

Federal Court



Cour fédérale

Date: 20140623

Docket: T-51-13

Citation: 2014 FC 604

Ottawa, Ontario, June 23, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

SUNSHINE VILLAGE CORPORATION

Applicant

and

**PARKS CANADA AGENCY and
HER MAJESTY THE QUEEN IN RIGHT OF
CANADA**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is a challenge to a decision of the Superintendent of Banff National Park of Parks Canada Agency [Superintendent] to prohibit the parking of vehicles on the upper three kilometres of the Sunshine Access Road from the Trans Canada Highway to Sunshine Village Ski Resort [Applicant or Sunshine] in Banff National Park.

[2] The relevant legislative provisions are:

National Parks General Regulations, SOR/78-213

36. (1) Where the superintendent deems it necessary for the prevention of any seasonal or temporary danger to persons, flora, fauna or natural objects in a Park, he may by notice in writing close to public use or traffic any area in the Park for the period he considers the danger will continue.

(2) A notice referred to in subsection (1) shall be displayed on each approach road, trail or other way of access to the area in the Park closed to public use or traffic.

(3) No person shall enter any area in a Park during the period that it is closed to public use or traffic pursuant to subsection (1) except with the permission of the superintendent.

36. (1) Le directeur du parc peut interdire par un avis écrit l'accès au public ou à la circulation de zone, lorsqu'il le juge nécessaire pour préserver le public, la faune, la flore ou les matières naturelles de tout danger de nature temporaire ou saisonnière.

(2) Cet avis est affiché sur les voies routières, ferroviaires ou autres voies d'accès à la zone concernée.

(3) Il est interdit d'y pénétrer sans autorisation du directeur du parc.

Canada National Parks Act, SC 2000, c 32

13. Except as permitted by this Act or the regulations,

(a) no public lands or right or interest in public lands in a park may be disposed of; and

(b) no person shall use or occupy public lands in a park.

13. Sauf dans la mesure permise par les autres dispositions de la présente loi ou ses règlements, il est interdit d'aliéner les terres domaniales situées dans un parc, de concéder un droit réel ou un intérêt sur celles-ci, de les utiliser ou de les occuper.

National Parks Highway Traffic Regulations, CRC, c 1126
[Highway Regulations]

16. (1) The superintendent may mark and erect on or along a highway a traffic sign or device that	16. (1) Un directeur de parc peut placer ou ériger en bordure d'une route ou sur la chaussée un signal de route pour
...	...
(b) regulates or prohibits the tethering of horses or the stopping or parking of motor vehicles or any class thereof;	b) réglementer ou interdire l'attache de chevaux ou le stationnement ou l'arrêt de véhicules automobiles ou de catégories de véhicules automobiles;
...	...
(h) regulates pedestrian traffic;	h) réglementer la circulation des piétons;
...	...
(k) regulates, directs or controls in any other manner the use of the highway by horses, motor vehicles or pedestrians.	k) réglementer, diriger ou contrôler de quelque autre façon la circulation sur la route des véhicules automobiles, des chevaux ou des piétons.
...	...
23. (1) The superintendent may erect a sign that designates an area as	23. (1) Un directeur de parc peut, au moyen d'un écriteau, désigner une zone comme
...	...
(c) an area where parking is not permitted.	c) une zone où le stationnement est interdit.

II. Background

[3] The Sunshine ski resort leased land from the federal Crown starting on March 10, 1981.

The lease granted Sunshine general access rights via the Access Road and obligated the Crown

to maintain the Access Road and to provide comprehensive avalanche control to all areas which might affect the use and enjoyment of the leased land.

[4] Sunshine is accessible by a seven kilometre access road which leads from the Trans Canada Highway to the gondola base. The first four (4) kilometres after leaving off the highway are referred to as the “Lower Road”. The Lower Road is not threatened by avalanche.

The upper three (3) kilometres are referred to as the “Upper Road”. This stretch of road is threatened by eight (8) large and serious avalanche paths (known as Bourgeau 1 through 7 on the north side and Eagle 3 from the south). The paths are subject to avalanches of varying degrees of frequency.

