

Federal Court



Cour fédérale

**Date: 20170921**

**Docket: T-2181-16**

**Citation: 2017 FC 846**

**Ottawa, Ontario, September 21, 2017**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**SUNSHINE VILLAGE CORPORATION**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Sunshine Village Corporation [the Applicant, Sunshine Village, or Sunshine] applies for judicial review of the November 17, 2016 decision by the Parks Canada Superintendent of the Banff Field Unit [Parks Canada, the Superintendent or the Decision-Maker] that the parking permissions that applied on an Access Road since the 2012 - 2013 ski season would only continue for the 2016 - 2017 season and thereafter no parking on the Access Road would be permitted in future years [the Decision].

[2] Sunshine Village submits that the Decision is unreasonable and not supported by the evidence, that it was made in a perverse and capricious manner, and that it is contrary to law. It seeks various orders, including that the Decision in its entirety, or in the alternative specific aspects of it, be quashed and set aside.

[3] I find the Superintendent failed to consider the evidence before him concerning the implications of prohibiting parking on the Lower Access Road without adequate provision for alternative parking which he should have had regard for in making the Decision.

[4] I conclude that portion of the Superintendent's Decision was made without regard to evidence and is unreasonable. Accordingly, that portion of the Decision is quashed and remitted back to be decided anew.

[5] My reasons are set out below.

#### I. **Background**

[6] Sunshine Village and Parks Canada entered into a lease agreement on March 10, 1981, with amendments made in 1990 and 1993 [the Lease]. The Sunshine Village skiing facility leasehold is accessed by a 7.7 kilometre Access Road from the Trans-Canada Highway [the Access Road]. The Access Road has two components, an upper 3.5 kilometres closest to the Sunshine Village leasehold [the Upper Road or Upper Access Road] which is subject to an avalanche risk and the remaining 4.2 kilometres closest to the Trans-Canada Highway [the Lower Road or Lower Access Road] which is not.

[7] The Access Road is located in Banff National Park, on Crown land managed and administered by Parks Canada Agency. Save a small 'pullout area', the Access Road does not

fall within the leasehold. The Lease provides Sunshine Village with general access rights via the Access Road, which Canada is obligated to maintain. Canada is also obligated to provide comprehensive avalanche control to all areas that could affect the use and enjoyment of the leasehold.

[8] There is a designated parking area [the Parking Lot] on the Leasehold that provides about 1600 to 1840 parking spaces. The inadequacy of the Parking Lot to accommodate the number of visitors to the Resort on busy days, including most weekends and holidays [Overflow Days], is a long-standing issue.

[9] Many of the background facts in this judicial review up to 2013 are the same as they were explained by Justice Michael L. Phelan in *Sunshine Village Corporation v Parks Canada Agency*, 2014 FC 604 [*Sunshine Village*] at paragraphs 9-21:

[9] In May 2006 Parks Canada commissioned and received the Stetham [*sic*] 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.

...

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.

...

[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:

...

[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.

...

[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 [*sic*] 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.

[10] In the above quoted *Sunshine Village*, Sunshine Village had sought judicial review of the December 2012 decision. Justice Phelan dismissed the application, finding Parks Canada’s decision passed judicial review on the standard of reasonableness. The Federal Court of Appeal upheld his decision (*Sunshine Village Corporation v Canada (Parks)*, 2015 FCA 128).

[11] In this application for judicial review, Sunshine Village stresses it is not revisiting this earlier decision. Rather, Sunshine Village’s present application for judicial review is challenging the decision to prohibit parking on the Lower Road where there is no avalanche hazard.

[12] The December 2012 decision stated that any of the parking which would be permitted on parts of the Access Road was permitted only for the winter of 2012-2013, and that such parking could “be prohibited or further restricted at any time for safety or other reasons.” The Superintendent urged Sunshine Village to pursue permanent solutions for the following season, and offered some alternate parking options for the 2012-2013 season. The Superintendent’s decision regarding parking for 2013-2014 included the same conditions as that for 2012-2013. His decision for the 2014-2015 season also included the same conditions. He explained in the latter decision that parking on the Access Road was intended only as a temporary solution, and

stated “that Parks Canada Agency is seriously considering completely eliminating parking along the [A]ccess [R]oad by 2017.”

[13] Sunshine Village states it has submitted multiple proposals regarding replacement parking to Parks Canada, but none have been approved. In mid-2015, Sunshine Village conveyed its concerns regarding parking issues to the Minister of the Environment, and received a response in April stating that a “long-term sustainable solution that does not involve continued parking on the Sunshine Access Road must be found.” The Minister said she would “ensure that Parks Canada continues to work constructively with Sunshine Village” to develop a plan.

[14] That summer, Sunshine Village met with Parks Canada officials to try to develop a parking plan. In subsequent months, it became clear that the parties had different understandings regarding whether an agreement-in-principle had been reached during those meetings. The Superintendent’s parking decision for 2015-2016 contained the same conditions as in the decision for the previous three seasons, and included a reiteration that Parks Canada was “seriously considering completely eliminating parking along the [A]ccess [R]oad by 2017.”

[15] At the end of June 2016, the Superintendent informed Sunshine Village that he planned on making a decision “regarding parking on the [A]ccess [R]oad for the 2016-2017 season and for future seasons.” The Superintendent invited Sunshine Village to submit its opinion in writing by July 20, 2016, following which the Superintendent would consider the submissions alongside previous studies and expert reports. Sunshine Village submitted a letter dated July 2, 2016 reiterating that its earlier positions stated in its September 16, 2015, October 24, 2014, October 28, 2013, and July 26, 2013 correspondence were still applicable and these earlier points should be reconsidered. Of this earlier correspondence the September 16, 2015 letter stated that parking

near the Sunshine Village gate was reasonable since the avalanche risk rating was minimal and that, but for one site, the public would not use the proposed alternative parking.

