COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***R.K. Heli-Ski Panorama Inc. v. Glassman,*** 2007 BCCA 9

Date: 20070108
Docket: CA33603

Between:

R.K. Heli-Ski Panorama Inc.

Appellant
(Petitioner)

And

Martyn Glassman, in his capacity as the Project Assessment Director for the Jumbo Glacier Resort project, Joan Hesketh, in her capacity as the Executive Director, Environmental Assessment Office, The Minister of Sustainable Resource Management, the Minister of Small Business and Economic Development, the Minister of Water, Land and Air Protection and Glacier Resorts Ltd.

Respondents
(Respondents)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine
The Honourable Mr. Justice Smith

R.V. Wickett — Counsel for the Appellant

N. Poole and N. Brown — Counsel for the Respondents, Glassman, Hesketh, Environmental Assessment Office, Minister of Sustainable Resource Mgmt., Minister of Small Business and Economic Development, and the Minister of Water, Land and Air Protection

Place and Date of Hearing: Vancouver, British Columbia
7 September 2006

Place and Date of Judgment: Vancouver, British Columbia
8 January 2007

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] It has been sixteen years since the respondent Glacier Resorts Ltd. ("Glacier") set out to build a year-round ski resort on Crown land in the Jumbo Valley in southeastern British Columbia's Purcell Mountains. As the judge below trenchantly observed, Glacier's plans have "ground along at a somewhat glacial pace." For the first fourteen of those sixteen years, the project was caught up in administrative procedures designed by the provincial government to elicit the views of the general public, First Nations, and private interests and to ensure that the project was compatible with land-use, environmental, economic, social, heritage, and health values. Then, on October 12, 2004, the Ministers of Sustainable Resource Management, of Small Business and Economic Development, and of Water, Land and Air Protection ("the Ministers") issued an environmental assessment certificate to Glacier pursuant to the ***Environmental Assessment Act***, S.B.C. 2002, c. 43 ("the ***2002 Act***"), which entitled it to go forward with the project, albeit subject to a number of conditions and to obtaining further necessary approvals.

[2] The appellant, the operator of a heli-skiing business on the affected Crown land and an opponent of the project since its inception, applied to the Supreme Court of British Columbia pursuant to the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 for an order quashing the issuance of the environmental assessment certificate, alleging bias and a denial of procedural fairness in the administrative procedures that led to the Ministers' decision. The application was dismissed by Mr.

Justice Melnick for reasons that may be seen at 21 C.E.L.R. (3d) 58, 2005 BCSC 1622.

[3] The appellant now asks us to set aside this judgment and to substitute an order quashing the issuance of the certificate and remitting the matter for a reconsideration of the environmental assessment. The appellant alleges that Mr. Justice Melnick erred in concluding that it had been given a meaningful opportunity to be heard in the investigative process antecedent to the Ministers' decision. It has not appealed the rejection of its allegation of bias.

[4] For the reasons that follow, I have concluded that the learned chambers judge made no error that would warrant our intervention and I would dismiss the appeal.

Background

[5] The appellant and its predecessors have carried on the heli-skiing business since 1970 pursuant to licences of occupation of Crown land granted by the provincial government. The licences do not provide the appellant with assured tenure, and neither it nor its predecessors in the business have ever had a right to exclusive use of the land. The current licence, which was granted on December 2, 2001 for a term of twenty years, provides that the government may terminate it on notice if the land is required for public use or if, in the opinion of the government, cancellation is in the public interest. As well, it permits the government to make other dispositions of the land and provides that the appellant will make no claim for compensation or damages in respect of any such disposition unless the disposition

materially affects the exercise of its rights under the licence. It provides for all disputes to be resolved by arbitration.

[6] The events that led to the underlying conflict were set in motion in 1989 and 1990. In October 1989, the appellant applied for permission to clear ski runs in the Jumbo Valley, an area within its licence. Permission was granted in May 1990. At or about the same time, Glacier submitted a formal "expression of interest" to the provincial government in developing a ski resort in the Valley. Then, the Minister of Environment, Lands and Parks issued a call for proposals for a ski resort. Glacier responded in early 1991 and its proposal was accepted in 1993. In the meantime, the appellant had completed the clearing of ski runs and, since then, it has carried on most of its business in the Jumbo Valley and on the adjoining Farnham Glacier.