[5] There is a parking lot at the gondola base which has a parking capacity of 1,500-1,700 cars. This parking lot is within the Sunshine lease area, as is a portion of the road connecting the parking lot to the Upper Road [the Pull Out Area].

[6] On busy days at the hill, the parking lot is insufficient for the demand. On those days at Sunshine’s instructions, the public is directed to park on the Access Road starting at the top on the Upper Road and leading down the road toward the highway. The Upper Road is generally sufficient to handle the overflow parking which is typically required between 25 and 35 days per year.

[7] There is a dispute as to how long Sunshine had been using the Access Road for overflow parking. The Applicant alleges it began over 40 years ago; the Respondents allege it began in the

late 1990s. Until the winter of 2005/2006 there were signs on the Upper Road stating “No Stopping – Avalanche Area”. There is no issue that the Respondents knew about the practice and did not take steps to prevent it (by towing the parked cars, for example).

[8] The evidence establishes that parking is a problem because of limited capacity in the parking lot at the gondola base. Parking on the Access Road raises issues of risk and responsibility for avalanches and their consequences.

[9] In May 2006 Parks Canada commissioned and received the Stetham Report which recommended that Parks Canada apply a higher standard of avalanche forecasting and control to the Access Road and parking lot than would normally be applied for a highway with moving traffic. Relying on this sophisticated forecasting, cars would be allowed to park in designated sectors of the Access Road according to the daily avalanche hazard rating. The Stetham Report also recommended expanding the parking lot at the base gondola area.

These recommendations were adopted on an interim basis and the “no stopping” signs were taken down [2006 Interim Protocol]. Since entering into this protocol, the parties have been meeting to discuss expanding resort parking and other overflow parking alternative.

[10] On March 6, 2012, a critical event in the case occurred. Parks Canada triggered a large avalanche in the Bourgeau 7 avalanche path. The avalanche exceeded its historical runout boundaries and deposited approximately 150 metres of debris and broken timber on the Upper Road in an area previously believed to be safe and where Sunshine customers regularly parked

their vehicles. This avalanche was far bigger than the avalanche experts, who had triggered it, had expected.

[11] Each side has a different perspective on this event and its importance/relevance to the final decision. Parks Canada characterized this event as a “close call” whereas Sunshine characterizes it as a successful exercise of avalanche management. Parks Canada has described it as a defining moment that underscored the unpredictability of avalanches, as if this was a new found insight which justified the decision.

[12] A week after the avalanche Parks Canada informed Sunshine that parking would be restricted in the area of the large avalanche for the remainder of that season; that a new risk assessment would be undertaken; and that Sunshine should begin to look at alternative parking options.

[13] Parks Canada received the McElhanney Report on March 28, 2012. This report identified a number of safety issues related to parking on the Upper Road, and concluded that the safest solution to mitigate these issues was to relocate the roadside parking elsewhere.

[14] About a week later Parks Canada received the Parks Canada Report prepared by Alpine Solutions Avalanche Services. This report concluded that the risk of the overflow parking on the Upper Road was very high and made three (3) recommendations:

1. restrict vehicles from parking in avalanche areas unless Parks Canada avalanche personnel receive the necessary resources and manpower to apply a level of risk

management comparable to an alpine ski area. Ticket and tow all vehicles in restricted avalanche areas;

2. re-establish a continuous avalanche zone along the Upper Access Road that restricts vehicles from parking or stopping between the east side of the Bourgeau 1 path to the west side of the Eagle 3 path (the existing gate). A second restricted avalanche zone should be established in the parking lot; and
3. as in 2, except apply a higher level of risk management for the Eagle 5 path that allows limited parking and pedestrian exposure within the extreme boundary of the path.

[15] On September 17, 2012, Sunshine was provided with the McElhanney and Parks Canada reports and informed that there would be no parking on the Upper Road until further notice [Interim Decision]. Sunshine protested this latest position.

[16] Parks Canada advised Sunshine to provide any additional information it wished Parks Canada to consider before a final decision was made. Sunshine was also informed that Parks Canada was retaining a consultant to review the situation and provide recommendations.

