. C.A.) — considered

Kahlon v. Canada (Minister of Employment & Immigration), [1986] 3 F.C. 386, 30 D.L.R. (4th) 157, 26 C.R.R. 152 (Fed. C.A.) — referred to

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) (1990), 46 Admin. L.R. 161, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134, [1990] 3 S.C.R. 1170 (S.C.C.) — considered

Pharmacia Inc. v. Canada (Minister of National Health & Welfare) (1994), 58 C.P.R. (3d) 209, *(*sub nom. *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.)* 176 N.R. 48, *(*sub nom. *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.)* [1995] 1 F.C. 588 (Fed. C.A.) — referred to

Rocky Mountain Ecosystem Coalition v. Canada (National Energy Board) (1999), 174 F.T.R. 17 (Fed. T.D.) — referred to

Statutes considered:

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

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

Generally — referred to

s. 18 — referred to

s. 18(1)(b) — considered

s. 20 — referred to

s. 20(1)(a) — considered

National Parks Act, R.S.C. 1985, c. N-14

Generally — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 81(1) — referred to

Tariffs considered:

Federal Court Rules, 1998, SOR/98-106

Tarriff B, Table, column III — referred to

APPLICATIONS by leaseholder for judicial review of various actions taken by Superintendent of Banff National Park with respect to approval of redevelopment proposal and environmental assessment.

***Gibson J.*:**

Introduction

1 These reasons follow the hearing at Calgary, Alberta, on the 23rd and 24th of January 2001 of two applications for judicial review in which the applicant on each application for judicial review, the Schwarz Hospitality Group Limited (the "leaseholder"), seeks the following reliefs:

> in respect of the judicial review application on file T-1552-98 (the "first application"), a declaration that a one year moratorium on development of Outlying Commercial Accommodation Areas in Banff National Park announced by the Minister of Canadian Heritage on the 26th of June 1998 is invalid or unlawful and of no force and effect as against the applicant's Storm Mountain Lodge redevelopment proposal (the "redevelopment proposal") and an order directing the Superintendent of Banff National Park (the "Superintendent") to review and approve the redevelopment proposal in accordance with the existing development approval process and development guidelines; and
>
> in respect of the judicial review application on file T-34-00 (the "second application");
>
> - a declaration that the conditions of the Banff National Park Advisory Development Board (the "Advisory

Development Board") in relation to the redevelopment proposal have been fulfilled;

- a declaration that the environmental assessment relating to the redevelopment proposal, submitted by the leaseholder to the Superintendent on the 18th of November 1999 (the "environmental assessment") fulfils the requirements of the *Canadian Environmental Assessment Act*;[FN1]

- a declaration that the Superintendent has no reasonable grounds to refuse, fail or neglect to prepare a screening report in respect of the environmental assessment under para. 18(1)(b) of the *Canadian Environmental Assessment Act*;

- an order in the nature of a writ of *mandamus* directing the Superintendent to prepare such a screening report;

- a declaration that the Superintendent has no reasonable ground to refuse to make a determination under s. 20 of the *Canadian Environmental Assessment Act* and, in particular, under para. 20(1)(a) of that Act, that the redevelopment proposal is not likely to cause significant adverse environmental effects and an order in the nature of a writ of *mandamus* directing the Superintendent to make such a determination;

- a declaration that the Superintendent has no reasonable grounds to refuse to take the course of action set forth in para. 20(1)(a) of the *Canadian Environmental Assessment Act* and an order in the nature of a writ of *mandamus* requiring the Superintendent to take such a course of action; and

- a declaration that the Superintendent has statutory authority under the *Canadian Environmental Assessment Act* and the *National Parks Act*[FN2] and regulations made thereunder to review the redevelopment proposal and to issue all required permits and that the Minister of Canadian Heritage (the "Minister") has no residual authority or discretion to intervene in the review, approval and permit process.

2 Pursuant to an order of the Associate Chief Justice dated the 12th of September 2000, the two applications for judicial review were heard together. At the close of the hearing, I advised counsel that I would reserve my decision and that these reasons and related orders would follow.

Background

3 According to the affidavit of George Schwarz filed on the first application, the President of the leaseholder and a partner in the proposed redevelopment of the Storm Mountain Lodge leasehold, Storm Mountain Lodge was developed in the 1920s as one of the Canadian Pacific Railway Company's bungalow camps, accommodating travellers on the newly opened Banff-Windermere Highway, now Highway 93, in the Vermillion Pass between Banff National Park and Kootenay National Park. Storm Mountain Lodge is located on the north side of Highway 93, about 23 kilometres from each of the Banff and Lake Louise town sites, in Banff National Park.

4 Mr. Schwarz further attests that the leaseholder has owned and operated Storm Mountain Lodge since acquiring the leasehold and improvements in 1986. The existing improvements consist of a main lodge, including a restaurant, guest common area, office facilities and rest rooms, twelve (12) rental cabins, four (4) staff cabins and several service buildings. The main lodge, cabins, and service buildings, which have a total combined footprint of 325 square metres, are dispersed throughout a 2.3 hectare (23,000 square metre) leasehold site. The main lodge is classified as an historic feature of Banff National Park.

5 Mr. Schwarz further attests that Storm Mountain Lodge has not been significantly renovated since the 1920s except for the addition of electrical power and plumbing upgrades. The facilities are presently suitable for summer use only, and have been operated only on a seasonal basis. Guests travelling between Banff and the Windermere Valley typically utilize the restaurant facility on a day-basis, while overnight visitors to Banff National Park utilize the guest

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

accommodations as a base for exploring the Vermillion Pass and the surrounding area.