[16] In August 2016, Parks Canada made it clear it did not believe an agreement-in-principle existed, and stated that if no agreement on site guidelines was reached by the end of 2016, it would accept the reality that they may not be able to reach an agreement and both “parties [would] then have to consider the next appropriate steps.” Further talks took place that fall, including regarding potential construction of a parkade (tiered parking) which Parks Canada supported but Sunshine Village found prohibitively expensive.

## II. **Decision Under Review**

[17] The Superintendent identified on two main outcomes in his Decision: (1) the parking permissions and conditions that had applied since the 2012-2013 season would continue for the 2016-2017 season; and (2) no parking on the Access Road in winter would be permitted in future years (i.e. as of the 2017-2018 season).

[18] The Superintendent considered the following documents and correspondence in coming to his decision:

- The Stethem Report of 2006
- The McElhanney Report of 2012
- The Alpine Solutions Avalanche Services Report of 2012 [the Alpine Report]
- The Dynamic Avalanche Consulting Report of 2012, as well as a map of Access Road Parking Zones prepared by the same consulting company that prepared the report [the Sunshine Report]
- Advice from Parks Canada avalanche safety experts including the 2012 memo “Parking Among Avalanche Zones on the Sunshine Village Road”

- Correspondence from Sunshine Village dated September 18, 2012; October 2 and 12, 2012; November 1 and 9, 2012; December 19, 2012; July 26, 2013; October 28, 2013; October 24, 2014; September 16, 2015; and July 2, 2016.

[19] The Superintendent explained that parking on the Access Road has been allowed since 2006 only as an interim solution, and observed that 10 years later no permanent, safe solution had been implemented. He described the 2012 avalanche as “clear confirmation that the risk to the public continues despite our best efforts.”

[20] He also explained that, beyond avalanche-related risks, the McElhanney Report outlined risks associated with the fact that the Access Road was “not designed to safely accommodate the mix of moving and parked vehicles and foot traffic that it sees in the winter season.” The Superintendent cited the McElhanney Report’s conclusion that “the safest solution to mitigate the safety issues is to relocate the roadside parking elsewhere, resulting in the elimination of vehicle-pedestrian conflicts on the road.”

### III. **Submissions of the Parties**

#### A. *Sunshine Village’s submissions*

[21] Sunshine Village submits that the appropriate standard of review is reasonableness, and that the Decision was unreasonable as it was based on erroneous findings of fact and made contrary to law.

(1) The Decision-Maker based its decision on erroneous findings of fact

[22] First, Sunshine Village outlines four findings of fact it deems to be erroneous and that it says warrant intervention based on paragraph 18.1(4)(d) of the *Federal Courts Act*, (RSC 1985, c F-7 [the *Act*]). They are summarized below as points (a) to (d).



(a) *Lack of evidence that the Decision will reduce avalanche, traffic, and highway risk*

[23] Sunshine Village submits that there is no evidence that the Decision will lower avalanche, traffic and highway risk. It interprets the evidence as indicating that the expected result of the Decision will be to increase such risk. Sunshine Village points out that the evidence indicates the Lower Road presents no avalanche risk, and that the risk in the single kilometre of the Upper Road where parking has been permitted since 2012 “is a manageable risk provided Parks Canada engages in the level of avalanche control activities required by the Lease.”

[24] Sunshine Village submits that the McElhanney Report warns that closing the entire Access Road without providing adequate replacement parking has “the potential for hundreds of vehicles to be illegally parked” and that “[i]t is expected that without any other option, visitors would disregard the parking restrictions and park within high risk avalanche areas”, thereby increasing the risk. It further points to evidence in the McElhanney Report and the Stethem Report regarding inadequacy of Parks Canada resources for enforcing parking prohibitions.

[25] Sunshine Village further submits Parks Canada would have to place reliance on Sunshine Village for such enforcement of no parking on the Access Road. Sunshine Village states that it lacks legal authority to enforce a no parking rule. Finally, Sunshine Village submits that Parks Canada has not offered adequate replacement parking, highlighting what it sees as inadequacies with proposed replacement parking.

(b) *Lack of evidence that the parking issue could have been solved but for unreasonable delay on the part of Sunshine Village*

[26] Sunshine Village submits that the evidence establishes that it has made many good faith attempts to resolve the parking issue, but that Parks Canada has not approved these options.

Accordingly, there was no evidence upon which the Superintendent could find that the failure to have a permanent solution in place was due to unreasonable delay on the part of Sunshine Village. Sunshine Village points out that a permanent solution requires collaboration with and approval by Canada: both according to law and to the Lease, as Sunshine Village is dependent on issuance by Canada of required permits, licenses, and authorizations to be able to create parking structures on its leasehold.

(c) *Failure to consider crucial evidence of Sunshine Village's lease rights*

[27] Regarding basis (b), Sunshine Village submits that the Decision furthered an improper purpose in that the Superintendent characterized Sunshine Village's objection to a proposed parkade as unreasonable and failed to consider Sunshine Village's concerns related to sub-Articles 30 (a), (b) and (c) of the Lease which state:

30. (a) If, in the opinion of the Minister, the operations being carried out on the land and the facilities erected on the land by the Lessee become inadequate at any time during the period of this Lease to meet the needs of the visitor, thereby making it expedient to alter, improve or expand such operations and facilities to meet such needs, the Lessee will, at the request of the Minister, provide such alterations, improvements or expansions as the Minister may require within such time as may be prescribed by the Minister.

(b) In no event shall the Minister require the Lessee to provide alterations, improvements or expansions the cost of which cannot be reasonably recovered prior to the termination of the term hereby granted and which shall include a profit to the Lessee consistent with the profit received from the then existing operations on the land.

(c) In the event that the Lessee is unwilling or unable to provide additional facilities required pursuant to subsection (a) or fails to provide the same within the time prescribed by the Minister, the Minister may, upon giving the Lessee six (6) months notice in writing, grant such further and additional licenses as may be required to provide the said additional facilities, provided however that such grant of additional licenses shall not in any way effect the Lessee's use and occupation of the land herein granted.

[28] Sunshine Village submits it never objected to the idea of a parkade *per se*, but rather to “the cost and impact to Sunshine’s business [a parkade would have] unless its rights under Article 30(b) or (c) were given effect to”.

