Mountain Parks Watershed Assn. v. Chateau Lake Louise Corp., 2004 FC 1222 (CanLII)

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Dockets : T-1481-02 and T-592-02

Citation : 2004 FC 1222

BETWEEN :

MOUNTAIN PARKS WATERSHED ASSOCIATION

Applicant

AND :

CHATEAU LAKE LOUISE CORPORATION AND

THE HONOURABLE SHEILA COPPS,

MINISTER OF CANADIAN HERITAGE

Respondents

REASONS FOR ORDER

ROULEAU, J.

[1] This is an application for an order quashing the decision of Gaby Fortin, Director-General, Western Canada, Parks Canada Agency, dated August 12, 2002, to issue a Water Withdrawal Permit to the respondent Chateau Lake Louise Corporation.

[2] The facts leading to this application may be summarized as follows. The applicant, Mountain Parks Watershed Association, is a provincially registered not-for-profit society whose primary objective is promoting the highest possible environmental standards in the watersheds of Canada's Rocky Mountain Parks.

[3] The Respondent Minister for Canadian Heritage is named in her capacity as the person responsible for ensuring that the Parks are preserved for the enjoyment of future generations and as the person responsible for ensuring the ecological integrity of the parks.

[4] The Chateau Lake Louise, owned by the respondent corporation and located on the shores of Lake Louise in Banff National Park first started providing guest facilities and services on a seasonal basis in 1890. In 1982, the Chateau commenced operating on a year round basis. Commensurate with this change in operations, it installed infrastructure for the withdrawal, treatment and distribution of water from Lake Louise. The water which the Chateau withdraws and treats is also distributed to the Deer Lodge, a hotel on Upper Lake Louise and to Parks Canada Agency's public washrooms at Lake Louise. The relative proportions of water used by the Chateau, Deer Lodge and Parks Canada are approximately 92%, 7% and 1% respectively.

[5] In early January of 2001, the Chateau applied for an updated replacement Water Permit pursuant to subsection 18(1) of the *National Parks General Regulations* and the *Canada National Parks Act*. The application proposed the continuation of water withdrawal from Lake Louise in approximately the same amounts and utilizing the existing infrastructure as was authorized under the previous permit. Specifically, the permit sought to withdraw 525,653 cubic metres of water, based on average water withdrawal during the time period from 1995 to 1998.

[6] Thereafter, in accordance with the *Canadian Environmental Assessment Act* ("CEAA"), Parks Canada, as responsible authority, issued Terms of Reference and required the Chateau to conduct an environmental screening and to issue a report as to whether the issuance of a water permit was likely to cause adverse environmental effects.

[7] The Chateau retained the services of a water resources engineering firm, Hydroconsult EN3 Services Ltd. ("Hydroconsult"). Between January of 2001 and March 2002, the firm, under the direction and with the specific involvement of Parks Canada, and pursuant to Terms of Reference provided by Parks Canada, conducted an assessment of the environmental impacts of the proposed water withdrawal.

[8] Subsequently a Draft Environmental Assessment Report dated June 5, 2001 was prepared and submitted to Parks Canada. This was followed by revised reports dated August 2001 and December 2001, culminating in the final Environmental Screening Report ("ESR") dated January 2002, and entitled *"Environmental Assessment for Chateau Lake Louise Water Permit"*. Each draft of the Report was reviewed by James Fennell, an Environmental Assessment Specialist employed by Parks Canada and stationed in the Lake Louise Yoho, Kootenay field office in Lake Louise. It was his responsibility to review each draft and to advise Chateau representatives what additional information and investigations were required before the water permit could issue.

[9] After independent evaluation and review of the Environmental Assessment and after making it available in the Public Registry and in other forums to allow for further public consultation, Parks Canada issued a Screening Report on March 19, 2002, which included the determination of the Field Superintendent that the project was not likely to cause adverse environmental effects. On March 20, 2002, a water permit was issued in accordance with subsection 18(1) of the *National Parks General Regulations* and pursuant to the *Canada National Parks Act*.

[10] The applicant now seeks to have the decision to issue the water permit set aside on the grounds that it is contrary to subsection 8(2) of the *Canada National Parks Act* and is unreasonable, patently unreasonable or otherwise incorrect in light of what the applicant submits is overwhelming information relating to the significant adverse effects which will occur as a result of further water withdrawal from Lake Louise.

