Date: 20080814

Docket: T-1688-06

Citation: 2008 FC 940

Ottawa, Ontario, August 14, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOHNSTON CANYON CO. LTD.

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act* of a decision by Parks Canada, in a letter dated August 17, 2006, to require certain terms for a new lease of Crown land to the applicant. The applicant seeks a series of remedies including a declaration that it is entitled to the grant of a 42 year lease at a method of rent calculation of its choice. For the reasons that follow the application is dismissed.

Background:

[2] The applicant, Johnston Canyon Co. Ltd., operates a seasonal (April 1 to October 31) accommodation facility in Banff National Park, 25 kms west of the town of Banff and close to the popular Johnston Canyon trailhead. The facility, consisting largely of rustic bungalows, has operated on leased Crown land since 1927. The bungalows are classified by Parks Canada as Outlying Commercial Accommodation (OCA).

[3] In 1963, the applicant and the Crown signed a lease for 42 years, expiring December 31, 2004, with a right of renewal for a further 21 years "at a rent to be determined by the Minister".

[4] In 1988 the Minister of Canadian Heritage, the minister responsible for Parks Canada, imposed a moratorium on OCA development in the mountain national parks and appointed a panel to review the issue. The OCA panel's report was made public in April 2000 followed by the report of a separate panel on maintenance of the parks' ecological integrity. These reports served as the basis for the development of Parks Canada policy respecting OCAs.

[5] By letter dated May 30, 2001 the Chief Executive of Parks Canada advised the applicant that the agency did not accept certain of the OCA panel's recommendations respecting the Johnston Canyon resort because of ecological concerns and that redevelopment and expansion of the facility would be subject to new guidelines which were set out in the letter.

[6] The two parties began negotiations for a mutually acceptable redevelopment plan and new lease in 2001. Issues in contention included extension of the operating season to include the winter months, redevelopment, expansion and partial relocation of the site and the rent regimes available to the applicant on a new lease. Parks Canada officials advised the applicant that the agency was open to its redevelopment proposals so long as they were “environmentally advantageous”. Expansion would be permitted if an ecological benefit could be shown.

[7] On May 21, 2004, Parks Canada adopted a Revised Policy Directive for Commercial Rent Setting, which was to be applied to all commercial leases and land occupation licences. For replacement leases negotiated thereafter, an agreed-upon percentage of gross revenue would be the only available basis for calculating the rent. Where ‘substantive negotiations’ had been completed between Parks Canada and a lessee on the terms of surrender and replacement of a lease by May 20, 2004, the lessee would be permitted to select a rent option from those set out in subsection 6(1) of the *National Parks of Canada Lease and Licence of Occupation Regulations*, SOR/92-25 (the *Regulations*). The Minister has since taken steps to amend the *Regulations* to reflect the Revised Policy but those changes were not in place at the time the policy was adopted and applied in this case.

[8] Over the course of the negotiations, the parties were in regular communication in writing and through telephone calls and face to face meetings between Parks Canada officials and the applicant’s directors. The applicant submitted proposals in April and September 2004 which were refused primarily on the ground that they did not demonstrate sufficient environmental advantages. By letter dated October 21, 2004 to the applicant, a Parks Canada official advised that proposed

changes to the surveyed lease area and to the nature of the operations would require a new lease. No agreement on the issues was reached prior to the expiry of the original lease on December 31, 2004.

[9] A letter from the applicant dated February 26, 2005 was read by Parks Canada officials as withdrawing Johnston Canyon's redevelopment proposal and ending the request for a new 42 year lease. Correspondence from Parks Canada in March and May 2005 confirmed that a new lease was no longer under consideration and that the 21 year renewal remained on the table under which the applicant could choose one of the rental options outlined in the *Regulations*. There was some dispute over the appraised value of the facility but ultimately, the applicant executed the renewal agreement in June 2005 essentially on the same terms as the 1963 lease with an expiry date of December 31, 2025.

[10] On October 25, 2006 the applicant submitted a revised redevelopment proposal within the guidelines fixed by Parks Canada based upon a 42 year term with rent to be determined according to the options set out in the *Regulations*. Further meetings and correspondence ensued between the parties. By letters dated February 3, 2006 and August 17, 2006 Parks Canada reiterated its position that the only rent regime available for a new lease was the percentage of gross revenue approach.