[7] From 1991 until 1999, while Glacier's project was undergoing the rigid assessment process mandated by the then-existing legislative scheme, the appellant voiced objections at every stage. As a result, an independent consultant, Mr. Harley, was retained in September 1998 by the responsible government agency, the Environmental Assessment Office (the "EAO"), to advise on the possible effects of the project on the appellant's business and to identify ways of mitigating any adverse effects. During the course his investigation, which commenced in September 1998, Mr. Harley met extensively with the appellant and Glacier and with their respective consultants and, as well, did some heli-skiing in the Jumbo Valley. He published a draft report in early 1999 that was not favourable to Glacier and spent approximately eight months thereafter responding to Glacier's criticisms of the draft. In November 1999, he reported back that, in his opinion, the proposed ski

resort would have a detrimental effect on the appellant's business and, as the resort expanded, would deprive the appellant of reliable bad-weather heli-skiing terrain and cause its business to fail.

[8] Dismayed by Mr. Harley's report, Glacier suspended further action on its application until the Legislature repealed the applicable legislation and replaced it with the ***2002 Act***.

[9] Under the ***2002 Act***, the determination of the scope of environmental assessments and of the methods and procedures to be used in the assessments was delegated, by s. 11, to the executive director of the EAO, who was also given a broad discretion to vary particular assessment schemes in order to deal with proposal modifications and to ensure the completion of "an effective and timely assessment". The next steps are set out in s. 17:

> **17** (1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied
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> (a) under section 11 . . .
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> . . .
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> the executive director . . . must refer the proponent's application for an environmental assessment certificate to the ministers for a decision under subsection (3).
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> (2) A referral under subsection (1) must be accompanied by
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> (a) an assessment report prepared by the executive director . . .
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> (b) the recommendations, if any, of the executive director. . ., and
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> (c) reasons for the recommendations, if any, of the executive director . . .

> (3) On receipt of a referral under subsection (1), the ministers
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> (a) must consider the assessment report and any recommendations accompanying the assessment report,
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> (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and
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> (c) must
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> (i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,
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> (ii) refuse to issue the certificate to the proponent, or
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> (iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

[10] As well, the ***2002 Act*** and the ancillary ***Prescribed Time Limits Regulation***, B.C. Reg. 372/2002 imposed time limits on the EAO and the Ministers for the completion of their respective statutory responsibilities. Clearly, the legislative objective of the new legislation was to reduce delays in the environmental assessment process and to make it more flexible and efficient than it had been under the previous legislative scheme.

[11] By administrative order of the EAO issued at the end of December 2002 (the "transition order"), the Glacier project was formally transferred into the new assessment process. In December 2003, Glacier submitted a revised proposal to the EAO and made suggestions on how to ameliorate the consequences reflected in the Harley report for the appellant's business. In January 2004, an order was made pursuant to s. 11 specifying the scope of the assessment of the revised proposal

and the procedures and methods to be used. Among other things, the assessment was to "take into account practical means to prevent or reduce to an acceptable level any potential significant adverse effects" and to consider "potential economic effects within the scope of the assessment". The order also provided for full public disclosure and broad public consultation. As well, the order imposed deadlines on the EAO and the Ministers for completion of their statutory responsibilities: the EAO was to deliver its assessment report within 180 days of accepting Glacier's proposal for review and the Ministers were to make their decision within forty-five days thereafter. The latter limit was subsequently extended for a short period.

[12] The EAO accepted the revised proposal for review on February 5, 2004. The appellant continued to oppose the project throughout the new assessment process. It attended two open houses in the local area sponsored by the EAO in March 2004, at which it set up information booths and made known its views. As well, it delivered a comprehensive seventy-eight-page submission to the EAO in April 2004 in which it detailed its objections to the revised proposal. Further, the appellant met in May 2004 with the responsible Ministers and with the Minister of State for Resort Development and, using a PowerPoint presentation, explained its objections to the project and advocated the refusal of an environmental assessment certificate. The presentation was effective – in a letter written following the meeting to thank the appellant for the presentation, the Minister of Water, Land and Air Protection stated, "We are certainly aware of the issues concerning your tenure".

[13] In the meantime, in March 2004, the EAO decided to re-evaluate the possible business conflict between the appellant and Glacier in light of Glacier's revisions to

the design of the project. On May 31, 2004, after considering several firms for the re-evaluation, the EAO hired Sierra Systems Group Inc. ("Sierra") as an independent consultant. The contract with Sierra incorporated draft terms of reference on which the appellant had been consulted. Sierra was to determine how much ski terrain would be lost to the appellant if the ski resort should proceed; to evaluate the measures proposed to ameliorate those losses by Glacier and by Lands and Water B.C. Inc. (LWBC), the lead government agency in the process; and, if there would be losses that could not be mitigated, to advise on the factors to consider in arriving at appropriate compensation and to estimate the amount of compensation that might be payable to the appellant. As to the approach to be taken, the terms of reference indicated that Sierra should, "to the extent possible . . . work closely" with the appellant and its consultant, with LWBC, and with Glacier, and that it should "consult the following sources of information": the Harley report; Glacier's response to the Harley report; Glacier's revised proposal for the project; the appellant's comments on the revised proposal; Glacier's response to the appellant's comments; any additional information supplied by the appellant and Glacier; and the appellant's management plan, operational records, and other information and reports submitted by the appellant to LWBC.