6 In 1996, after initial consultations with Parks Canada representatives, the leaseholder decided to redevelop Storm Mountain Lodge with three objectives in mind:

> First, to upgrade the visitor experience by emphasizing heritage tourism and providing modernized amenities; second, to open Storm Mountain Lodge to year-round use; and third, to eliminate any negative environmental impact of the existing and renovated facilities.

In August of 1996, the leaseholder submitted to Parks Canada a redevelopment proposal. That proposal was eventually withdrawn.

7 In 1997, a Banff National Park Management Plan[FN3] was tabled in Parliament. In a forward to the Plan, the Minister wrote:

> The Banff-Bow Valley Task Force was formed because we needed to change the ways we did things in the park. We needed to find a new common ground on which Canadians could build a new future for the park.
>
> After more than two years of extensive research, consultation and discussion, the Banff-Bow Valley Study was released, and many of its recommendations are incorporated here in the new park management plan. The Study made a unique contribution to helping us better understand the role that science plays in making our decisions. And it also made a unique impact by getting people involved, through the Banff-Bow Valley Study Round Table, in defining what the future of Banff should be. We are going to build on those foundations.

In the introduction to the plan, the following appears:

> The *National Parks Act* requires each national park to have a management plan. These plans reflect the policies and legislation of the Department and are prepared in consultation with Canadians. They are reviewed every five years. *This management plan will guide the overall direction of Banff National Park for the next ten to fifteen years and will serve as a framework for all planning within the Park.* [Emphasis added.]

8 At p. 66 of the Plan, under the heading "Development Review Process," the following appears:

> Banff National Park will adopt a revised *Development Review Process* for all proposals outside the town of Banff. This revised process:
>
> 1) Uses the municipal development review process as a model.
>
> 2) Includes two stages - the development permit review and the building permit review.
>
> 3) Introduces opportunities for public involvement through the Advisory Development Board (ADB). This board reviews all applications publicly to ensure they are appropriate and meet the requirements of the *National Parks Act*, regulations and planning. The ADB submits its recommendations to the park Superintendent.
>
> . . . . .
>
> 6) Incorporates the requirements of the *Canadian Environmental Assessment Act* (CEAA) and sets high standards for environmental assessment. Assessments that do not meet the standard will be returned to the

proponent and will not be posted publicly.

9 Mr. Schwarz further attests in his affidavit earlier referred to that visitor services in Banff National Park are restricted to certain areas within which commercial accommodation is permitted. The two major areas for visitors are the Banff and Lake Louise town sites. However, commercial accommodations are also provided in 29 outlying commercial accommodation facilities ("OCAs"). Storm Mountain Lodge is one of the OCAs.

10 Within the framework of the Banff National Park Management Plan, redevelopment of OCAs continued to be governed by the Four Mountain Parks Outlying Commercial Accommodation Redevelopment Guidelines[FN4] (the "OCA Guidelines") that were promulgated in November of 1988. The preamble to the OCA Guidelines reads in part as follows:

> These guidelines apply to outlying commercial accommodation facilities (OCAs) or bungalow camps in the four mountain national parks of Banff, Jasper, Kootenay and Yoho. These are privately run, road-accessible facilities for accommodating the park visitor overnight. The guidelines are based on the direction provided in "In Trust for Tomorrow" (1986). This planning framework was announced by the Minister of the Environment in February, 1986, and sets the direction within which redevelopment for OCAs may occur.
>
> The redevelopment guidelines have been prepared for two purposes. The first is to make it clear to OCA owners that *redevelopment may be permitted within well-defined parameters*. Secondly, *the guidelines form the framework within which Environment Canada-Parks staff will review, comment on and approve redevelopment proposals*.
>
> . . . . .
>
> The existing 29 outlying commercial accommodation facilities provide approximately 1,100 units of road-accessible commercial accommodation outside the park towns and visitor centres. Although they are privately owned, they operate on land leased from Environment Canada - Parks and are an integral part of the parks system. They must, therefore, respect all the environmental and heritage concerns that apply to the system in general.[FN5] [Emphasis added.]

11 The leaseholder's 1996 redevelopment proposal, including a related environmental assessment, was the subject of extensive consultation. In the result, a revised redevelopment proposal was submitted to Parks Canada in June of 1997. It is this redevelopment proposal that is at the heart of these applications for judicial review. The leaseholder was advised by the Superintendent that the redesigned proposal and related environmental assessment would be reviewed pursuant to a new development review process and, in particular, would be reviewed by the newly created Advisory Development Board. Over the summer of 1997, extensive review of the revised redevelopment proposal, including the related environmental assessment, took place both within Parks Canada and more broadly. A public review and hearing by the Advisory Development Board occurred on the 28th of July 1997. Minutes of the Advisory Development Board meeting[FN6] indicate that a motion to recommend to the Superintendent that he or she accept the redevelopment proposal subject to certain conditions and amendments was carried.