[17] Despite media reports of a parking ban on the Upper Road and the erection of “No Parking” signs on the Upper Road, the Superintendent confirmed that a final decision had not been made.

[18] By the end of October 2012, Sunshine had its own expert report which addressed issues in the Parks Canada Report and the McElhanney Report. The Sunshine Report and submissions were provided to Parks Canada on November 1, 2012.

[19] The essential conclusion of the Sunshine Report was that the 2006 Interim Protocol provided acceptable risk management. The Sunshine Report concluded that so long as the established avalanche mitigation and traffic management protocols are continued, there is no significant risk to the continuation of the established practice of overflow parking on the Upper Road,

[20] On November 9, 2012, Parks Canada varied its September 17, 2012 interim decision. Notably, an additional 1 kilometre of parking was made available on the Upper Road subject to certain restrictions.

[21] An undated report to the Superintendent entitled "Parking Among Avalanche Zones on the Sunshine Valley Road" are the reasons for the Decision. There is an agreed date of the Decision – December 11, 2012. On this date the Superintendent sent a letter to Sunshine advising that public parking will be prohibited on the Upper Road, with the exception of approximately 1 kilometre between Bourgeau 4 and Bourgeau 1 which will be available for parking during periods of minimal avalanche hazard.

[22] Sunshine protested the decision. It failed to secure an injunction against the interim decision; sought reconsideration from Parks Canada and ultimately commenced this judicial review.

[23] The events leading to the Decision have been laid out in some detail due to Sunshine's allegation that the process leading to the Decision was unfair.

III. The Decision

[24] The Superintendent's final decision was as follows:

Public parking will not be permitted between the gate at the Sunshine Village parking lot and the east side of Bourgeau 4. Public Parking will be permitted between the east side of Bourgeau 4 and the east side of Bourgeau 1 during periods of forecasted minimal avalanche hazard only.

[25] The permission to park in the 1 kilometre area during low risk periods is a change from the Interim Decision, which prohibited all parking on the Upper Road at all times.

[26] The reasons for the decision are contained in the undated Report to the Superintendent. The Report outlined the history, the context and current status. It then summarized the various reports in issue and then turned to the considerations which should guide the final outcome.

These considerations were the following:

1. The access road has the highest Avalanche Hazard Risk of all the roads in Banff, Kootenay and Yoho National Parks. Both reports calculate the risk to vehicles after mitigation to be Very Low. The 2006 Interim Protocol resulted in slow or stalled moving traffic and dozens of pedestrians being exposed to avalanche hazard on peak days.

2. The Parks Canada Report recommends a return to the pre 2006 “no stopping in avalanche areas” rule. This is consistent with practices in other national parks in Canada.
3. The frequency, size and timing of both natural and explosive triggered avalanches are very difficult to predict.
4. The Sunshine report is based on risk to moving traffic, which is not the issue. Rather the issue is the risk posed by unpredictable avalanches to slowed or stopped traffic and pedestrians. The 2006 Interim Protocol does not provide enough margin of safety given these uncertainties.
5. Parks Canada has the obligation and responsibility for managing avalanche risk on the entire access road. The *Canada National Park Act* gives the Minister the power to administer, manage and control park lands. The *National Parks Highway Traffic Regulations* enables the Superintendent to erect signs to prevent parking.
6. The E4 avalanche path lies directly above the Sunshine parking lot. The Parks Canada report suggests restricting parking in this path, but Parks Canada recommends accepting the risk as restricting a previously unrestricted parking area in the middle of the parking lot is impractical.
7. This issue could impact Sunshine’s business on peak days if a long-term solution is not found.
8. Other ski areas with similar parking problems have found solutions by using buses to transport people on peak days.
9. Any interim measures offered to Sunshine should be limited to one winter only as history shows that interim measures risk becoming permanent in the absence of a commitment to a long term solution.

[27] The Report then laid out options as follows:

1. No parking on the upper road

Parking and/or stopping is prohibited on the upper road from the western side of E3 to the eastern side of B1. Parking may continue on the lower road for the winter of 2012-13 only.