[14] The contract also contained a schedule for the various steps in the assignment. Although Sierra was required to complete its study and submit its final report by June 21, 2004, three weeks after the contract was signed, it did not submit the report until late July 2004.

[15] Contrary to Mr. Harley's earlier opinion, Sierra's view was that the appellant's business would not be destroyed by Glacier's project. In its opinion, although the business would be adversely affected, the appellant would be able to mitigate the harm by taking advantage of the ski resort to supplement its business and by utilizing other skiing areas within the boundaries of its licence including, in particular, the Glacier Creek area. The EAO delivered the Sierra report to the appellant and to Glacier and invited their comments by August 13, 2004.

[16] In the meantime, on August 3, 2004, the date stipulated by the s. 11 order, the EAO submitted its assessment report, along with other relevant materials, to the Ministers pursuant to s. 17 of the ***2002 Act***. The scope of the report, which was 127 pages in length and was preceded by a ten-page executive summary, can be seen from the table of contents. It discussed, among other matters relevant to the issuance of an environmental assessment certificate, government policy and planning; the commercial alpine ski policy process; technical resort design and management issues; environmental, resource management and related technical issues, including waste management, air quality, water management, fish and wildlife resources, forest resources, mineral resources, and agricultural resources; socio-economic and community issues, including economic development, recreation and tourism, road access and transmission line issues, and infrastructure requirements; and First Nations issues.

[17] Four pages of the assessment report, under the heading "Recreation and Tourism Impacts", were devoted to implications for the appellant's business. The report noted that the ski resort and the heli-skiing business would be "overlapping

tenures" and stated, "Overlapping tenures are common on Crown lands throughout the Province as the government strives to achieve the highest and best use from a provincial resource." It reviewed the full history of the conflict between the appellant and Glacier, including the Harley report and the Sierra report, and set out and discussed the appellant's objections to the project. It stated that the EAO was awaiting receipt of comments on the Sierra report from the appellant and from Glacier and that they would be taken into account after receipt. It noted that Glacier had committed to cooperating with the appellant in specific ways to minimize the harmful effects on its business and, as well, to indemnifying the province in the event that compensation might be due to the appellant pursuant to the terms of its licence, and it recommended that these assurances be incorporated as conditions of any environmental certificate that might be issued. It concluded,

> Based on the information available, the EAO is satisfied that measures can be implemented (such as R.K. Heli-Ski making better use of other regions of its tenure and the Proponent allowing R.K. Heli-Ski access to the CRA and willingness to develop a synergistic relationship) to avoid or address any potential material effect on R.K. Heli-Ski.

[18] In response to the EAO's request for comments on the Sierra report, the appellant delivered a detailed letter on August 11, 2004 in which it alleged that the "two key conclusions drawn by Sierra" were wrong and were based on inaccurate information and faulty analysis. According to the appellant's letter, they were, first, a suggestion that it had intentionally increased its usage of the Jumbo Valley in the 1989/1990 ski season upon learning of Glacier's proposed ski resort in an attempt to thwart the project, and, second, that its losses could be mitigated by sharing a

synergistic relationship with Glacier and in particular by shifting some of its business to the Glacier Creek drainage area to make up for the loss of skiing terrain in the Jumbo Valley and on Farnham Glacier.

[19] On the first point, the appellant stated that the statistics relied upon by Sierra as showing a large shift of heli-skiing business to the Jumbo Valley in and after 1990 were incorrect. It attached what it said were the correct statistics and explained how, in its view, these statistics supported its position that the use of the Jumbo Valley was critical to its business. It denied any bad faith and set out business and safety reasons for its increased use of the Jumbo Valley.

[20] On the second point, the appellant stated that the Jumbo Valley is its only predictable bad-weather access to skiing and that the Glacier Creek area is inaccessible in bad weather. It argued that Sierra's conclusions that it had made significant use of the Glacier Creek area in the past and that this area provided predictable bad-weather access were based on a misreading of its records. Further, it alleged that Sierra had failed to do a detailed analysis of usage such as the one Mr. Harley had done. As a result, it said, Sierra's report was inaccurate and was not based on fact. It concluded by asserting that the Harley report provided "a realistic assessment" of the impact of the proposed ski resort on its business.