12 By letter dated the 1st of August 1997,[FN7] the Acting Superintendent advised the leaseholder in part as follows:

> Further to [your] Development Permit application, . . . I would advise that the Parks Canada Advisory Development Board, as part of a public meeting dated July 28, 1997, has put forward a recommendation to this office proposing acceptance of the application subject to conditions.
>
> Having reviewed the information and conditions attached to the ADB recommendation, I am advising of my

> agreement with the recommendations including all terms and conditions as put forward. I would advise you to proceed with action as may be necessary to satisfy all requirements and conditions described. Final decision and issuance of Development Permit will not be forthcoming until all conditions and requirements of development have been resolved to the satisfaction of Parks Canada. . . .
>
> . . . . .
>
> Upon satisfactory resolution of conditions and requirements, the proposal will be subject to a public review period (for issues of process or procedure only) of fourteen days. Provided there are no appeals, a Development Permit may be issued upon completion of the public appeal period.
>
> *Please Note: This is not a Development Permit.* Prior to issue or release of Development Permit, all terms, conditions and requirements of ADB recommendations as put forward and accepted by the Superintendent must be satisfied including obligations under the Canadian Environmental Assessment Act (CEAA). [Emphasis in original.]

13 Extensive discussions involving revisions of and supplements to the redevelopment proposal followed with a view to fulfilling all of the terms, conditions and requirements of the Advisory Development Board recommendation. By mid-June 1998, the leaseholder was under the impression that final approval of the redevelopment proposal was imminent. What Mr. Schwarz describes in his affidavit as a "final meeting" with Parks Canada was scheduled for the 10th of July 1998.

14 On the 26th of June 1998, the leaseholder was advised by the office of the Superintendent as follows:

> The Minister of Canadian Heritage and the Secretary of State (Parks) announced today new measures to protect the ecological integrity of Canada's national parks. Further to this announcement, a review panel will be established to review guidelines for the future development of Outlying Commercial Accommodations (OCA's) and Hostels.
>
> *Until such time as the panel's recommendations have been considered and approved by the Minister, a moratorium on development that would result in a square footage increase for OCA's and Hostels has been put in place*.[FN8] [Emphasis added.]

The leaseholder's redevelopment proposal contemplated a substantial "square footage increase" for Storm Mountain Lodge.

15 The news release issued by the Minister and the Secretary of State (Parks) on the 26th of June 1998 contained only one paragraph relevant to the leaseholder's redevelopment proposal. That paragraph reads as follows:

> The Minister and Secretary of State also emphasized that steps are being taken to manage commercial development in outlying areas within National Parks. To ensure the long-term ecological integrity of National Parks, *a one-year development moratorium* has been placed on all commercial accommodation facilities outside park communities. A panel will be set up to recommend, within one year, the principles to guide the nature, scale and rate of future development.[FN9] [Emphasis added.]

I note here the dichotomy between the advice from the Superintendent in the letter of the 26th of June, which appears to speak of an indeterminate moratorium, and the news release, which speaks of a one-year development moratorium. In the absence of any satisfactory evidence of a rationalization of these two positions, I determine that the fixed-term moratorium contained in the public announcement governs.

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

16 Following confirmation that the development moratorium was interpreted to extend to the leaseholder's redevelopment proposal, the first application for judicial review followed.

17 The panel to review development in areas outside park communities in Canada's Mountain National Parks ("the OCA Panel") contemplated by the news release of the 26th of June 1998 was established on the 21st of October 1998. The OCA Panel invited public submissions and held public hearings. The leaseholder participated in the processes of the OCA Panel. The OCA Panel submitted its report in the summer of 1999. The report, as eventually released, contained a favourable recommendation in respect of the leaseholder's redevelopment proposal.[FN10]

18 In the meantime, discussion continued between Parks Canada officials and the leaseholder and its advisors regarding the redevelopment proposal. On November 18, 1999, a revised and consolidated final environmental assessment report was provided to Parks Canada.[FN11] Mr. Schwarz, in his affidavit filed on the second application for judicial review, attests that, by early December 1999, he anticipated an early positive decision under s. 20 of the *Canadian Environmental Assessment Act* to be followed by the issuance of a redevelopment permit by the Superintendent. When those expectations were not fulfilled, the second application for judicial review was filed on the 11th of January 2000. To that date, the leaseholder had not been formally advised of any deficiencies in the final environmental assessment report submitted to Parks Canada on the 18th of November 1999.

19 There remains only one final twist in the background to these applications for judicial review. During the hearing on the applications for judicial review, I was advised by counsel that, after the normal hour for close of business on the 22nd of January 2001, that is to say, on the evening before the hearing commenced, the leaseholder received at its place of business the following fax transmission from the Chief Executive Officer of Parks Canada:

> The report of the Outlying Commercial Accommodation (OCA) Panel, *Outlying Commercial Accommodations and Hostels in the Rocky Mountain National Parks*, was made public by the Honourable Sheila Copps, Minister of Canadian Heritage, in April 2000. Parks Canada officials subsequently had an opportunity to review and discuss its recommendations with you.
>
> The OCA Panel report, which has also been reviewed in light of the recommendations in the report of the Panel on the Ecological Integrity of Canada's National Parks that was released last spring, will be the basis for developing Parks Canada guidelines for OCAs and hostels. *However, Parks Canada does not accept the OCA Panel recommendations with respect to Storm Mountain Lodge*. The maximum total gross floor area that Parks Canada is prepared to consider for the redevelopment of the Lodge is 2,750 m^2. In developing the new concept you will need to reduce the mass of the buildings from what you currently have in your proposal.
>
> Mr. Bill Fisher, Field Unit Superintendent, Banff National Park of Canada, will provide you with a copy of the common sections of the guidelines over the next few months and also answer any questions you may have. In the interim, Parks Canada officials will work with you to finalize the site-specific guidelines for Storm Mountain Lodge, based on the above. *All future development at this site will be reviewed according to the requirements of the Canadian Environmental Assessment Act, the new Canada National Parks Act and Regulations made thereunder, and the appropriate development review process*.
>
> OCAs and hostels are an important part of the range of accommodation available in the Rocky Mountain national parks, and I appreciate the time you have taken to contribute to this review process. [Emphasis added.]