[11] The August 17, 2006 letter was taken by the applicant to be the decision which forms the basis of this application for judicial review. If successful, the applicant seeks:

a) a declaration that it must be permitted to choose one of the applicable rent provisions from the *Regulations* in the grant of a lease to it;
b) a declaration that Parks Canada has no jurisdiction to impose a specific rent option on it;
c) a declaration that Parks Canada has a duty to exercise its discretion fairly and equally between similarly situated lessees;

d) a declaration that Parks Canada has not fairly, equitably and consistently exercised its discretion;
e) a declaration that it had a legitimate expectation that it would be granted a 42 year lease on the rent option of its choice;
f) an order of *certiorari* setting aside the impugned decision;
g) a declaration that it is entitled to a new 42 year lease consistent with the statutory requirements and its legitimate expectation; and
h) its costs.

The Regulations

[12] The regulatory provisions governing the lease of land in national parks pertaining to this case at the relevant times include the following sections:

3. (1) Subject to subsection (2) and sections 4 and 19, the Minister may, for any term not exceeding 42 years and on such terms and conditions as the Minister thinks fit, grant leases of public lands […]	**3. (1)** Sous réserve du paragraphe (2) et des articles 4 et 19, le ministre peut octroyer des baux d'une durée d'au plus 42 ans, selon les modalités qu'il juge indiquées, à l'égard des terres domaniales […]
6. (1) At the time a lease is granted, the lessee shall choose a rental rate set out in section 7, 8, 11, 13 or 14 that is applicable to the location, use and conditions of occupancy of the leased public lands and the purpose for which the lease is granted, and that rental rate shall be a term of the lease.	**6.** (1) À l'octroi du bail, le preneur doit choisir, parmi les taux prévus aux articles 7, 8, 11, 13 et 14, le loyer qui est exigible d'après l'emplacement, l'usage et les conditions d'occupation des terres domaniales louées, ainsi que les fins auxquelles le bail est octroyé; ce loyer est indiqué dans le bail.
11. (1) The rental rate for a lease of public lands in the Town of Jasper or a visitor centre that is granted for the purpose of trade, tourism or places of	**11.** (1) Le loyer afférent au bail octroyé à l'égard de terres domaniales situées dans la ville de Jasper ou un centre d'accueil aux fins de commerce, de tourisme ou de lieux de divertissement ou de

recreation or entertainment, for a lease of public lands in the Town of Banff that are to be used for that purpose and for a lease of public lands outside the Town of Banff or the Town of Jasper, visitor centres and resort subdivisions that is granted for the purposes of tourism, service stations or places for the accommodation, recreation or entertainment of visitors to the parks shall be

récréation, au bail octroyé à l'égard de terres domaniales situées dans le périmètre urbain de Banff pour utilisation à l'une de ces fins, ou au bail octroyé à l'égard de terres domaniales situées à l'extérieur du périmètre urbain de Banff, de la ville de Jasper, des centres d'accueil et des centres de villégiature, aux fins de tourisme, de stations-service, de logement ou de lieux de divertissement ou de récréation pour les visiteurs des parcs, est l'un des suivants :

(a) subject to subsection 12(1), 6.0 per cent per annum of the appraised value;

a) 6,0 pour cent l'an de la valeur estimative, sous réserve du paragraphe 12(1);

(b) subject to subsection 12(2), 4.0 per cent per annum of the appraised value;

b) 4,0 pour cent l'an de la valeur estimative, sous réserve du paragraphe 12(2);

(c) subject to subsection 12(3)

(i) 4.0% per annum of the appraised value, or

(ii) in respect of those leases for which the rental rate was set in 2000 in accordance with subsection 6(2) or (3), the greater of 4% per annum of the appraised value and the 1999 rental rate;

c)sous réserve du paragraphe 12(3):

(i) 4 pour cent l'an de la valeur estimative,

(ii) en ce qui concerne les baux dont le loyer a été fixé en 2000 conformément aux paragraphes 6(2) ou (3), 4 pour cent l'an de la valeur estimative ou le loyer de 1999, selon le plus élevé des deux montants.