[21] Glacier responded to the EAO's request for comments with a letter to the EAO dated August 13, 2004, in which it expressed satisfaction with the Sierra report and said the conclusions reached were "fair".

[22] The EAO submitted this correspondence to Sierra for its consideration. Sierra responded with a twenty-page supplemental report in which it gave a detailed explanation of why it did not accept the appellant's criticisms. It stated that it had based its analysis on information provided by the appellant, including reports filed by the appellant with the government pursuant to its licence, and on responses by the appellant's representatives to interview questions. It advised, "Nothing has come to light in this review that would give cause to modifying the interpretations or conclusions presented in the Report".

[23] On August 24, 2004, the EAO delivered several documents to the Ministers: the Sierra report; the comments of the appellant and Glacier on the Sierra report and the Sierra supplemental report; the Harley report; and the comments of the appellant, Glacier, and Mr. Harley on the Harley report. Along with them, it delivered an "Information Notice", in which it stated that the additional documents presented no new information that would affect the conclusion it had expressed in the assessment report previously submitted.

[24] Subsequently, representatives of the EAO met with the Ministers and discussed the consequences for the appellant's business if the project should be approved. Ultimately, on October 12, 2004, the Ministers issued the impugned environmental assessment certificate. As recommended by the EAO in the assessment report, it included, as a condition, the requirement that Glacier indemnify the government for any damages that might be payable to the appellant.

Decision of the chambers judge

[25] The chambers judge concluded that the appellant had a right to a fair and impartial hearing. However, he rejected the three submissions made by the appellant as to its right to be meaningfully heard.

[26] To the appellant's first submission, that the EAO did not ensure that it was heard by Sierra, the chambers judge responded,

> [63] . . . The EAO provided terms of reference to Sierra which provided for meaningful input from all members of the public, including R.K. Sierra conducted two open houses at which R.K. had the opportunity to make its case and at which other interested individuals could express support and concern for its position.

[27] On the appellant's second point, that the EAO did not provide the opportunity the appellant expected to prove to it or to Sierra that Sierra's findings were in error before submitting Sierra's report to the Ministers and thereby failed to honour the appellant's legitimate expectations, he said,

> [64] The terms of reference and the investigative framework established for the process that resulted in the BHA report were not the same as those established for the process that resulted in the Sierra report. R.K. had no reason in law or in fact to expect that the process would be exactly the same given the enactment of new legislation and the promulgation of an order defining the new process that explicitly repealed the former process.
>
> [65] In fact, Sierra was not obliged to meet directly with either Glacier or R.K. It is unfortunate that, having apparently taken the step of meeting with a representative of Glacier, however, that Sierra had to be convinced of the importance of also meeting in person with representatives of R.K. That said, however, the fact remains that there was such a meeting.

[28] As to the third argument, that the EAO did not consider or analyze the appellant's response to the Sierra report before it completed and delivered its assessment report, the chambers judge concluded,

> [66] R.K. is correct in suggesting that the more appropriate chain of events would have been for the EAO to have requested its comment on the Sierra report before incorporating Sierra's conclusions into its Assessment Report and sending that report to the Ministers. Had that been the end of it, I would have agreed with R.K. It would have been preferable for the EAO to have secured an extension of the deadline in which to submit its report so as to include not only the responses of R.K. and Glacier to that report but also its observations on those responses and have incorporated the responses into the decision making process leading to its recommendation. However, before its report was considered by the Ministers, the EAO did provide to the Ministers the responses of both Glacier and R.K. and, most importantly, provided a letter by way of supplemental report commenting on the responses and indicating that the views of the EAO had not changed because of the responses. As noted earlier, there was a further meeting between officials of the EAO and the Ministers to discuss the issues relating to Glacier and R.K. Thus, to the extent there was a breach of procedural fairness because of R.K. not having its response considered before the report of the EAO went to the Ministers on August 3, 2004, that breach was cured by the subsequent action of the EAO in providing to the Ministers the responses of R.K. and Glacier and its commentary on those responses and indication that its view as to its recommendation had not changed as a result.
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> . . .
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> [68] In the result, I conclude that any breach of procedural fairness demonstrated by the timing and manner of the receipt of submissions of R.K. by the EAO and its comment upon them was technical and not substantial in nature.