20 By agreement with counsel, I received the foregoing communication as evidence on these two applications for judicial review notwithstanding that it was not covered by an affidavit and that it substantially post-dated the filing of each of the applications for judicial review.

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

21 The communication of the 22nd of January 2001, I was advised by counsel for the applicant, indicated that the maximum total gross floor area that Parks Canada was prepared to consider for the redevelopment of Storm Mountain Lodge was somewhere in the range of 50% of the total gross floor area reflected in the leaseholder's redevelopment proposal that had been before Parks Canada since June of 1997. Arguably at least, it would render any success that the leaseholder might have on the second application for judicial review a "pyrrhic victory." It further proposes to preempt any success that the applicant might have on the first application for judicial review by indicating that the whole process of review of the leaseholder's redevelopment proposal, having taken place as it has under a redevelopment review process governed by the current *National Parks Act*, the Banff National Park Management Plan and the Four Mountain Parks Outlying Commercial Accommodation Redevelopment Guidelines has been a waste of time, energy and resources, not only because of the new stipulation regarding maximum total gross floor area, but also because future development on the leasehold on which Storm Mountain Lodge is situated will be reviewed according to the requirements, not only of the *Canadian Environmental Assessment Act*, but of the new *Canada National Parks Act*, not yet proclaimed in force, and regulations made thereunder, whenever they might be promulgated, and " . . . the appropriate development review process," whatever that might be.

Analysis

Preliminary matters

22 By Notice of Motion filed the 9th of September 1998, the respondents on the first application sought to strike the notice of application as it was filed, in the submission of the respondents, out of time, did not appropriately identify the orders sought to be reviewed, was not limited to a review of a single order and named as a respondent the tribunal in respect of which the application was brought. By order dated the 19th of April 1999, Prothonotary Hargrave dismissed the application. In related reasons, he referred to a number of authorities, including *Pharmacia Inc. v. Canada (Minister of National Health & Welfare)*,[FN12] where Mr. Justice Strayer noted that " . . . the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself." At the opening of the hearing before me, I advised counsel for the respondents that, despite the fact that the respondents' motion had been dismissed, I regarded it as open to him to argue any of the grounds for the motion as a ground on which the application should now be dismissed before me. Counsel raised only one of the grounds put forward in the respondents' earlier motion, that being the alleged late filing of the application for judicial review. Counsel for the leaseholder urged that the application for judicial review was not, in fact, late-filed but that if it was, he moved for an extension of time to file. Out of an abundance of caution, I took cognizance of counsel's oral motion and ordered from the Bench that the time for filing of the first application for judicial review was extended to the time of actual filing, if such an extension was required.

23 On the second application for judicial review, the respondent moved to strike out certain paragraphs or certain sentences within paragraphs of the affidavit of George Schwarz filed on the application on the ground that the impugned paragraphs or sentences contained expression of personal opinion, argument, conclusion or interpretation of law or were otherwise inadmissible by virtue of R. 81(1) of the *Federal Court Rules, 1998*.[FN13] By order dated the 15th of June 2000, Prothonotary Hargrave adjourned the motion " . . . to the hearing of the judicial review on its merits. Disallowance of various affidavit evidence to be left to the judge hearing the judicial review. Costs in the course [sic]."

24 Once again at the opening of the hearing, I advised counsel that I would not strike the impugned paragraphs or sentences despite the fact that I had significant sympathy for the concerns of counsel for the respondent. I indicated that, rather than striking the impugned material, I would give to it the weight that I considered it deserved and that weight would be very little indeed in respect of those passages in Mr. Schwarz's affidavit that I regarded as inappropriate. In the result, this application on behalf of the respondent was not further pursued.

The First Application

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

25 As noted earlier in these reasons, the first relief requested on the first application, that is: "a declaration that the moratorium [reflected in the news release of the Minister and the Secretary of State (Parks) dated the 26th of June 1998 and the related letter to the leaseholder from the Superintendent dated the 26th of June 1998] is invalid or unlawful and of no force and effect as against the Storm Mountain Lodge redevelopment proposal," is, I am satisfied, moot.

26 In *Borowski v. Canada (Attorney General)*,[FN14] Mr. Justice Sopinka wrote at p. 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

Mr. Justice Sopinka continues at some length on the questions of when an appeal is "moot" and on the criteria for the exercise of discretion to "address" a moot issue. Against the guidance provided by the Supreme Court of Canada, I am satisfied that the issue of whether the moratorium here in question is invalid or unlawful and of no force and effect as against the leaseholder is moot. Further, I am satisfied that against the relevant criteria identified by the Court, this is not an appropriate case to respond to the issue of the validity of the moratorium on the leaseholder's redevelopment proposal.