or

(d) when the leased public lands have been used for commercial purposes during the previous five

d) lorsque les terres domaniales louées ont été utilisées à des fins commerciales durant les cinq années précédentes et que les livres

years and the financial records relating to that use are available to the lessee, or the leased public lands have been used for commercial purposes for less than five years and the gross revenue can be reasonably estimated, the greater of

comptables y afférents sont à la disposition du preneur, ou lorsque les terres domaniales louées ont été utilisées à des fins commerciales pendant moins de cinq ans et que les recettes brutes peuvent être raisonnablement estimées, le plus élevé des pourcentages suivants :

(i) a per cent per annum that is agreed to by the Minister and the lessee of the annual gross revenue from business conducted on or from the leased public lands by the lessee and any sublessee, sublicensee or concessionaire, and

(i) le pourcentage annuel, convenu par le ministre et le preneur, des recettes brutes annuelles tirées du commerce exploité par le preneur et tout sous-preneur ou concessionnaire sur les terres domaniales louées ou à partir de celles-ci,

(ii) a percent per annum that is agreed to by the Minister and the lessee

(ii) le pourcentage annuel, convenu par le ministre et le preneur, de l’un des montants suivants :

(A) of the average annual gross revenue from business conducted on or from those leased public lands by the lessee and any sublessee, sublicensee or concessionaire during the previous five year period, or

(A) la moyenne des recettes brutes annuelles des cinq années précédentes tirées du commerce exploité par le preneur et par tout sous-preneur ou concessionnaire sur les terres domaniales louées ou à partir de celles-ci,

(B) if financial records of gross revenue for that period are not available to the lessee, of estimated annual gross revenue

(B) si le preneur n’a pas à sa disposition les livres comptables y afférents, les recettes brutes estimatives de la première année du bail.

for the first year of the term of the lease.	
(e) [Repealed, SOR/2002-237, s. 12]	e) [Abrogé, DORS/2002-237, art. 12]

Issues

[13] The applicant raises the following issues:

1. What is the appropriate standard of review?

2. Was the August 17, 2006 decision not made in accordance with the *National Parks Act*, S.C. 2000, c. 32 (the *Act*) and its associated *Regulations* and was therefore beyond the jurisdiction of Parks Canada?

3. Does the refusal to grant a 42 year lease constitute an abuse of discretion by discriminating between holders of OCA leases?

4. Did the decision prematurely terminate discussions on negotiating a new lease and thereby violate the applicant's legitimate expectations?

[14] The respondent counters that the second issue is not whether Parks Canada had jurisdiction, which it clearly did, but whether the decision not to grant the applicant a new lease on the terms of its choosing was reasonable.

Standard of review

[15] Following *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the decisions of tribunals and other administrative bodies are to be reviewed on one of two standards: reasonableness or correctness. It is not necessary to undertake an analysis of the appropriate standard of review where such standard is settled by prior jurisprudence.

[16] Questions of jurisdiction, in the sense of whether the decision maker had the authority to decide, are specifically noted in *Dunsmuir* to be subject to a correctness standard. Both abuse of discretion and breach of legitimate expectations are issues of procedural fairness and would be cause to vacate the decision if found to have occurred. The decision not to grant the lease on the terms proposed by the applicant is discretionary and therefore attracts significant deference. It will be quashed only if unreasonable.

Jurisdiction / reasonableness of decision

[17] The applicant argues that the respondent cannot rely on its Revised Policy Directive of May 21, 2004 as it is incompatible with section 6 of the *Regulations*. While it agrees that policies may inform the interpretation of statutory instruments, the applicant contends that section 6 clearly gives the choice of rental regime to the lessee at the time the lease is granted and can only be waived by the lessee, which was never done in this case. The reliance of Parks Canada on its Directive in refusing to grant the new lease under the applicant's preferred rental terms was an abuse of its discretion under section 3 of the *Regulations*. The applicant asserts that the proposed amendments to the *Regulations* (exhibit A to the supplementary affidavit of Geordie Nokes) appear to reflect a recognition that the *Regulations* must be altered to permit Parks Canada to insist that percentage of gross revenue be the basis of negotiations.

[18] Johnston Canyon submits in the alternative that its situation falls within the 'substantive negotiations' provision of the Directive, as it has unwaveringly sought a 42 year lease since the outset of the negotiations. In the further alternative, it contends that the Policy applies only where an

existing lease is expiring or where the Minister may grant a renewal lease for such term as he may consider advisable. It argues that it is not voluntarily requesting a new lease but is required to do so in order to pursue its redevelopment plans.