[11] As is becoming increasingly common in administrative law cases, a prodigious amount of time was spent by the parties, at both the hearing before me and in their written submissions, regarding the correct standard of review to be applied. Although counsel did an admirable job of analysing the jurisprudence in order to delineate the fine and often obscure nuances between the concepts of patent

unreasonableness and reasonableness *simpliciter*, it is obvious that what has developed in this field of law is an unwieldy framework which is unnecessarily complex and difficult to apply.

[12] In this regard, I wholeheartedly adopt the following comments of Lebel, J. in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 (S.C.C.) :

The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available with the pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* . . . Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers'Compensation Commission (Nfld)* 1997 CanLII 10862 (NL S.C.T.D.), (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para 27, illustrate:

In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. . . . Given its broad application, the law governing the standards of review must be predictable, workable and coherent.

. . .

The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario*, supra, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized

administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonable be considered to bear", the reviewing court should not intervene.

Upon the advent of reasonableness simpliciter, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

. . .

Under both patent unreasonableness and reasonableness simpliciter, mere disagreement with the adjudicator's decision is insufficient to warrant intervention . . . Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement " (United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., 1993 CanLII 88 (S.C.C.), [1993] 2 S.C.R. 316 at p. 341). In the case of reasonableness simpliciter, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing courts find compelling" (Ryan, supra, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness . . . Because the two variants of reasonableness are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of reasonable, not on "fine distinctions"between the test for patent unreasonableness and reasonableness simpliciter . . .

The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear"rather than "mere"irrationality, allows for a margin of appreciation for decisions that are not in accordance with reasons. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny"(Mullan, "Recent Development in Standard of Review", supra, at p. 25)

(emphasis added)

[13] In any event, whatever standard of review I apply in this case, be it patent unreasonableness or reasonableness *simpliciter*, I am satisfied that there is nothing about the impugned decision of the Minister to issue the water permit to the Chateau Lake Louise Corporation which would warrant this Court's interference.

[14] The applicant maintains that the water permit impairs the park's ecological integrity through the Chateau's withdrawal of huge amounts of water on an annual basis and through the introduction of ecological stresses such as the drying up of the upper reaches of Louise Creek, the reduction of natural stream flows in Louise Creek, the introduction of increased amounts of treated sewage into the Bow River and the alteration of the aquatic invertebrate community. The primary complaint that the applicant has is with respect to the amount of water that the permit allows the Chateau to withdraw from Lake Louise. It is submitted that the 525,653 cubic metres of water which the permit allows and the use of the average annual water withdrawal from the period of 1995 to 1998 to arrive at that figure, is unreasonable and is not in accordance with subsection 8(2) of the *Canada National Parks Act* which provides that "the maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks".

[15] However, the vast majority of the applicant's submissions are simply an attack on the evidence that was before the decision-maker and the correctness of the conclusions drawn from that evidence. The lengthy affidavits and submissions of the parties in this case reflect a battle of science between the parties' experts. As stated by the Federal Court of Appeal in *Alberta Wilderness Association v. Express Pipelines Ltd. et al.*, [1996] F.C.J. 1016, while reasonable persons may disagree about the adequacy and

completeness of evidence, this does not necessarily raise questions of law. In this regard, the Court observed:

. . . in a general way, the great majority of the applicants' submissions failed to raise any questions of law or jurisdiction but were simply an attack on the quality of the evidence before the panel and the correctness of the conclusions that the majority drew from that evidence. No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. The appreciation of the adequacy of such evidence is a matter properly left to the judgment of the panel which may be expected to have, as this one in fact did, a high degree of expertise in environmental matters. In addition, the principal criterion set by the statute is the "significance" of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law.

[16] The Court of Appeal has made it clear that in cases of this nature, a reviewing court should decline to allow itself to become an academy of science called upon to weigh conflicting statements about the maintenance or restoration of ecological integrity so as to determine which statement is correct. In *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 37 C.E.L.R. (N.S.) 1, Linden J. A. stated:

The court must ensure that the steps in the act are followed, but it must defer to the responsible authorities in their substantive determinations as to the scope of the project, the extent of the screening and the assessment of the cumulative effects in the light of the mitigating factors proposed. It is not for the Judges to decide what projects are to be authorized, but, as long as they follow the statutory process, it is for the responsible authorities.