27 I have earlier determined that the moratorium was a one-year development moratorium on commercial accommodation facilities outside park communities. It was related to the establishment of a panel to recommend, within the term of the moratorium, the principles to guide the nature, scale and rate of future development outside park communities. The one-year moratorium has now long since expired. The panel contemplated in the news release was indeed established and indeed reported within, or shortly after the expiration of, the one-year term of the moratorium. The report of that panel has now been made public. There is absolutely no evidence before the Court that the moratorium has been extended, or that a new moratorium has been imposed. In fact, throughout the term of the moratorium, Parks Canada officials continued to meet with the leaseholder and its advisors and to review the Storm Mountain Lodge redevelopment proposal.

28 In all of the circumstances, I conclude that there remains no "live controversy" regarding the moratorium between the parties that are before the Court. I further conclude that no purpose whatsoever would be served by examining at any length whether or not the moratorium was invalid or unlawful or of no force and effect as it purported to relate to the Storm Mountain Lodge redevelopment proposal. I conclude that the leaseholder suffered no significant prejudice by reason of the imposition of the moratorium, whatever its validity might have been. In short, I

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

conclude that no relief in respect of the moratorium that was purportedly imposed is warranted.

29 The second relief requested on the first application is not so easily dealt with. In effect, counsel for the leaseholder urges that the Superintendent, by his or her actions and the actions of persons within the Banff National Park offices of Parks Canada created a reasonable or legitimate expectation on the part of the leaseholder that the Storm Mountain Lodge redevelopment proposal would be reviewed and a decision would be taken on it in accordance with the development approval process and development guidelines in place when the redevelopment proposal, in its substantially ultimate form save for the related environmental assessment, was presented to Parks Canada in June of 1997.

30 The parameters of the doctrine of legitimate expectation are well established in law. In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*,[FN15] Mr. Justice Sopinka, for the majority, wrote at pp. 1203 and 1204:

> It appears, however, that at bottom the appellant's submission is that the conduct of the Committee created a legitimate expectation of consultation. . . .
>
> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation. [Citations omitted.]

More recently in *Baker v. Canada (Minister of Citizenship & Immigration)*,[FN16] once again for the majority, Madam Justice L'Heureux-Dubé wrote at pp. 839 and 840:

> . . . the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: . . . . As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. *If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness*: . . . . Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. *This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the* promises or *regular practices of administrative decision-makers*, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights. [Emphasis added, portions of the quoted paragraph and citations omitted.]

31 On the evidence before the Court in this matter, it is clear that officials of Parks Canada in Banff National Park continued to consult with the leaseholder and its representatives, throughout the development moratorium, on the leaseholder's redevelopment proposal. In fact, I am satisfied that officials continued to encourage the leaseholder to continue to invest time, energy and money in the refinement of the proposal, all as against the approval process and development guidelines then in place. The leaseholder engaged in the processes of the OCA Panel. The OCA panel reported to the Minister and, when the report of that Panel was eventually made public, its recommendation in favour of the leaseholder's redevelopment proposal also became public. From that time forward until the eve of the hearing of these applications for judicial review, Parks Canada officials continued to consult with the leaseholder and to encourage it to refine its redevelopment proposal. By reference to the words of Madam Justice L'Heureux-Dubé quoted above, I am satisfied that the doctrine of legitimate expectations, as applied in Canada, affecting as it does procedural fairness, takes into account the "regular practices of administrative decision-makers." In the result, once again, on the evidence in this matter, I am satisfied that it would be unfair for those administrative decision-markers to act in contravention of the representations, implicit in their continuation of consultations and encouragement, to, as reflected in

the fax received by the leaseholder on the eve of the hearing of these applications, "backtrack" on those representations.

32 In sum, I am satisfied that the actions of persons within the Banff National Park offices of Parks Canada created a legitimate or reasonable expectation on the part of the leaseholder that the Storm Mountain Lodge redevelopment proposal would be reviewed and a decision would be taken on it in accordance with the development approval process and development guidelines in place when the redevelopment proposal, in its substantially ultimate form, save for the related environmental assessment, was presented to Parks Canada in June of 1997. In the result, relief in favour of the leaseholder will issue on the first application. For reasons elaborated later in these reasons on the limitation of the scope of *mandamus*, that relief will not extend to requiring a particular decision, namely, approval, in respect of the redevelopment proposal.

The Second Application

33 During the hearing of these applications, counsel for the leaseholder conceded that, while *mandamus* may lie to compel a decision where a decision-maker has a range of choices open to him or her, it does not lie to compel a particular decision from among the range that might be available to the decision-maker. That this is the case is abundantly clear in the following quotation from Brown and Evans in *Judicial Review of Administrative Action in Canada*:[FN17]

> The presence of a discretion to act or not, or to act in one of a number of ways, will preclude the issue of *mandamus* since there will be no specific duty to act in a particular way. In other words, where a public official has a discretion, *mandamus* will not issue to compel its exercise in the manner sought by the applicant. [Footnote omitted.]

34 The foregoing is not to say that *mandamus* does not lie in circumstances where a decision-maker has a range of optional decisions open to him or her. It is merely to say that *mandamus* does not lie to require the decision-maker to make a particular decision from among that range of choices. In *Kahlon v. Canada (Minister of Employment & Immigration)*,[FN18] Mr. Justice Mahoney put the principle very succinctly at p. 387:

> *Mandamus* will issue to require performance of duty; it cannot, however, dictate the result to be reached.