Grounds of appeal

[29] The appellant alleges that the chambers judge erred in each of these three conclusions. On the third ground, it adds a submission that the chambers judge did not mention, that is, that an assessment report arising out of a process in which

there was a denial of procedural fairness is not an "assessment report" within the meaning of s. 17 of the ***2002 Act*** and, as a result, the Ministers had no jurisdiction to issue the environmental assessment certificate.

Discussion

1. Procedural fairness – the relevant principles

[30] Administrative decisions must be made "using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context": see ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at ¶ 22 *per* L'Heureux-Dubé J. That the Ministers' decision affected the appellant's interests was only incidental, in the sense that those interests were but one factor to be weighed in the balancing of numerous disparate concerns. At its heart, the decision to allow the ski resort to proceed was a public policy decision that involved the weighing of all public and private interests involved. This context puts the decision at the far end of the administrative-decision spectrum from judicial-like decisions and their attendant procedural safeguards. Since the appellant's business is at risk, the appellant must be given a hearing, but the requirements of procedural fairness will be satisfied in the circumstances so long as the appellant was given an opportunity to put forward its views and its evidence and to have them considered.

[31] The impugned decision in this case was made by the Ministers. However, the appellant does not suggest that they failed to afford it procedural fairness. Rather,

the appellant submits that their decision is fatally flawed because the EAO failed to do so.

[32] The obligation to provide a fair hearing is not always confined to the actual decision-maker. It also extends to public bodies, like the EAO, whose function is to investigate and make recommendations to the decision-maker: see ***Irvine v. Canada (Restrictive Trade Practices Comm.)***, [1987] 1 S.C.R. 181 at 221-22, 41 D.L.R. (4th) 429, citing ***Abel v. Ontario (Advisory Review Board)*** (1980), 119 D.L.R. (3d) 101, 31 O.R. (2d) 520 at 529-31 (C.A.). However, this duty does not normally extend to staff and other agents of the public body, since the rights of the individual are not usually affected in a final or determinative sense until the public body acts on the result of their investigation: see ***Irvine***, *supra*, at 219.

2. The EAO's alleged failure to ensure a hearing by Sierra

[33] The appellant submits first that the EAO breached its duty to provide procedural fairness in the environmental assessment process by failing to require Sierra, its agent, to afford the appellant a meaningful hearing. As I understand this submission, the appellant contends that the Sierra report was a critical foundation for the EAO's recommendation and consequently for the Ministers' decision, and that the failure of Sierra to properly hear the appellant's case infected the whole process with procedural unfairness.

[34] The respondents submit that this argument should be rejected because Sierra was not a statutory delegate of the EAO. Rather, the respondents say, Sierra was an "independent consultant". I think this issue turns on the substance of Sierra's

role, rather than on semantic distinctions. In my view, since a substantial part of Sierra's assignment was to find the facts upon which the EAO could rely, Sierra was a delegate of the EAO for that purpose. Since the findings of fact were critical to the appellant's interests, it seems to me that the appellant should have been afforded a fair hearing at the fact-finding stage.

[35] However, nothing turns on this, since I am not persuaded that the trial judge erred in concluding that Sierra had afforded a fair hearing to the appellant.

[36] The appellant begins this submission by alleging two "patent errors" of fact by the chambers judge. First, it contends that the finding that the terms of reference provided by the EAO to Sierra "provided for meaningful input from all members of the public, including R.K." is patently wrong – the terms of reference said only that "to the extent possible, the consultant will work closely with" the appellant. The second obvious error, the appellant says, is the finding that "Sierra conducted two open houses at which R.K. had the opportunity to make its case" – in fact, the open houses were sponsored by the EAO before Sierra was retained.

[37] The appellant is correct that the chambers judge erred in these findings. Obviously, on the first point, the chambers judge had in mind the s. 11 order, which provided for full and broad public consultation throughout the assessment process. It is clear that Sierra's task was confined in its focus and did not involve public consultation. However, nothing turns on this since the chambers judge found that Sierra had, in fact, afforded the appellant an opportunity to make its case. The second error is immaterial – the substance of the chambers judge's finding was that

the appellant had an opportunity to make its case at two open houses, whoever sponsored them.

[38] The next error alleged is that, although there was a meeting between representatives of Sierra and the appellant, the trial judge erred in concluding that the meeting was "meaningful".