[29] Sunshine Village submits that during talks in October 2016 when discussing with Parks Canada the possibility of a parkade, Sunshine Village made it clear that its concerns with the proposal were that it would be “cost-prohibitive” for Sunshine Village, and it objected to the idea of a third party building the parkade if that meant parking charges would be introduced.

(d) *Disregarding evidence that other ski resorts had adequate replacement parking established prior to losing access road parking*

[30] Sunshine Village submits that the Superintendent was not alive to the “crucial factor” that, when dealing with ski resorts in the vicinity of Sunshine, Parks Canada has not closed Access Road parking without ensuring adequate replacement parking is in place. Sunshine Village relies on documentary evidence establishing that Parks Canada has permitted continued road parking at Lake Louise and at Marmot until replacement parking is established.

(2) The Decision was made contrary to law.

[31] Sunshine Village submits that the Superintendent acted in a way that was contrary to law within the meaning of paragraph 18.1(4)(f) of the *Act* on the basis that (a) the Decision exceeded the Superintendent’s statutory or regulatory authority, and (b) it constituted an improper use of the Superintendent’s discretionary authority.

(a) *Exceeding the Superintendent’s statutory or regulatory authority*

[32] Sunshine Village submits that subsection 36(1) of the *National Parks General Regulations*, SOR/78-213 [the *General Regulations*], and paragraphs 16(1)(b) and 23(1)(c) of the

*National Parks Highway Traffic Regulations*, CRC, c 1126 [the *Highway Regulations*], provide the Superintendent with discretionary authority to prohibit parking on the Access Road where this authority is exercised for purposes of preventing a seasonal or temporary danger or promoting traffic and highway safety. Sunshine Village submits that the Decision frustrates the purpose of the relevant regulations.

[33] Sunshine Village submits that the decision to prohibit parking on the Lower Access Road is not in accordance with the above-described purposes, since (a) there is no evidence that any avalanche risk is engaged in that area; and (b) the evidence suggests that closing the Lower Access Road will increase highway, traffic, and avalanche risk because the expected result of prohibiting parking on the entire Access Road, including the Lower Road, is that “there is the potential for hundreds of vehicles to be illegally parked” and that “[i]t is expected that ... visitors would disregard the parking restrictions and park within high risk avalanche areas.”

[34] Sunshine Village further submits that prohibiting parking in the 1 kilometre stretch of the Upper Road where it has been permitted since 2012 is similarly inconsistent with the purposes of the relevant regulations. Sunshine Village interprets the evidence as establishing that conditions precedent should be met before parking is prohibited in that area. Specifically, adequate replacement parking should be in place and Canada should be able to rely on Sunshine’s assistance in patrolling the Access Road or be able to commit more resources to conduct such patrolling. Sunshine Village submits that the McElhanney report establishes that, absent these conditions, prohibiting parking will result in vehicles parking illegally, including in high risk avalanche areas.

[35] Sunshine Village further submits that the evidence establishes the best way of mitigating traffic risks is through safety measures already in place, and that closing parking on the Access Road without adequate replacement will exacerbate traffic risks by aggravating and confusing motorists.

(b) *Improper use of the Superintendent's discretionary authority*

[36] Sunshine Village submits that the Decision furthered an improper purpose: “to improve Parks Canada’s negotiating position and force Sunshine to build [a] parkade without accessing its rights under the Lease.” Sunshine Village points to the Superintendent’s description in the Decision of solutions supported by Parks Canada, “such as parkade structures that meet accepted engineering standards, and mass transit.”

[37] Sunshine Village points out that it already uses mass transit, and takes the position that the parkade is the only option Parks Canada is willing to pursue, and that Parks Canada is trying to impose the option on Sunshine without providing financial assistance.

B. *Parks Canada's Submissions*

[38] Parks Canada submits the standard of review is reasonableness, and that the Decision was reasonable and supported by the evidence before the Superintendent. Parks Canada makes four main points to support its submission that the Superintendent considered all the evidence and came to a reasonable conclusion that falls within a range of acceptable outcomes: there is no right to park on the Access Road; identifiable risks to safety justify the parking prohibition; the Decision was made fairly; and the Decision was supported by the evidence before the Superintendent.

(1) There is no right to park on the Access Road

[39] Parks Canada submits that the Decision does not restrict access to the Sunshine Village resort, but rather prevents parking on a public highway for public safety reasons. Parks Canada takes the position that Sunshine Village does not have a right to have its patrons park on the Access Road, and that its right of access to the leasehold is subject to reasonable rules and regulations made by the Superintendent regarding use of the leasehold. It also emphasizes Sunshine Village covenanted to respect the *National Parks Act* and its regulations as well as regulations made pursuant to related statutes. Parks Canada relies on *Sunshine Village* at paragraph 45, Articles 3 and 19 of the Lease, the *Canada National Parks Act*, SC 2000, c 32, and the *Highway Regulations*.

(2) Identifiable risks to safety justify the parking prohibition

[40] Parks Canada submits that “[t]he Decision was based on[,] and justified by[,] evidenced risks to public safety ... from avalanches; and ... [from] public safety risks associated with traffic.” Parks Canada outlines key evidence relating to the avalanche risk found in the 2012 Briefing Memo, the McElhanney Report, the Alpine Report, and the Stethem Report as follows:

- The East B4 area [the section of the Upper Access Road closest to the Lower Access Road] ... is affected by three avalanche paths;
- As evidenced by the March 6, 2012 triggered avalanche which cascaded onto the Access Road with unpredicted ferocity and size, avalanche risk prediction is not an exact science, and a large margin of safety should be accounted for;
- The Access Road has the highest avalanche hazard index of all roads in Banff, Kootenay, and Yoho national parks;
- Nowhere else in Canada is parking allowed in active avalanche zones; [The East B4 area at issue]

- The Sunshine Report suggested avalanche risk remains low, but that Report had palpable weaknesses including that it did not account specifically for Peak Day traffic volumes, based its assessment of pedestrian risks on the non-analogous circumstances of backcountry hikers, failed to consider the daily or hourly variability of avalanche risk, and disregarded avalanches terminating near the road without crossing it;
- Regardless of the probability of an avalanche affecting the Access Road, a single unpredicted avalanche would likely have significant consequences to persons and property including “extensive vehicle damage and multiple fatalities”;
- Avalanches pose greater risks to pedestrians and parked vehicles than moving traffic.