[19] The respondent counters that the Minister has a broad discretion pursuant to section 3 of the *Regulations* to accept the surrender of a lease or to grant a new lease. He asserts that Johnston Canyon has no entitlement to a 42 year lease under the rent regime of its choice. The Minister has no obligation to accept the surrender of the current lease or to grant a new one. The focus on the rent regime is misguided. The parties failed to reach an agreement through negotiations and the Minister decided in his discretion not to grant a new lease to Johnston Canyon.

[20] The Attorney General further submits that the Revised Policy Directive is a guideline to be used when a new lease is to be granted. It is not at issue in the case at bar, as the lease was not to be granted. Furthermore, the long history of negotiations between Johnston Canyon and Parks Canada is not indicative of 'substantive negotiations' as provided for in the Directive, but rather shows that the parties were not close to agreement on the substantive parts of a new lease by the relevant date of May 2004.

[21] There is merit to the submissions of both parties. I agree with the applicant that the Revised Policy Directive cannot override the choice of rent regime granted the lessee in section 6 of the *Regulations*. A policy statement or guideline may assist in interpreting a statutory instrument but cannot be used to contradict its plain meaning. It is clear that section 6 provides the lessee with the right to choose the rent regime from the options provided upon the grant of a lease. Accordingly, the

Minister would have exceeded her jurisdiction under the *Regulations* had she decided to grant the lease and had then unilaterally imposed a rent regime which the applicant had not chosen from one of the four options.

[22] However, that does not mean that the applicant is entitled to the remedy that it seeks in these proceedings. It was open to the Minister, pursuant to section 3 of the *Regulations*, to decline to grant a new 42 year lease on the terms sought by the applicant including redevelopment plans that Parks Canada was not prepared to accept.

[23] It might be helpful to envision the process as occurring in two steps. The Minister makes a discretionary decision under section 3 to grant a lease of public lands under terms and conditions which she considers appropriate up to a maximum term of 42 years. This discretion is fettered only by subsection 3(2) and sections 4 and 19. Having made the decision to grant a lease, the choice then passes to the lessee for the selection of a rental regime pursuant to section 6. In coming to this understanding of the relevant passages, I noted the plain meaning of the language of section 6, which reads "[a]t the time a lease is granted, the lessee shall choose a rental rate […] that is applicable to the location, use and conditions of occupancy of the leased public lands and the purpose for which the lease is granted, and that rental rate shall be a term of the lease".

[24] As noted by the applicant, the proposed amendments to the *Regulations* appear to reflect a recognition on the part of the Minister that the *Regulations* must be altered to permit Parks Canada to insist that percentage of gross revenue be the basis of negotiations. Unfortunately for the applicant, this does not further its cause towards the relief it seeks.

[25] Accepting the surrender of a pre-existing lease or granting a new lease remains at the discretion of the Minister and she decided not to do so in this case. In returning to the two-step analogy, it would be fair to say that the first step was decided in the negative and the second step, about which the applicant takes issue, never came into play.

[26] As for the final submission of the applicant on the question of jurisdiction, I agree with the respondent that, despite the evidence of lengthy negotiations, there is no evidence that a new lease was substantially negotiated by May 2004. In fact, the failure of the parties to reach an agreement after at least three years of negotiating demonstrates a lack of substantive agreement on the terms of a new lease.

Abuse of discretion

[27] The applicant alleges that Parks Canada is not being even-handed in continuing to demand that the applicant accept a percentage of gross revenue as the basis of its negotiations as other similarly situated OCAs have negotiated 42 year leases based on rental amounts under other rental regimes. The decision to limit negotiations to the one rental regime in the case of Johnston Canyon was made in the absence of any statutory authority to discriminate or public policy justification for discrimination. The applicant contends that it is placed at a competitive disadvantage by the arbitrary decision of the Minister and her delegates.

[28] The respondent counters that OCAs are not a homogenous group and that the Minister has the right to negotiate leases with each OCA on different terms. The broad authority to make

regulations regarding the determination of fees includes the ability to make distinctions between classes of fee payers: *Parks Canada v. Sunshine Village Corp.*, 2004 FCA 166, [2004] 3 F.C.R. 600. There is no requirement for explicit statutory authority to distinguish between classes and kinds of business, indeed the Courts have looked for statutory language prohibiting such distinctions before finding that such differentiation was not permitted.