[39] The appellant contends first that the chambers judge "ignored the uncontradicted evidence" that one of Sierra's representatives, Mr. Davidson, "appeared uninterested" and "perturbed" during the meeting, and that the Sierra representatives said they had "damning information", obtained "from the government", that the appellant concentrated its business in the Jumbo Creek Valley only after it learned of Glacier's proposal. It submits further that "at no time during the meeting did Sierra allow [the appellant] to view this so called 'damning information' . . . or allow [the appellant] to provide comments or an explanation regarding same". This information consisted of the records filed by the appellant with LWBC of its usage of the various areas within its licence and, in particular, the records of its change in usage of the Jumbo Valley in and after 1990.

[40] I do not agree that the chambers judge ignored the appellant's evidence about the attitude of Sierra's representative at the meeting. He said that Sierra was reluctant to meet with the appellant and had to be convinced to do so, he noted Sierra's apparently unsympathetic attitude to the appellant, and he observed that it was unfortunate that, after it had already met with Glacier, Sierra had to be convinced of the importance of a meeting with the appellant.

[41] Nor can I agree with the appellant's submission that the chambers judge failed to address whether the meeting was meaningful. The appellant contends that the attitude of Mr. Davidson belies any suggestion that the appellant was given a fair hearing. However, although the meeting ended acrimoniously, the chambers judge concluded that it had given the appellant "an opportunity to meet with a representative of Sierra, to make a submission to it, and to explain its concerns". The evidence supports this conclusion.

[42] With respect to the submission regarding the "damning information", the appellant led no direct evidence to show that its representatives at the meeting asked to see the information and to show that Mr. Davidson refused their request. Moreover, Mr. Gibbons, a representative of the appellant at the meeting, deposed in his affidavit that he was given an opportunity on the following day to respond to Sierra's suggestion that the appellant had deliberately made misleading use of the Jumbo Valley. He said [my emphasis added],

> 44. On July 9, 2004 Dan Slamet of Sierra called me on the telephone. Mr. Slamet apologized to me for the way the meeting on the previous day had ended. He also said that both he and Mr. Davidson were overwhelmed by my "truthfulness and candourness [*sic*]" and they wanted to make it clear that they believed what I had told them. He then advised me that they were required to balance what I had told them with historic documents. He then told me that there was no question that the Jumbo ski resort project would have an impact on RK. He also advised that they had no dispute as to the use data provided by RK and he advised that it will be up to the Environmental Assessment Office to assess the importance and context of the historic information in contrast to the current use data. He then told me that he needed some documents from us to prove that RK had not changed its behaviour to thwart the Jumbo ski resort project. I advised him that we had such documents and that I would provide them to him.

> 45. Following the phone call referred to in the preceding paragraph I faxed the documents sought by Mr. Slamet to Sierra's office.

[43] Thus, the appellant was given an opportunity to respond and did respond to the suggestion that it had attempted to thwart Glacier's project.

[44] Accordingly, I am not persuaded that the chambers judge erred as alleged and I would not accede to the appellant's first submission.

3. The alleged failure to honour the appellant's legitimate expectations

[45] One of the relevant factors in a consideration of procedural fairness is whether the person affected had any legitimate expectations as to the procedures to be followed. If there were such expectations based on a regular practice of the tribunal or on an express or implied representation that certain procedures would be followed, procedural fairness might require that the expected procedures be adopted: see ***Baker***, *supra*, at ¶ 26.

[46] The appellant relies on two arguments in its submission that its legitimate expectations were not met.

[47] The first submission begins with the allegation that the chambers judge erred in concluding, in the following passage of his reasons, that the process for consultation adopted in the pre-2002 assessment period had been repealed:

> [43] . . . On December 30, 2002, a transition order was made which placed the process for the Jumbo Project under the auspices of the Act. Of some importance is that the transition order repealed the consultation process which had been followed under the project

specifications that had been in place and which led to the BHA report. Specifically, the transition order provided:

> The process for establishing a project committee under the former Act is repealed and a process for consulting with members of the former project committee and others will be specified whenever an order is issued under section 11 of the Act.

[48] The appellant contends that the transition order repealed only the "process for establishing a project committee", not the consultation process that had previously been in effect. Further, the appellant submits, this clause stipulated in effect that a process for consulting with the appellant would be set out in the s. 11 order. Since the order subsequently made under s. 11 did not specify any consultation with the appellant, the appellant says it was entitled to expect that the consultation afforded Glacier in respect of the Harley report would be afforded it in respect of the Sierra report.

[49] The foundation of this argument is fundamentally flawed. The clause of the transition order on which the argument is founded was not an operative order – rather it was a recital of the precedent facts upon which the operative orders that followed were based. Moreover, it was a correct recital.