[citations removed]

[41] Parks Canada outlines key evidence relating to the traffic-associated risk found in the McElhanney Report, the only report looking specifically at general traffic safety. That evidence indicated that roadside parking contributes to:

- Limited sight distances for drivers of the Access Road;
- The narrowing of the portion of the Access Road usable for through traffic;
- Driving obstacles such as:
  - open doors,
  - stopped shuttle buses ...
  - and
  - pedestrians on the road
  - ...
- Emergency vehicles being slowed due to obstruction, or potentially, stopped;

- Difficulty signing the Access Road at always-appropriate speeds, which leads to drivers proceeding at unsafe speeds in close proximity to pedestrians; and
- Aggressive and erratic driving behaviour caused by driver confusion, frustration, and impatience with road congestion.

[citations removed]

[42] Parks Canada notes collision data suggested “68% of the collisions on the Access Road between 2005 and 2009 were caused by roadside parking” with “[a]t least six collisions ... result[ing] in injuries to persons.” [citations removed]

[43] Parks Canada submits the Decision was clearly made in consideration of risks to safety of users of the Access Road, and that it was reasonable for the Superintendent to accept the McElhanney Report recommendation that roadside parking be prohibited.

[44] Additionally, Parks Canada highlights the Superintendent’s expertise in regulating highway traffic in the Park. Parks Canada rejects the suggestion that the Superintendent was motivated by an improper purpose.

(3) The Decision was fair

[45] Parks Canada submits that communications between Canada and Sunshine Village since 2012 establish that the Decision to prohibit all roadside parking should not have been a surprise to Sunshine Village. There was ample indication provided by Canada that roadside parking was being permitted on a year-by-year basis as an exceptional measure, that other parking options should be considered and pursued, and that Parks Canada was “seriously considering completely eliminating parking along the [A]ccess [R]oad by 2017.”



[46] Additionally, Parks Canada submits that the Superintendent was not required to outline each and every element that led him to his Decision, but that the reasonableness of the Decision should be assessed based on both his reasons and the record.

(4) The Decision was supported by the evidence before the Superintendent

[47] Parks Canada disagrees with Sunshine Village's interpretation of the McElhanney Report as indicating that closing the Access Road to parking would aggravate traffic and avalanche risks.

[48] Parks Canada acknowledges that the McElhanney Report cautions that a parking prohibition should not be instituted without other parking options being made available. Parks Canada emphasizes, however, the speculative nature of the warning: Parks Canada states the report, "considered that without clear instructions on where parking is permitted, motorists might grow aggravated and might "potential[ly]" park in restricted areas; if so, enforcement mechanisms would need to be implemented." [emphasis removed]

[49] Parks Canada submits there is nothing to indicate this caution was overlooked by the Superintendent, and further submits Sunshine Village's arguments related to inadequacy of enforcement abilities are speculative. Parks Canada also points out that other parking options have been provided to Sunshine Village, but that Sunshine Village has declined 461 alternate parking spots offered to it.

[50] Additionally, Parks Canada submits the fact that the Superintendent communicated as early as November 2014 that he was considering a complete prohibition on roadside parking by

2017 indicates his decision was motivated by safety, not negotiations: he could not have known in 2014 that no agreement relating to long-term solutions would have been reached by 2017.

[51] Furthermore, Parks Canada rejects Sunshine Village’s suggestion that the Decision forces it to build a parkade, highlighting that the parkade option was provided as an example of an acceptable long-term solution, and highlighting Sunshine Village’s rejection of 461 off-site offered spaces. Parks Canada submits that Article 30 of the Lease is thus not engaged, since it deals with situations in which the Minister *requires* the lessee to make “alterations, improvements or expansions.”

[52] In response to Sunshine Village’s reliance on the fact that roadside parking has not been prohibited at other nearby resorts without alternate long-term parking plans being in place, Parks Canada submits this is irrelevant. Parks Canada points to a lack of available comprehensive evidence regarding traffic risks on those roads, stating the Superintendent reasonably based his decision on evidence of safety concerns at play on the Access Road.

#### IV. Legislation

[53] The *Federal Courts Act*, RSC 1985, c F-7 provides:

Application for judicial review	Demande de contrôle judiciaire
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l’objet de la demande.
...	...
Powers of Federal Court	Délai de présentation
(3) On an application for judicial review, the Federal	Pouvoirs de la Cour fédérale

Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

[54] The relevant National Parks legislation and regulations provide:

*Parks Canada Agency Act*, SC 1998, c 31

Establishment

3 There is hereby established a body corporate to be called the Parks Canada Agency, that may exercise powers and perform duties and functions only as an agent of Her Majesty in right of Canada

Minister responsible

4 (1) The Minister is responsible for the Agency and the powers, duties and functions of the Minister, in that capacity, extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) areas of natural or historical significance to the nation, including national parks, national marine conservation areas, national historic sites, historic canals, historic museums established under the Historic Sites and Monuments Act, Saguenay-St. Lawrence Marine Park and Rouge National Urban Park;

(b) heritage railway stations,

Constitution de l'Agence

3 Est constituée l'Agence Parcs Canada, dotée de la personnalité morale et exerçant ses attributions uniquement à titre de mandataire de Sa Majesté du chef du Canada.

Ministre responsable

4 (1) Le ministre est responsable de l'Agence et, à ce titre, ses attributions s'étendent de façon générale à tous les domaines de compétence fédérale non attribués de droit à d'autres ministères ou organismes et liés :

a) aux lieux naturels ou historiques d'importance pour la nation, notamment les parcs nationaux, les aires marines nationales de conservation, les lieux historiques nationaux, les canaux historiques, les musées historiques créés en vertu de la Loi sur les lieux et monuments historiques, le parc marin du Saguenay — Saint-Laurent et le parc urbain national de la Rouge;

b) aux gares ferroviaires patrimoniales, aux phares

heritage lighthouses, federal heritage buildings, historic places in Canada, federal archaeology and Canadian heritage rivers; and

(c) the design and implementation of programs that relate primarily to built heritage.