This operation will require close cooperation with Sunshine. In the absence of such cooperation a strong Parks Canada presence will be necessary in order to manage and enforce the parking and pedestrian scenario on the upper road.

Option 1 is the recommended option.

2. Very limited parking on the upper road

The same as Option 1, with an addition 1 km of parking from the east side of B4 to the east side of B1 during periods of forecasted minimal risk.

This option carries a higher element of risk and does not meet industry best practices.

3. Continue the 2006 Interim Protocol

Continue to allow vehicles to park on the upper access road, exposing vehicles and pedestrians to active avalanche paths subject to daily risk assessment.

This option is not recommended as the risk to people is unacceptable.

[28] The Superintendent chose Option 2. As mentioned earlier, the Report in effect constitutes the reasons for the Superintendent's decision.

IV. Analysis

[29] While the parties have each phrased the issues slightly differently, the issues can be described as follows:

1. Was the decision within the Superintendent's jurisdiction?
2. Was the decision reasonable?
3. Were the requirements of procedural fairness observed?

A. *Standard of Review*

[30] The issues of the applicable standards of review are well settled by now:

- a) Jurisdictional issues are reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]). The issue is a true jurisdictional question of the powers of the Superintendent in an area where he has no expertise and where it would be inconsistent with the general rule of law to allow a representative of the Executive board to determine the extent of his own powers.
- b) The decision to close the Upper Road to parking is made pursuant to the exercise of discretion given to the Superintendent to manage the park. The decision is analogous to a decision to prohibit the harvesting of soft shell crabs in a national park or to close off a river to all boating activity – both of the decisions were reviewable on a reasonableness standard (see *Burley v Canada (Attorney General)*, 2008 FC 588, 328 FTR 227, and *Young v Canada (Attorney General)*, [1999] FCJ No 1290, 174 FTR 100).
- c) Breach of procedural fairness is reviewable on a standard of correctness (*Dunsmuir*).

B. *Superintendent's Jurisdiction*

[31] It is the Applicant's position that the Superintendent did not have jurisdiction to issue an absolute indefinite ban on parking on the Upper Road or the Pull Out Area. The Pull Out Area lies within Sunshine's lease area and therefore, the Applicant contends, not subject to the

Highway Regulations. The Applicant claims that it has the right to control the Upper Road by easement of prescription.

[32] However, paragraph 13(b) of the *Canada National Parks Act* provides that no person shall use or occupy public lands within a national park except as permitted by the Act or its regulations. The Superintendent has authority to regulate parking throughout Banff National Park on all “highways” and “areas”. The whole Upper Road, along with the Pull Out Area, constitutes a “highway”.

[33] The Applicant has taken the position that the power to post signs and thus control parking found in paragraph 23(1)(c) of the Highway Regulations is not applicable to Sunshine’s lease areas because the provision was enacted in 1990, after the lease was effective and cannot be applied retrospectively. However, that argument cannot be sustained because clause 3 of the lease incorporates by reference the obligation to comply with the Act and Regulations as they exist from time to time.

[the Lessee must comply] with the provisions of the National Parks Act, and with the Regulations made pursuant to such statute and all other statutes relating thereto, as they may be amended, revised or substituted from time to time.

[34] The lease is not a purely commercial contract as it incorporates legislated and regulatory provisions. It is evident that the clause in the lease intended to and did capture the statute and regulations which governed the Park as they stood from time to time.

[35] Further, paragraph 23(1)(c) of the Highway Regulations gave the Superintendent the express power to post signs that regulate or prohibit the stopping or parking of motor vehicles. This is consistent with the purpose of the Highway Regulations to control traffic and the safety of highways in the Park. That includes the ability to address risks to highway users arising from and including such matters as wildlife, rock slides and avalanches.

[36] Prohibiting the parking of vehicles on a highway or in an area of unpredictable avalanche paths is rationally connected to the purposes of the Act and Highway Regulations and is supported by paragraphs 16(1)(b) and (k) and s 23(1)(c) of the Highway Regulations.

[37] The Superintendent's Decision was fully within his jurisdiction to make.