[50] Section 7 the ***Environmental Assessment Act***, R.S.B.C. 1996, c. 119 provided for the assessment of reviewable projects and for the granting or denial of approval. Sections 9 and 10 provided for the establishment of project committees to assess reviewable projects pursuant to s. 7 and set out their duties and responsibilities. Subsection 9(6)(a) provided that project committees could determine their own procedures and s. 10 provided,

> **10** The purpose of a project committee established for a reviewable project is, in respect of that project,
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> (a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and
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> (b) to analyze and advise the executive director, the minister and the responsible minister as to,
>
> (i) the comments received in response to an invitation for comments under this Act,
>
> (ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,
>
> (iii) the potential effects, and
>
> (iv) the prevention or mitigation of adverse effects.

[51] By s. 58 of the ***2002 Act***, the 1996 Act was repealed. By s. 51(3), any assessment of a reviewable project that was in progress under s. 7 of the repealed legislation "must be continued and disposed of under this Act as an application for an environmental certificate". Thus, the trial judge was correct to say that consultation process in effect with respect to the Harley report had been repealed, although it was repealed by s. 58 of the ***2002 Act***, not by the transition order.

[52] As well, the clause relied on by the appellant did not decree that a consultation process would be specified in an order under s. 11. The clause merely recited that this would occur, as it must have occurred because s. 16(5) of the ***2002 Act*** specifies (in part) that the executive director of the EAO must assess applications for environmental assessment certificates in accordance with the procedure determined under s. 11(1), which, in turn, states that the executive

director must determine by order the scope of assessments of reviewable projects and the procedures and methods for conducting them.

[53] Accordingly, there is nothing in this submission that would support a legitimate expectation by the appellant that the previous process of consultation would be followed.

[54] The appellant's second submission in relation to legitimate expectations is as follows. The appellant argues that the EAO issued terms of reference to two consultants (Mr. Harley and Sierra) dealing with the same subject matter and that, in substance, both required the consultant to "work closely" with the appellant. Thus, it says, since the EAO directed Mr. Harley to deal with Glacier's concerns following his draft report, a process that took eight months, it was entitled to expect that the EAO would direct Sierra to spend a similar amount of time dealing with the appellant's concerns about the Sierra report. It submits that, by immediately incorporating Sierra's findings into the assessment report and submitting the report to the Ministers, the EAO defeated its legitimate expectation that it would be afforded an opportunity to "work closely" with Sierra for a period up to several months in order to attempt to persuade Sierra that its conclusions were wrong.

[55] The appellant contends further that the chambers judge erred in failing to find that it had a legitimate expectation that the process used to assess Glacier's revised proposal would be similar to that used in assessing the initial application under the old legislative scheme. In particular, the appellant submits, it could have received a fair hearing only if Sierra, like Mr. Harley, had physically assessed the Glacier Creek

area in bad weather and had consulted "neutral" helicopter pilots and ski guides with personal knowledge of the circumstances in order to determine whether, as a matter of observable fact, the appellant could gain access to the Glacier Creek area by helicopter under such conditions. Since Sierra based its analysis on a review of historical records, the appellant says, it was denied an opportunity to influence Sierra's opinion and to attempt to persuade it to change its "pre-conceived" opinion favouring Glacier's position.

[56] In my view, there is simply no merit in these submissions. The procedures enacted in the ***2002 Act*** replaced those that were in effect during the first several years of review of the Glacier project. It is clear, in my view, that the legislative purpose was to eliminate delay and to expedite the review of applications. The appellant could not reasonably have believed otherwise in the circumstances. Moreover, the appellant knew that the Sierra assessment was to be carried out in a short period of time in the early summer months and that the focus of the analysis was to be on documentary records. In those circumstances, the suggestion that the appellant expected that Sierra would physically investigate the skiing areas in bad weather, as Mr. Harley had done during winter conditions, is not credible.

[57] Accordingly, I would reject the submission that the chambers judge erred in failing to find that the assessment process did not take account of the appellant's legitimate expectations.

4. The alleged breach in the sequence of delivery of documents

[58] The appellant's next submission is that the chambers judge erred in concluding that the breach of procedural fairness occasioned by the EAO's forwarding its assessment report and recommendations to the Ministers before receiving the appellant's comments on the Sierra report had been cured by the later delivery of those comments. The appellant submits that the delivery of its criticisms of the Sierra report could not remedy the failure to afford it a fair hearing because the criticisms were a response to Sierra's incorrect approach and it was never given an opportunity to present its case fully and fairly before Sierra reached the conclusions it had reached in advance of its meeting with the appellant.