[17] Accordingly, the function of this Court in reviewing the decision of the Director-General to issue the water permit, is to ensure that the decision was made in accordance with the governing legislation and that it is a reasonable decision in light of the evidence and information which was before the decision-maker.

[18] The water permit was issued pursuant to subsection 18(1) of the *National Parks General Regulations* which provides as follows:

18. (1) A Director-General may issue a permit to any person for a period not exceeding 10 years, authorizing the person to take water for domestic, business or railway water supply purposes with a Park from

(a) Any watercourse;

(b) Any Park well; or

(c) Any Park water supply system other than a waterworks system for a townsite or subdivision.

[19] The above-noted regulation is made under the *Canada National Parks Act*. Accordingly, any authority exercised under the regulation, must be exercised consistent with the requirements of the *Act*. Under subsection 8(1) of the Act, the Minister is responsible for the administration, management and control of parks. Subsection 8(2) provides as follows:

8. (2) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.

[20] Ecological integrity in turn, is defined in subsection 2(1) of the *Act*:

Ecological integrity means, with respect to a park, a condition that is determined to be characteristic of its natural region and likely to persist, including biotic components nd the composition and abundance of native species and biological communities, rates of change and supporting processes.

[21] However, the *Act* calls for a sustainable balance between use, enjoyment, development and preservation of ecological integrity. Subsection 4(1) states:

The National Parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the Regulations, and the Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generals.

[22] Banff National Park holds a unique position among Canada's national parks. For this reason, Parks Canada has engaged in a detailed and thorough review of the park's ecological habitat and the inter-relations between human activity and that habitat, culminating in the Banff National Park Management Plan, which was tabled in the House of Commons in March of 1997. The primary focus and purpose of the Plan is to strike a sustainable balance between human activity and preservation of ecological integrity. The Management Plan is the method through which the Minister is charged with directing the management of human activities in Banff National Park in such a way as to preserve the park's ecological integrity for future generations.

[23] The provisions of the *Canadian Environmental Assessment Act* also form part of the tools available to the Minister in ensuring that the ecological integrity of the Park is preserved for future generations to enjoy. Like the *Canada National Parks Act*, the CEAA is intended to promote a sustainable balance between human activity and environmental protection. The purposes of the CEAA are set out in section 4 of the *Act* and include:

(a) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;

[24] When an Environmental Assessment is required under the CEAA, as is the case with the issuance of water permits, the process for conducting the Assessment is established in sections 14 through 17 of the *Act*. In order to accommodate a wide range of projects, the level of detail required for an Environmental Assessment varies with the nature and size of the project and the significance of the predicted effects associated with the proposed project.

[25] In the present case, the water permit, contained in the Book of Certified Documents at Tab 9, indicates in Recital "D" that the Director-General considered "first and foremost" the "maintenance or restoration of ecological integrity" in exercising his discretion to issue the permit. Further, the recital states that the respondent Chateau submitted in support of its application for the permit, and the Director-General considered in the exercise of his discretion, the following information, as required by the *Canada National Parks Act*, the *Canadian Environmental Assessment Act* and subsection 18(1) of the *National Parks General Regulations*:

(a) A statement specifying the purpose for which the water is required;

(b) A description of the method to be used to take the water;

(c) A statement specifying the location of any equipment to be installed in taking the water;

(d) A document setting out the results of a water quality test that shows that the quality of the water to be taken is suitable for the purpose for which it is required;

(e) A description of any impairment to the resources of the Park that may result from the installation of the equipment used in taking the water; and,

(f) The Environmental Assessment, including a description of measures intended to mitigate any environmental effects and the Determination.

[26] The record also reveals that among the documents before the Director-General, included were the Banff National Park Management Plan, the Lake Louise Community Plan the Overall Water Conservation Plan, and the Environmental Screening Report's conclusions which were generally supported in an independent review by the McLeod Institute for Environmental Analysis. These documents clearly demonstrate that the issuance of the water permit is consistent with the first priority of maintenance or restoration of ecological integrity. While the Chateau Lake Louise is permitted to withdraw no more water than in the past, improvements to the Lake Louise Waste Water Treatment Facility ensure that phosphorous discharges from the plant actually decrease, even if Lake Louise is full built up as contemplated by the Lake Louise Community Plan.