The foregoing is affirmed in Brown and Evans,[FN19] at p. 1-44, where the learned authors write:

> On the other hand, when a decision must be made, *mandamus* will lie even if there is a discretion as to what the decision can be. [Citations omitted.]

35 Against the foregoing, I am satisfied that many of the declaratory reliefs sought on the second application as described earlier in these reasons, and some of the related relief in the way of *mandamus*, fall away. In essence, what the leaseholder is left seeking is closure to the review of the final environmental assessment delivered to Parks Canada on the 18th of November 1999.

36 The review process provided for in the *Canadian Environmental Assessment Act* is, when reduced to its simplest terms, not a complex process. But given the myriad of situations to which it must apply, and the various forms of assessment that are open, its description in the *Act* is quite complex. It is admirably summed up in the reasons of Mr. Justice Linden in *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*.[FN20] Mr. Justice Linden wrote at paras. 17 to 19;

> Environmental assessment is a tool used to help achieve the goal of sustainable development by providing "an effective means of integrating environmental factors into planning and decision-making processes." According to Parks Canada, environmental assessment is "a comprehensive and systematic process designed to identify, ana-

> lyse and evaluate the environmental effects of proposed projects." The Supreme Court of Canada commented that an environmental assessment had become "a planning tool that is now generally regarded as an integral component of sound decision-making."
>
> There are three types of environmental assessments: screening, comprehensive study, and panel review. Screening and comprehensive study account for the vast majority [of] projects assessed under the Act.
>
> The basic framework for an environmental assessment is as follows. First, the responsible authority must decide whether the Act applies to the project and if it does, which type of environmental assessment applies. The next step is the conduct of the assessment itself. Following the assessment, the responsible authority makes a decision as to whether or not to allow the project to proceed. The final step is the post-decision activity which includes ensuring that mitigation measures are being implemented and giving public notice concerning the responsible authority's course of action. [Citations omitted.]

37 It was not in dispute before me that the responsible authority in relation to the leaseholder's redevelopment proposal is the Superintendent. The Superintendent, or his delegate, took the decision that the *Canadian Environmental Assessment Act* applies to the project and determined that the lowest level of environmental assessment, that is to say screening, was applicable. The leaseholder, in consultation with Parks Canada and through the agency of appropriate contractors, conducted the assessment which resulted in the final report submitted to Parks Canada on the 18th of November 1999. Between that date and the date when the second application was commenced, the responsible authority, that is to say the Superintendent, neither ensured that a screening report was prepared (para. 18(1)(b) of the *Act*), nor took one of the courses of action, more generally described as a decision, open to him or her under s. 20 of the *Act*. Indeed, on the evidence that was before the Court, neither of these steps had been completed at the time of the hearing of these applications. If both had been completed, I am satisfied that the second application would have been moot, regardless of what the final decision taken under s. 20 by the responsible authority might have been. In the final analysis, it is the fulfilment of his or her statutory obligations by the responsible authority that the applicant seeks to compel by *mandamus*.[FN21]

38 In *Apotex Inc. v. Canada (Attorney General)*,[FN22] at para. [45], Mr. Justice Robertson enumerated several "principle requirements" that must be satisfied before *mandamus* will issue. They are the following:

> (1) There must be a public legal duty to act;
>
> (2) The duty must be owed to the applicant;
>
> (3) There is be a clear right to performance of that duty, . . .
>
> (4) Where the duty sought to be enforced is discretionary, [certain] rules apply; . . .
>
> (5) No other adequate remedy is available to the applicant;
>
> (6) The order sought will be of some practical value or effect;
>
> (7) The court in the exercise of its discretion finds no equitable bar to the relief sought;
>
> (8) On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

Mr. Justice Robertson cites substantial authority for each of the foregoing principles. He elaborates principles (3) and (4) in a degree that I find unnecessary to repeat here.

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

39 Briefly, against the foregoing principles, I reach the following conclusions on the evidence that is before the Court:

- first, the *Canadian Environmental Assessment Act* places on the responsible authority, here the Superintendent, a public legal duty to act;

- second, the duty is owed to the leaseholder;

- third, given the conduct of the Superintendent and his or her delegates since the redevelopment proposal was filed, the leaseholder has a clear right to performance of that duty. I am satisfied that the leaseholder had, at the time the second application for judicial review was filed, satisfied all conditions precedent then made known to it giving rise to the duty, and that there was a prior demand for performance of the duty. If not between the time the environmental assessment report was provided and the time the second application for judicial review was filed, then certainly between the time the environmental assessment report was provided and the time of hearing of the second application, a reasonable time to comply was provided. There was no outright refusal or rejection of the environmental assessment up to the time of the hearing before me. There has been an implied refusal since the second application was filed, through unreasonable delay. I am not prepared to interpret the communication received on the eve of the hearing before me as either an outright or implied rejection of the environmental assessment. It bears no relation to the environmental assessment *per se*;

- fourth, the duty sought to be enforced is not discretionary, it is mandatory although the ultimate decision need not be favourable to the leaseholder;

- fifth, no other adequate remedy is available to the leaseholder;

- sixth, the order sought will be of some practical value or effect, and I will return to this point briefly below;

- seventh, there is no equitable bar to relief by way of *mandamus*; and

- eight and finally, on a "balance of convenience" *mandamus* should issue.