[59] I am not persuaded that the chambers judge erred in his reasons for rejecting this submission. That a fresh hearing can remedy an earlier breach of procedural fairness is a question of law on which the appellant concedes that the chambers judge was correct. That the "fresh hearing" in this case cured the earlier breach was a finding of fact that can be supported on the evidence that was before the chambers judge. No error of fact has been identified that would permit us to intervene.

[60] I would also reject the appellant's submission that the Ministers lacked jurisdiction to issue the certificate on the basis that the assessment report before them was not an "assessment report" within the meaning of s. 17 because there was a breach of procedural fairness in the process antecedent to the report. The appellant cited no authority for that proposition. The document in question was an

assessment report on a plain-meaning reading of the definition of that phrase in s. 1 of the ***2002 Act***, which says that "assessment report means a written report submitted to ministers under s. 17(2), summarizing the procedures followed during, and the findings of, an assessment".

[61] The essence of the appellant's complaint is not really an absence of jurisdiction. Rather, it is that the Ministers were not given the appellant's views and its evidence in the assessment report.

[62] The assessment report was a lengthy document, as I have already noted. It set out in considerable detail various concerns arising from the project, including environmental issues, socio-economic and community issues, administrative issues, and First Nations issues. The appellant is correct that the four pages devoted to the potential negative effects on its business did not include the appellant's objection to Sierra's conclusion that it could mitigate any losses by shifting its operations to the Glacier Creek area. However, the assessment report did state that "the inability to access Glacier Creek during bad weather was debatable." Moreover, the assessment report stated the appellant's concerns that, if the project should be approved, it would put it out of business. As well, the report summarized the Harley report's conclusions in that regard. It also referred to the appellant's assertion that safety was a factor in its decision to conduct the bulk of its business in the Jumbo Creek Valley, which implied that other areas such as Glacier Creek were less safe.

[63] Accordingly, the assessment report identified that there was a question whether the Glacier Creek area was inaccessible in bad weather and, if it was, that

the appellant's business could be adversely and perhaps fatally affected. The fact that this contention was not presented in the assessment report as a direct response by the appellant to the Sierra report is inconsequential in terms of procedural fairness.

[64] At the conclusion of his introductory remarks in his reasons for judgment, the chambers judge quoted s. 9(1) of the ***Judicial Review Procedure Act***:

> **9** (1) On an application for judicial review of a statutory power of decision, the court may refuse relief if
>
> > (a) the sole ground for relief established is a defect in form or a technical irregularity, and
> >
> > (b) the court finds that no substantial wrong or miscarriage of justice has occurred.

He alluded to this language later in his reasons when he said,

> [68] In the result, I conclude that any breach of procedural fairness demonstrated by the timing and manner of the receipt of submissions of R.K. by the EAO and its comment upon them was technical and not substantial in nature.

and later still,

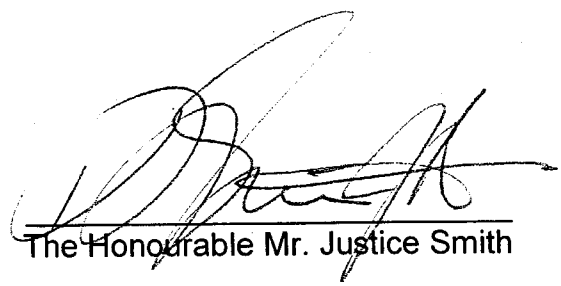
> [78] . . . As noted above, while there may have been technical faults in the process leading to the issuance of the EA Certificate by the Ministers, those irregularities were not substantial and do not merit the remedy sought by R.K. In the result, I dismiss the petition of R.K.

[65] In my view, the chambers judge found that, if there were any breaches of procedural fairness, they amounted to technical irregularities and no substantial wrong or miscarriage of justice had occurred. If he did, I would agree with him. I am

satisfied that the opportunities afforded the appellant to put forward its views and its evidence were fully sufficient to meet the requirements of natural justice.

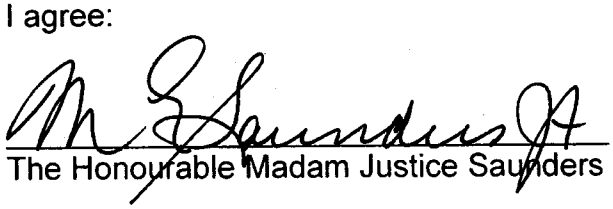
Conclusion

[66] For those reasons, I would dismiss the appeal.



The Honourable Mr. Justice Smith

I agree:



The Honourable Madam Justice Saunders

I agree:

The Honourable Madam Justice Levine