Ministerial direction

(2) The Minister has the overall direction of the Agency, which shall comply with any general or special direction given by the Minister with reference to the carrying out of its responsibilities.

...

Exercise of powers conferred on Minister

5 (1) Subject to any direction given by the Minister, the Agency may exercise the powers and shall perform the duties and functions that relate to national parks, national historic sites, national marine conservation areas, other protected heritage areas and heritage protection programs that are conferred on, or delegated, assigned or transferred to, the Minister under any Act or regulation.

Officers and employees

(2) An officer or employee of the Agency may exercise any power and perform any duty or function referred to in subsection (1) if the officer or employee is appointed to serve in the Agency in a capacity appropriate to the exercise of

patrimoniaux, aux édifices fédéraux patrimoniaux, aux lieux patrimoniaux au Canada, à l'archéologie fédérale et aux rivières du patrimoine canadien;

c) à la mise sur pied et la mise en œuvre de programmes visant principalement le patrimoine bâti.

Instructions du ministre

(2) Le ministre fixe les grandes orientations à suivre par l'Agence, à qui il incombe de se conformer aux instructions générales ou particulières qu'il lui donne en ce qui a trait à la réalisation de sa mission.

...

Exercice de certaines attributions du ministre

5 (1) Sous réserve des instructions que peut donner le ministre, l'Agence exerce les attributions qui sont conférées, déléguées ou transférées à celui-ci sous le régime d'une loi ou de règlements dans le domaine des parcs nationaux, des lieux historiques nationaux, des aires marines nationales de conservation, des autres lieux patrimoniaux protégés et des programmes de protection du patrimoine.

Dirigeants et employés

(2) Les dirigeants ou employés de l'Agence ayant, au sein de celle-ci, la compétence voulue peuvent exercer les attributions visées au paragraphe (1); le cas échéant, ils se conforment aux instructions générales ou

the power or the performance of the duty or function, and in so doing, shall comply with any general or special direction given by the Minister.

particulières du ministre.

*Canada National Parks Act, SC 2000, c 32*

Definitions

2 (1) The definitions in this subsection apply in this Act.

...

Minister means the Minister responsible for the Parks Canada Agency.

...

superintendent means an officer appointed under the Parks Canada Agency Act who holds the office of superintendent of a park or of a national historic site of Canada to which this Act applies, and includes any person appointed under that Act who is authorized by such an officer to act on the officer's behalf.

...

Parks dedicated to public

4 (1) 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 generations.

...

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

...

ministre Le ministre responsable de l'Agence Parcs Canada.

directeur Fonctionnaire nommé, en vertu de la Loi sur l'Agence Parcs Canada, directeur d'un parc ou d'un lieu historique national du Canada régi par la présente loi. Y est assimilée toute personne nommée en vertu de cette loi qu'il autorise à agir en son nom.

...

Usage public des parcs

4 (1) Les parcs sont créés à l'intention du peuple canadien pour son bienfait, son agrément et l'enrichissement de ses connaissances, sous réserve de la présente loi et des règlements; ils doivent être entretenus et utilisés de façon à rester intacts pour les générations futures.

...

Autorité compétente

8 (1) Les parcs, y compris les terres domaniales qui y sont

## Management by Minister

8 (1) The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks and, for that purpose, the Minister may use and occupy those lands.

## Ecological integrity

(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.

...

No disposition or use without authority

13 Except as permitted by this Act or the regulations,

...

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

situées, sont placés sous l'autorité du ministre; celui-ci peut, dans l'exercice de cette autorité, utiliser et occuper les terres domaniales situées dans les parcs.

## Intégrité écologique

(2) La préservation ou le rétablissement de l'intégrité écologique par la protection des ressources naturelles et des processus écologiques sont la première priorité du ministre pour tous les aspects de la gestion des parcs.

...

Aliénation ou utilisation des terres domaniales

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 General Regulations, SOR/78-213*

## Closing of Areas and Ways

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

## Fermeture de zones et de voies

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

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.

concernée.

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

*National Parks Highway Traffic Regulations, CRC, c 1126*

2 In these Regulations,

...

highway includes a road, street, avenue, parkway, driveway, lane, square, bridge, viaduct, trestle or other place within a park intended for use by the public for the passage or parking of vehicles;

...

Traffic Signs and Devices

16 (1) The superintendent may mark and erect on or along a highway a traffic sign or device that

...

(b) regulates or prohibits ... the stopping or parking of motor vehicles or any class thereof;

...

(h) regulates pedestrian traffic;

... or;

(k) regulates, directs or controls in any other manner the use of the highway by

2 Dans le présent règlement,

...

route. Vise notamment une route, une rue, une avenue, une promenade, une allée, une ruelle, un pont, un viaduc, un pont sur chevalets, une place ou tout autre endroit à l'intérieur d'un parc destiné à être utilisé par le public pour le passage ou le stationnement d'un véhicule.

...

Signalisation routière

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) réglementer ou interdire l'attache de chevaux ou le stationnement ou l'arrêt de véhicules automobiles ou de catégories de véhicules automobiles;

...



horses, motor vehicles or pedestrians.

...

#### Parking

23 (1) The superintendent may erect a sign that designates an area as

- (a) an area where parking is reserved for persons holding parking permits;
- (b) an area where parking is permitted for a period of time; or
- (c) an area where parking is not permitted.

h) régler la circulation des piétons;

... or;

k) régler, diriger ou contrôler de quelque autre façon la circulation sur la route des véhicules automobiles, des chevaux ou des piétons.