40 I return to the sixth principle, whether or not *mandamus*, if issued, would be of some practical value or effect. It would appear to the Court that, if the Parks Canada letter delivered by fax to the leaseholder on the eve of the hearing of this matter stands as a decision and not merely a notice, completion of the environmental assessment process based upon the redevelopment proposal submitted in 1997 might be considered to be of no practical value or effect; it would, in effect, be moot. That being said, I am not prepared to reach a conclusion that the position adopted by Parks Canada in the fax stands as a decision that will bind the leaseholder. That is a matter not before me.

41 As noted earlier, the fax delivered on the eve of the hearing of these applications was not before me under cover of an affidavit and substantially post-dated the perfection by both parties of the second application. The issue of mootness was not addressed in memoranda of argument and was not argued before me on behalf of the leaseholder. I could not reasonably have expected it to be argued. Under the circumstances, I am not prepared to reject all of the reliefs sought on the second application on the basis of mootness. It is worth noting here that the leaseholder is not simply seeking an order directing the respondent to make a decision *per se*. As noted earlier, when the two applications are read together, relief is sought to require the Superintendent to make a decision under the regulatory scheme and process consistent with the leaseholder's legitimate expectations. To fail to grant relief on the second application would completely frustrate the relief I have already determined to grant on the first application. I am not prepared to conclude that the fax forecloses the justiciability of these applications that are quite properly before the Court. Thus, I

am prepared to conclude that I should proceed on the basis that *mandamus* was, at the date of the hearing before me, and is, as of the date of my decision herein, of some practical value or effect.

42 Counsel for the respondent urged that there was here no unreasonable delay that would justify the issue of *mandamus*. He noted that legislative policy regarding the National Parks was in flux throughout the period of time when the leaseholder's redevelopment proposal was before Parks Canada and, indeed, continues to be in flux. That concern is reflected in the fax received by the leaseholder on the eve of trial. This issue was addressed by Mr. Justice Robertson in *Apotex*.[FN23] At para. [86], he wrote:

> Returning to the facts before us, in my view it cannot be said that in the exercise of his statutory power under the *FDA Regulations* the Minister was entitled to have regard to the provisions of Bill C-91 after they were enacted but before they were proclaimed into effect. *In the circumstances of this case, pending legislative policy is not a relevant consideration which can be unilaterally invoked by the Minister*. [Emphasis added.]

I am satisfied that the same might be said here. In the absence of clear statutory authority to the contrary, that is in force and not merely pending, pending legislative policy in the form of the new *Canada National Parks Act*, with all of the ramifications that might flow from it, cannot be unilaterally invoked by the Superintendent to delay or avoid fulfilment of the statutory duties imposed on him or her as a responsible authority under the *Canadian Environmental Assessment Act*. If he or she were able to do so, finality in dealings with Government officials in matters such as that here before the Court would be nothing more than a chimera.

Standard of Review

43 Counsel for the leaseholder urged that on both the first and second applications for judicial review, the standard of review that I should apply in determining whether or not to grant relief is "correctness." By contrast, counsel for the respondents urged that the appropriate standard of review on both applications for judicial review is "reasonableness." I determine that I am not obliged to address this issue. Whichever might be the appropriate standard of review, I am satisfied that the result would be the same.

Conclusions

44 In the result, on the first application, an order in the nature of *mandamus* will go directing the respondents to review the leaseholder's redevelopment proposal with respect to Storm Mountain Lodge that is before him in accordance with the development approval process and development guidelines that were in force in June of 1997 as modified only by the addition of a role for the Advisory Development Board and to issue to the leaseholder a redevelopment permit with respect to that proposal or, alternatively, to reject the redevelopment proposal. If the redevelopment proposal is rejected, the respondents shall provide to the leaseholder reasons for the rejection as against the development approval process and development guidelines referred to in this paragraph.

45 In respect of the second application for judicial review, an order in the nature of *mandamus* will go directing the responsible authority to fulfil his or her obligations under ss. 18 and 20 of the *Canadian Environmental Assessment Act* in relation to the environmental assessment submitted by the leaseholder in relation to its redevelopment proposal for Storm Mountain Lodge which environmental assessment was submitted to Parks Canada on or about the 18th of November 1999. If the responsible authority rejects the environmental assessment pursuant to s. 20 of the *Act*, he or she will be required to provide to the leaseholder reasons justifying such rejection.

Costs

46 I regard the leaseholder as having been substantially successful on these two applications for judicial review. In the result, in respect of each application for judicial review, an order of costs will go in favour of the leaseholder and

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

against, in the case of the first application, the Minister of Canadian Heritage, and in the case of the second application, the Attorney General of Canada, such costs, if not agreed upon, to be assessed in accordance with column III of the table to Tariff B to the *Federal Court Rules, 1998*.

— Annex

(Footnote 21)

18.(1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

(a) a screening of the project is conducted; and

(b) a screening report is prepared.

(2) Any available information may be used in conducting the screening of a project, but where a responsible authority is of the opinion that the information available is not adequate to enable it to take a course of action pursuant to subsection 20(1), it shall ensure that any studies and information that it considers necessary for that purpose are undertaken or collected.

(3) Where the responsible authority is of the opinion that public participation in the screening of a project is appropriate in the circumstances, or where required by regulation, the responsible authority shall give the public notice and an opportunity to examine and comment on the screening report and on any record that has been filed in the public registry established in respect of the project pursuant to section 55 before taking a course of action under section 20.

. . . . .