C. *Reasonableness of Decision*

[38] This is a case of "duelling experts". In the face of conflicting expert reports, it was the Superintendent's obligation to act in good faith, for proper purposes and to find an outcome that falls within "a range of acceptable outcomes".

[39] The Applicant argues that the Decision is unreasonable because it does not accord with the Sunshine Report. It submits that the 2006 Interim Protocol has been effective in regulating traffic; all avalanches since 1990 have been controlled avalanches.

[40] However, there are equally credible expert reports which point to and support the type of ban which the Superintendent imposed. There is no evidence of improper purpose or capricious

behaviour. Nor is there any evidence that the Superintendent invoked the ban to avoid committing resources to avalanche risk management. Even if there were, prudent management of resources is well within the mandate of the Superintendent. One could reasonably contend that the Applicant is attempting to secure more free parking.

[41] It is also within the mandate of the Superintendent to limit risk and to manage the risk and liability which the federal Crown is prepared to absorb.

[42] The Respondents' reliance on the March 2012 controlled avalanche as a trigger for the Decision is questionable. To cast it as a "wake up call" suggests prior drowsiness on the part of Parks Canada. The avalanche, being greater in size than predicted, merely confirmed what all experts seem to suggest is common general knowledge: that uncontrolled avalanches are unpredictable as to time, location and strength. Nonetheless, the March 2012 avalanche undermined the thesis behind the 2006 Interim Protocol which was based on reliable day-to-day avalanche forecasting.

[43] The differences between the Applicant's approach to avalanche risk management and that of Parks Canada runs along a spectrum of appropriate risk management. The Superintendent's decision to allow an additional 1 kilometre of parking with restrictions is evidence that he applied his mind to the issues and did not simply delegate responsibility to one or more experts.

[44] The Superintendent has a number of tools to manage avalanche risk and he is not required to use any particular method of management. This is a discretion with which the Court should be reluctant to interfere.

[45] Any suggestion of acquired rights or easements has not been made out. Legal prescription does not run and the suggestion that parking has occurred on the Upper Road for more than 40 years is undermined by the fact that until 2006, all parking on the Upper Road was prohibited.

[46] Therefore, the Decision is reasonable.

D. *Procedural Fairness*

[47] The Applicant's allegations in this regard can be summarized as:

- there was a failure to consult with respect to the interim decision; that interim decision was publicly announced without a prior opportunity to be heard;
- that Sunshine had a legitimate expectation that a decision regarding parking would not be made without real consultation;
- that there is a reasonable apprehension of bias in that Sunshine's right to make submissions after the interim decision was a hollow right;
- that Sunshine was denied a response to its Sunshine Report; and
- that Sunshine was denied disclosure and an opportunity to challenge the Parks Canada Report.

[48] I am not persuaded that there is any basis for a breach of procedural fairness for the following reasons:

- there is no evidence of a public announcement of the interim decision as alleged by the Applicant;
- the Applicant had notice after the March 2012 controlled avalanche that the 2006 Interim Protocol would likely be changed pending the result of an independent report, as evidenced by the Applicant's own documents. The Applicant was even warned to look for alternate parking spaces;
- following the Interim Decision, the Applicant was given over a month to provide submissions;
- the placement of "no parking" signs before the first snowfall is not sufficient to prove the Decision to be a sham. The exigencies of weather and oncoming winter are a sufficient explanation;
- there was real consultation before a final decision; this is evident from the record and the Superintendent's decision to vary the Interim Decision by permitting parking on 1 kilometre of the Upper Road in times of low risk;
- the allegation of bias is farfetched as Sunshine had the opportunity to make submissions before the final decision. The allegation that this opportunity was hollow cannot stand in light of the Superintendent's decision to vary the Interim Decision on the basis of Sunshine's submissions; and
- there was no right to rebut the Parks Canada Report as that report is essentially the reasons for decision.

[49] Therefore, there is no breach of procedural fairness.

V. Conclusion

[50] This judicial review will be dismissed with costs at the usual scale.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs at the usual scale.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-51-13

STYLE OF CAUSE: SUNSHINE VILLAGE CORPORATION v PARKS
CANADA AGENCY and HER MAJESTY THE QUEEN
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