[27] In addition, the water permit establishes several terms and conditions which further ensure the preservation and restoration of ecological integrity by requiring the respondent Chateau to:

(a) Limit the water use volumes to a maximum annual volume of 525,653 cubic metres, which is the same amount of water as the Chateau has drawn historically as established through monitoring of historical water usage from the 1995 to 1998 period and allows no increase in average, annual water withdrawals from existing levels;

(b) Limit the was use volumes to a maximum of 78,500 cubic metres for the period from April 1 to May 31 of each year;

(c) Limit the water use volumes to a maximum of 97,500 cubic metres for the period from September 1 to October 31 of each year;

(d) Report to Parks Canada monthly water withdrawal volumes;

(e) Implement the Water Conservation Plan dated June 30, 1999;

(f) Implement the monitoring and reporting of hydrological and ecological conditions contained in the Monitoring Framework for Ensuring No Net Negative Environmental Impact of the Chateau Lake Louise and Meeting Facility dated September 14, 2001.

[28] The applicant objects to the use of 1995 to 1998 time period for identifying the historical use of water at the Chateau. However, I am satisfied that this was appropriate given that those years reflected recent and actual, as well as permitted, water use patterns; these are the earliest years for which comprehensive and accurate water use data is available; the 2000 water use data is inaccurate primarily due to a leaking valve

which led to inaccurate meter readings; and, in 1999 and 2000 water conservation measures were implemented by the respondent Chateau.

[29] Nor do I agree with the applicant's contention that there is a discrepancy between the total annual volume of water withdrawal authorized by the Water Permit and the historical water withdrawal based on the 1995 to 1998 time period. Table 24 of the Environmental Assessment, relied on by the applicant in support of its argument, sets out water consumption volumes, that is the amount of water actually measured in the facilities, and not production volumes, which is the amount of water actually withdrawn from Lake Louise. It is Figure 5 and Appendix B of the Environmental Assessment which sets out the actual water production and consumption records, and for the years from 1995 to 1998, it shows that the average water withdrawal by the respondent Chateau from the lake is 525,653 cubic metres, that amount allowed by the water permit, and not the lesser amount claimed by the applicant.

[30] For all of these reasons, I conclude that the decision to issue the water permit was made in accordance with the governing legislation and that it was a reasonable decision in light of the evidence and information which was before the Director-General.

[31] I turn now the applicant's second argument that the public consultation period in this case was not sufficient and the applicant was not provided with sufficient opportunity to make submissions regarding the issuance of the water permit. This argument simply has no merit.

[32] Subsection 18(3) of the *Canadian Environmental Assessment Act* enables a responsible authority to provide for public participation, where it deems such participation appropriate. That section reads as follows:

18. (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 an on any record that has been filed in the public registry established in respect of the project pursuant to s. 55 before taking a course of action under s. 20.

[33] There is no regulation which prescribes that public consultation shall take place in a case such as this, or what length of notice or length of time must be granted to examine a screening report. ; the determination of the length and form of the public participation is within the discretion of the responsible authority.

[34] I am satisfied that the facts demonstrate that Parks Canada Agency exercised its discretion reasonably by granting a two-week period of notice and opportunity to comment, which is the standard time period used by Parks Canada for CEAA determinations. First, both the Banff National Park Management Plan and the Lake Louise Management Plan contemplated expansion of the Chateau Lake Louise and were the subject of extensive public consultation. Second, the Chateau Lake Louise has been withdrawing water from Lake Louise since 1982 and the issuance of the water permit in question simply permitted the continuation of an already existing situation, rather than a new significant new use of Park resources. The Chateau is withdrawing no more water than the average water it withdrew from Lake Louise in the years from 1995 to 1998. Finally, during the two week period of public comment commenced February 11, 2002 and ending on February 27, 2002, the applicant filed three responses to the Environmental Screening Report which had been provided to it by Parks Canada Agency.

[35] For all of the foregoing reasons, the applicant's judicial review applications in both T-1481-02 and T-592-02 are dismissed. Costs to the respondents.

JUDGE

OTTAWA, Ontario

September 7, 2004

FEDERAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKETS : T-1481-02 and T-592-02

STYLE OF CAUSE : MOUNTAIN PARKS WATERSHED ASSOCIATION

v. CHATEAU LAKE LOUISE CORP. ET AL

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: June 22nd, 2004

REASONS : The Honourable Mr. Justice Rouleau

DATE OF REASONS: September 7, 2004

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