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

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

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

(c) where

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

(2) Where a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, notwithstanding any other Act of Parliament, in the exercise of its powers or the performance of its duties or functions under that other Act or any regulation made thereunder or in any other manner that the responsible authority considers necessary, ensure that any mitigation measures referred to in that paragraph in respect of the project are implemented.

(3) Where the responsible authority takes a course of action pursuant to paragraph (1)(b) in relation to a project,

(a) the responsible authority shall file a notice of that course of action in the public registry established in respect of the project pursuant to section 55; and

(b) notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made thereunder shall be exercised or performed that would permit that project to be carried out in whole or in part.

. . . . .

18.(1) Dans le cas où le projet n'est pas visé dans la liste d'étude approfondie ou dans la liste d'exclusion, l'autorité responsable veille :

a) à ce qu'en soit effectué l'examen préalable;

b) à ce que soit établi un rapport d'examen préalable.

(2) Dans le cadre de l'examen préalable qu'elle effectue, l'autorité responsable peut utiliser tous les renseignements disponibles; toutefois, si elle est d'avis qu'il n'existe pas suffisamment de renseignements pour lui permettre de prendre une décision en vertu du paragraphe 20(1), elle fait procéder aux études et à la collecte de renseignements nécessaires à cette fin.

(3) Avant de prendre sa décision aux termes de l'article 20, l'autorité responsable, dans les cas où elle estime que la participation du public à l'examen préalable est indiquée ou dans le cas où les règlements l'exigent, avise celui-ci et lui donne la possibilité d'examiner le rapport d'examen préalable et les documents consignés au registre public établi aux termes de l'article 55 et de faire ses observations à leur égard.

. . . . .

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

a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'appli-

cation des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en oeuvre du projet et veiller à l'application de ces mesures d'atténuation;

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

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

(i) s'il n'est pas clair, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,

(iii) si les préoccupations du public le justifient.

(2) L'autorité responsable qui prend la décision visée à l'alinéa (1)a) veille, malgré toute autre loi fédérale, lors de l'exercice des attributions qui lui sont conférées sous le régime de cette loi ou de ses règlements ou selon les autres modalités qu'elle estime indiquées, à l'application des mesures d'atténuation visées à cet alinéa.

(3) L'autorité responsable qui prend la décision visée à l'alinéa (1)b) à l'égard d'un projet fait consigner un avis de sa décision au registre public tenu aux termes de l'article 55 pour le projet, et, malgré toute autre disposition d'une loi fédérale, aucune attribution conférée sous le régime de cette loi ou de ses règlements ne peut être exercée de façon qui pourrait permettre la mise en oeuvre du projet en tout ou en partie.

Applications granted in part.

FN1 S.C. 1992, c. 37.

FN2 R.S.C. 1985, c. N-14. The *Canada National Parks Act* was enacted by Parliament as Chapter 32 of the *Statutes of Canada, 2000*, assented to on the 20th of October 2000. By s. 46 of that Act, the *National Parks Act* is repealed. Subject to limited exceptions not relevant here, subs. 70(1) of that Act provides that its provisions will come into force on a day to be fixed by order of the Governor in Council. As at the dates of hearing of these applications for judicial review, the *Canada National Parks Act* had not been proclaimed in force and the *National Parks Act* had not been repealed.

FN3 Applicant's application record on the first application, vol. 1, tab 2(c).

FN4 Applicant's application record on the first application, vol. 1, tab 2(d).

FN5 Between the times the OCA Guidelines and the Banff National Park Management Plan were published, the "Responsible Minister" in relation to national parks was changed from the Minister of the Environment to the Minister of Canadian Heritage.

FN6 Applicant's application record on the first application, vol. 1, tab 2(j).

2001 CarswellNat 328, 2001 FCT 112, 37 C.E.L.R. (N.S.) 295, 32 Admin. L.R. (3d) 113, 201 F.T.R. 85, [2001] F.C.J. No. 263

FN7 Applicant's application record on the first application, tab 2(k).

FN8 Applicant's application record on the first application, tab 2(v).

FN9 Respondent's application record on the first application, tab A2.

FN10 Applicant's application record on the second application, vol. III, tab 3A, p. 26.

FN11 Respondent's application record on the first application, vol. 2, tab B4.

FN12 (1994), [1995] 1 F.C. 588 (Fed. C.A.), at 596-597.

FN13 SOR/98-106.

FN14 [1989] 1 S.C.R. 342 (S.C.C.).

FN15 [1990] 3 S.C.R. 1170 (S.C.C.).

FN16 [1999] 2 S.C.R. 817 (S.C.C.).

FN17 Toronto: Canvasback Publishing, 1998, at 1-42. In support of their opinion, Brown and Evans cite *Apotex Inc. v. Canada (Minister of National Health & Welfare)* (1999), 252 N.R. 72 (Fed. C.A.), and *Rocky Mountain Ecosystem Coalition v. Canada (National Energy Board)* (1999), 174 F.T.R. 17 (Fed. T.D.).

FN18 [1986] 3 F.C. 386 (Fed. C.A.), at 387.

FN19 *Supra*, note 17.

FN20 [2001] F.C.J. No. 18 (Fed. C.A.).

FN21 For ease of reference, ss. 18 and 20 of the *Canadian Environmental Assessment Act* are set out in an annex to these reasons.

FN22 (1993), 162 N.R. 177 (Fed. C.A.).

FN23 *Supra*, note 22.

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