#### Stationnement

23 (1) Un directeur de parc peut, au moyen d'un écriteau, désigner une zone comme

- a) une zone où le stationnement est réservé aux détenteurs de permis de stationnement;
- b) une zone où le stationnement est permis pendant un certain temps; ou
- c) une zone où le stationnement est interdit.

## V. Issues

[55] The Parties submit that the standard of review for this case is reasonableness. I agree as the decision was made pursuant to the exercise of discretion given to the Superintendent to manage the park (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-54 [*Dunsmuir*]; *Sunshine Village* at para 30).

[56] The main issue is whether the decision is reasonable. In other words, is it justifiable, transparent and intelligible, and does it “fall[] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47). This entails considering the following:

- a) Was the Decision in accordance with the purposes of the *Canada National Parks Act* and its regulations?

b) Was the Decision based on the evidence before the Superintendent?

VI. **Analysis**

[57] Banff National Park is governed by the *Canada National Parks Act* which provides that the Minister responsible for the Parks Canada Agency is responsible for administration of and control of national parks. Both the *National Parks General Regulations* [*General Regulations*] and the *National Parks Highway Traffic Regulations* [*Highway Regulations*] are regulations made pursuant to the *Canada National Parks Act*. The Superintendent has delegated authority to make decisions pursuant to these regulations. The Access Road is a “highway” for the purposes of the *National Parks Highway Traffic Regulations*.

[58] Subsection 36(1) of the *General Regulations* authorizes a Superintendent to close to public use or traffic any area of the park if such is deemed “necessary for the prevention of any seasonal or temporary danger”. Subsection 16(1) of the *Highway Regulations* grants the Superintendent authority to regulate or prohibit motor vehicles from stopping or parking along highways, to regulate pedestrian traffic, and to regulate, direct or control in any other way the use of highways by vehicles or pedestrians. Paragraph 23(1)(c) of the *Highway Regulations* authorizes the Superintendent to designate any area as a no-parking area.

[59] In addition there are portions of the Lease which are related to the subject matter of this application:

3 The Lessee covenants that it will ... 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.

...

19 Her Majesty, covenants and agrees that at all times during the term of this Lease to ensure that there is good highway access, both from the East and West. Her Majesty also covenants and agrees to maintain the lower access road to a standard sufficient to meet the needs of the traffic attempting to use the said road. Her Majesty further covenants and agrees that the Lessee shall be given general rights of access to the right of way presently known as the upper access road, subject to the Superintendent's reasonable rules and regulations respecting use of same.

...

30 (a) If, in the opinion of the Minister, the operations being carried out on the land and the facilities erected on the land by the Lessee become inadequate at any time during the period of this Lease to meet the needs of visitors, thereby making it expedient to alter, improve or expand such operations and facilities to meet such needs, the Lessee will, at the request of the Minister, provide such alterations, improvements or expansions as the Minister may require within such time as may be prescribed by the Minister.

(b) In no event shall the Minister require the Lessee to provide alterations, improvements or expansions the cost of which cannot be reasonably recovered prior to the termination of the term hereby granted and which shall include a profit to the lessee consistent with the profit received from the then existing operations on the land.

(c) In the event that the Lessee is unwilling or unable to provide the additional facilities required pursuant to subsection (a) or fails to provide the same within the time prescribed by the Minister, the Minister may, upon giving the Lessee six (6) months notice in writing, grant such further and additional licenses as may be required to provide the said additional facilities, provided however, that such grant of additional licenses shall not in any way affect the Lessee's use and occupation of the land herein granted.

[Emphasis added]

[60] Generally, on judicial review of a decision, a reviewing court must determine if the outcome “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law” (*Dunsmuir* at para. 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). In *Canada (AG) v Select Brand Distributors Inc*, 2010 FCA 3 at

paragraph 45, Pelletier J.A. explained, “[a] tribunal’s factual conclusions are subject to review under paragraph 18.1(4)(d) of the Federal Courts Act where there is no evidence upon which the tribunal could have come to the conclusion it did.” Further, the failure to consider relevant evidence can result in a decision falling outside the range of possible acceptable outcomes (*Nyoka v Canada (Citizenship and Immigration)*, 2008 FC 568 at paras 20-21; *Osazuma v Canada (Citizenship and Immigration)*, 2007 FC 1145 at paras 25-30). This can occur as although an administrative decision maker is presumed to have considered all the evidence before them, in certain circumstances where such evidence is contrary to the findings of the decision maker or central to the decision there is the need for them to be addressed in the decision (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paras 16-17 (FCTD); *Do v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 432 at paras 56-58; and *Arias Ultima v Canada (Citizenship and Immigration)*, 2013 FC 81 at para 35).

[61] In *Sunshine Village*, Justice Phelan found that the Superintendent’s December 2012 decision to prohibit parking on all but one kilometre of the Upper Road (which would be available for parking during periods of predicted minimal avalanche hazard) was reasonable. The Court found that “[t]he differences between the Applicant’s approach to avalanche risk management and that of Parks Canada runs along a spectrum of appropriate risk management” (at para 43). The Superintendent’s decision, while different from what the Applicant wanted and what the Applicant’s experts recommended, fell within a range of acceptable outcomes. Justice Phelan found “there [were] equally credible expert reports [i.e. equal to the Applicant’s expert report] which point to and support the type of ban which the Superintendent imposed” (at para 40) and accordingly dismissed Sunshine Village’s application for judicial review.

[62] There are two significant differences between the decision considered by Justice Phelan and the Decision that is at issue here. First, the Decision is more restrictive than the 2012 decision: not only does it eliminate the one kilometre where parking was permitted pursuant to the 2012 decision in the avalanche-threatened Upper Access Road, it also eliminates parking that had been permitted pursuant to the 2012 decision on the avalanche-threat-free Lower Access Road. Second, the 2012 decision centered on avalanche risk and only made brief mention of traffic safety issues, unlike the present Decision where the McElhanney report takes a much greater role in the decision reached.

A. *Was the Decision in accordance with the purposes of the Canada National Parks Act and its regulations?*

[63] The national parks legislation, in particular s 36(1) of the *General Regulations* and s 23(1)(c) of the *Highway Regulations*, sets out the legal authority for the Superintendent to make the decision to prohibit parking on the entire Access Road.

[64] The expert reports before the Superintendent clearly identify the potential avalanche risk with respect to that portion of Upper Access Road near Sunshine Village's gate. This evidence indicates the East B4 area is affected by three avalanche paths. Sunshine Village contends this risk is minimal given avalanche management. However, Parks Canada makes a salient point that avalanche prediction is not an exact science and a large margin of safety should be accounted for as demonstrated by the unpredicted scale of the triggered March 6, 2012 avalanche.

[65] I conclude the Superintendent's Decision with respect to the Upper Access Road is clearly within the scope of s 36(1) of the *General Regulations* and s 23(1)(c) of the *Highway Traffic Regulations*. The issue of the parking prohibition on the Lower Access Road will be

addressed in the second part of the decision as the question with respect to the Lower Road is not jurisdiction but whether that decision was reasonable.

[66] Sunshine Village also submits the Superintendent made his decision for an improper purpose, namely to compel Sunshine Village to resolve the parking issue by constructing a parkade. There is little merit in this contention.

[67] First, the evidence that Parks Canada was advocating a parkade is equivocal. The Superintendent wrote “Parks Canada has been and continues to be supportive of Sunshine implementing solutions such as parkade structures that meet accepted engineering standards, and mass transit [emphasis added]”. Parks Canada reasonably submits it was only referenced as an example of alternative parking, not as a necessity.

[68] Second the Lease contemplates Sunshine Village having to undertake improvements but only if it can recover its expenditures within the term of the lease. Sunshine Village estimated the cost of constructing a parkade at \$30,000 to \$50,000 dollars per stall with some 500 parking stalls required. Here the Lease is due to expire in three years effectively establishing a limit to recovery within the term of the Lease. Parks Canada, as a party to this Lease, would be well aware of this constraint.

[69] Finally, although there has been mention of a parkade being a possible solution, an approved parkade plan was not put before the Court and from the evidence before the Court of correspondence and meetings it is clear that discussions in regards to parking structures and potential “creative solutions” were ongoing at the time of the Decision.

[70] In result I find the evidence does not support Sunshine Village's contention that the Superintendent made its decision for the improper purpose of compelling Sunshine Village to construct a parkade on its leasehold.

B. *Was the Decision based on the evidence before the Superintendent?*

[71] The Superintendent's Decision made on November 17, 2016 contains a number of references to considerations other than avalanche risk. In particular the Superintendent's letter states:

In addition to your previous correspondence, I have also reviewed and re-considered the following information:

*Sunshine Road Roadside Parking Safety Review Banff National Park* (McElhanney Consulting Services, 2012)

...

Based on the total information and correspondence above, I have determined that for the 2016-17 season, parking will be allowed in the same configuration and on the same terms as it was allowed last year. ... Please note that parking may be further prohibited or restricted at any time for safety or other reasons.

As indicated in my previous correspondence to you on this matter, I have also considered if and where parking should be allowed on the road in future years. As you know, the parking along certain sections of the access road has been allowed by Parks Canada since 2006/07 as an interim solution only, in order to provide time for Sunshine Village to identify and implement a permanent solution to the parking shortfall. After 10 years, a permanent, safe solution has yet to be implemented. ...

Additionally, the McElhanney report indicated that aside from the risk of avalanches, there is an additional risk to the public - whether waiting for transit, walking or driving on the road - stemming from the fact that the road was not designed to safely accommodate the mix of moving and parked vehicles and foot traffic that it sees in the winter season.

The McElhanney report states that the safest solution to mitigate the safety issues is to relocate the roadside parking elsewhere,

resulting in the elimination of vehicle-pedestrian conflicts on the road. The road is public land managed by Parks Canada, and responsibility of how it is used and for avalanche control, rest with Parks Canada.

On this basis I have determined that for future years, there will be no public parking at all allowed in the winter along the Sunshine Village access road. Parks Canada has done its best to mitigate the risks; however were not prepared to allow the public to be subject to this continuing risk, nor accept the potential liability that accompanies it.

[72] The March 28, 2012 McElhanney report is the only expert report to address traffic safety issues. The report noted that on December 28, 2011 roadside parking along the access road was observed to extend several kilometres down the road to within 1 km of the TransCanada Highway interchange (There were areas along the Access Road where parking was not permitted at that time).

[73] The report noted that over 97% of the vehicles during the 2011/12 Christmas break were passenger vehicles. The average estimated parking capacity of the Sunshine Village parking lot was 1785 vehicles with the daily traffic volumes to Sunshine Village reaching 2220 vehicles. This meant, assuming all these vehicles parked, there would be a total of 382 to 475 excess vehicles that would have to park on the roadside with evidence that the daily roadside parked vehicles had reached up to 498 vehicles as early as 2005/06.

[74] The McElhanney report identified the potential safety issues being: vehicle-pedestrian conflicts, avalanche exposure, narrow road cross-sections, roadside hazards, midblock U-turns, temporary traffic control, limited sight distances, and other minor safety issues such as double signage and white shuttle vans. The report also identified a number of human factors that could lead to increased risk such as distraction, confusion, impatience and fatigue. Driver distraction



results from motorists being in a rush to get to the ski hill or get a parking space, rushing to return home, on street parking maneuvers and the like. Similarly pedestrians on the road could be distracted while carrying their equipment, guiding smaller children, or rushing to catch the bus. Pedestrians on the Access Road which is carrying traffic represented one of the biggest safety risks.

[75] The McElhanney report identified a number of alternative recommendations to improve traffic safety issues: road widening, relocate roadside parking, expand the existing parking lot, provide an off-site parking lot, restrict roadside parking without providing additional parking, or improve existing roadside parking operations.

[76] The option that was adopted in 2012/13 was to improve existing roadside parking operations. This involved co-operation between Parks Canada in respect of avalanche monitoring and control and Sunshine Village in respect of traffic control and shuttle bus service. This option, the improved roadside parking operations, is now set aside for the 2017/18 season and thereafter by the Superintendent's Decision.

[77] Road widening has never been considered and expanding parking within the existing Sunshine Village leasehold by construction of a parkade is problematic given the relatively short remaining duration of the Lease.

[78] The McElhanney report rejected the option of restricting roadside parking without providing additional parking stating:

Another option is to restrict roadside parking on the Sunshine Road without providing additional parking elsewhere. This option is not recommended as it is expected to create great confusion aggravation to motorists. It is expected that without any other

option, visitors would disregard the parking restrictions and park within high risk avalanche areas.

[Emphasis added]

This observation is supported elsewhere in the McElhanney report where it is noted that Parks Canada staff indicated that parking was known to occur within the restricted no parking avalanche areas.

[79] The McElhanney report identified relocating roadside parking as the safest solution to mitigate the safety issues identified. The solution would eliminate vehicle-pedestrian conflicts which exist on the Access Road. The roadside parking demand was approximately 400-500 vehicles during peak holidays and as such any facility that is to facilitate the relocation of roadside parking will the need to accommodate at least 500 vehicles.

[80] The McElhanney report identified factors to be considered for off-site parking to accommodate overflow parking on peak days. It identified the challenges involved including:

- How will access be provided to the parking lot? Adequate intersection design will be required, particularly on a high-speed, high volume road such as Highway 1;
- What are the potential impacts of vehicle queues waiting to get in/out of the parking lot, including conflicts with through traffic?
- How will access to/from the parking lot be provided for traffic coming from/going to the east and west?
- What route will shuttle buses take to and from the ski resort? and,
- How will traffic be re-routed to the overflow parking lot when the primary lot fills to capacity?

The McElhanney report noted “[a]n off-site overflow parking lot could function adequately provided the questions identified above can be resolved.”

[81] In a clarifying letter dated November 29, 2016 subsequent to his Decision, the Superintendent reiterated Parks Canada’s offer to make other parking lots available to Sunshine Village, specifically Cascade Overflow Campground, Cascade Ponds, and the Fireside Day Use Area Parking Lot.

[82] Sunshine Village identified these locations as Cascade Overflow Campground, 22.3 km away from Sunshine with 119 spots, Cascade Ponds 21.3 km away from Sunshine with 31, 68 and 107 spots in separate lots, and Fireside Day Use off the TransCanada Highway 11-13 km away from Sunshine with 32 spots. Sunshine Village states it had declined these locations “for reasons of distance, unsuitability and other factors.” Sunshine Village states it “tried to use the Five Mile Pullout, the closest of the [d]eclined locations, [ 10.2-12.6km away from Sunshine and having 29 spots] on multiple occasions [(presumably successive overflow days)] by diverting traffic with signs and offering a free shuttle and discounted lift tickets to visitors who would park there. It received few takers and concluded the Five Mile Pullout was not a feasible solution”. Sunshine reasonably submits the public would also not use the other even further away declined locations. In addition, Sunshine Village highlighted safety concerns with the Five Mile Pullout due to vehicles queuing up on the TransCanada Highway during winter conditions.

[83] In my view, the McElhanney report identified a crucial factor that needs to be addressed when considering the issue of overflow parking, namely the response by motorists arriving at Sunshine Village. The report emphasized “[a]n off-site overflow parking lot could function adequately provided the questions identified above can be resolved.” Elsewhere it cautioned

“[i]t is expected that without any other option, visitors would disregard the parking restrictions and park within high risk avalanche areas.”

[84] Nowhere does the Superintendent’s Decision address these questions and cautions that were part of the evidence before him. The cautions and questions raised by the McElhanney report are of sufficient importance that it cannot be assumed that the Superintendent considered them by merely listing the McElhanney report among others and making reference to elements of the report (other than the questions and cautions outlined above).

[85] On the contrary, Sunshine Village has presented evidence of testing out one of the nearest alternative parking sites. Its experience correlates with the recommendations of the McElhanney report.

[86] I find the Superintendent failed to consider evidence before him that he should have had regard for in making his Decision concerning prohibiting parking on the Lower Access Road, and as such that portion of the decision is unreasonable.

## VII. **Conclusion**

[87] I conclude the Superintendent’s Decision with respect to the Upper Access Road where avalanche risk was present is clearly within the scope of s. 36(1) of the *General Regulations* and s. 23(1) of the *Highway Traffic Regulations*.

[88] Given the clear evidence of avalanche risk, albeit minimal in managed conditions on the 1 kilometre stretch of the Upper Access Road, the Superintendent’s Decision to prohibit parking on the Upper Access Road was made with regard to the evidence and is reasonable.

[89] I also conclude, with respect to the Lower Access Road where there is no avalanche risk present, the Superintendent failed to consider the evidence before him concerning the implications of prohibiting parking without adequate provision for alternative parking that he should have had regard for in making the Decision. As such the Decision with respect to the Lower Access Road is unreasonable.

[90] That portion of the Superintendent's Decision of November 17, 2016 to prohibit parking on the Lower Access Road is quashed and the matter is to be remitted back to be decided anew after Sunshine Village has had full opportunity to be heard on the question of adequate provision for alternative parking.

#### VIII. Costs

[91] The issues between the parties are complex and are not easily resolved. The success of the Parties was mixed.

[92] I make no award of costs.

**JUDGMENT IN T-2181-16**

**THIS COURT'S JUDGMENT is that:**

1. That portion of the Superintendent's Decision of November 17, 2016 to prohibit parking on the Lower Access Road for the 2017/18 season and thereafter is quashed and the matter is to be remitted back to be decided anew after Sunshine Village has had full opportunity to be heard on the question of adequate provision for off-site alternative parking.
2. No costs are awarded.

“Leonard S. Mandamin”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-2181-16

**STYLE OF CAUSE:** SUNSHINE VILLAGE CORPORATION V THE  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** EDMONTON, ALBERTA

**DATE OF HEARING:** JULY 12, 2017

**JUDGMENT AND REASONS:** MANDAMIN, J.

**DATED:** SEPTEMBER 21, 2017

**APPEARANCES:**

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