[29] As was noted by the Federal Court of Appeal in *Sunshine Village*, the Governor in Council has a very broad discretion when setting fees. Indeed, he has the authority to set different fees in different circumstances "regardless of whether doing so is discriminatory in the administrative law sense"(at paragraph 19).

[30] Similarly, it has been held by the Court of Appeal that discrimination by the Governor in Council on the exercise of broad powers is permissible unless contrary to public policy: *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2007 FCA 273, 284 D.L.R. (4th) 708, at paragraphs 29-30. The public policy referred to by Parks Canada in this case is the environmental impact of visitors to the national parks it manages.

[31] Parks Canada's refusal to grant a 42 year lease was based primarily on the failure of the applicant to submit a suitably 'environmentally advantageous' development plan acceptable to the Minister. Moreover, the evidence does not clearly establish that the applicant was discriminated against with respect to Parks Canada's treatment of similarly situated facilities. A review of the lease agreements for other facilities filed as exhibits indicate that there are significant differences

between them. In any event, I need not determine whether discrimination did in fact occur as the decision of the Minister was within the scope of her authority and not contrary to public policy.

[32] I conclude that the decision of Parks Canada to limit the basis of its negotiation to the single rent regime of percentage of gross revenue was not an abuse of discretion.

Legitimate expectations

[33] Next, the applicant contends that Parks Canada breached its duty to fulfill legitimate expectations when it prematurely terminated lease negotiations by applying the terms of the Revised Policy Directive midway through the negotiations. The applicant asserts that it was encouraged to submit a serious of proposals and was led to believe that there was no deadline for submissions. It was verbally assured in January 2001 and February 2004 that the replacement lease would be subject to the rent provisions in the *Regulations*.

[34] The applicant further submits that it relied on the assurances of Parks Canada officials that entering into the renewal lease would not harm its ability to obtain a new lease of 42 years with the legislated rent options. It claims that it was ‘blindsided’ by the new and unexpected rent regime. The decision to apply the policy is a breach of legitimate expectations, the argument goes, that arose from representations and substantive promises made by Parks Canada staff to Johnston Canyon directors.

[35] The respondent submits that the applicant is attempting to recast negotiations as unilateral representations where no agreement was reached on the essential terms of the lease. Johnston Canyon had ample time to make representations when it learned of the policy change prior to the making of the purported decision.

[36] The doctrine of legitimate expectation arises when a party affected by the decision of a public official has no opportunity to make representations: *Old St. Boniface Residents' Association v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385. In such circumstances, legitimate expectations give rise to procedural protection rather than substantive rights. As correctly asserted by the respondent, the opportunity to provide further representations will defeat a claim of a breach of the doctrine.

[37] The applicant's directors appear to have relied upon statements which were made to them by Parks Canada employees. This included a comment by one employee, not directly involved in the negotiations, to the effect that the regulations would have to be amended before the new rent regime could be imposed. However, this statement did not entitle the applicant to the grant of a new lease. As discussed above, that would have required agreement on the redevelopment proposals and the exercise of the Minister's discretion. I do not read any of the so-called representations of Parks Canada officials in the record as being anything other than comments or offers made in the context of ultimately unsuccessful negotiations.

[38] The applicant was provided with a variety of opportunities to respond to Parks Canada's assertion that a new rental regime was the only one on offer. The case it cites as authority for its

position, *Schwartz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)*, 2001 FCT 112, 201 F.T.R. 85, involved a conditionally approved plan for an altered lease. In the instant case, the negotiations simply had not proceeded to an equivalent point.

Conclusion:

[39] Upon the expiry of the 1963 lease, the applicant was entitled to a renewal for a term of 21 years subject to its choice of the applicable rent regimes as set out in section 6 of the *Regulations*. A renewal under those terms was executed in 2005 for the remaining twenty years. It was open then and remains open to the parties to reach agreement on a new lease for a maximum term of 42 years.

[40] I agree with the applicant that, under the *Regulations* in force at the time of the impugned decision, had a new 42 year lease been granted to it following the expiry of the 1963 lease the applicant would have been entitled to choose one of the applicable rent options from the *Regulations* and that the Minister had no jurisdiction to impose an alternative rent regime.

[41] The applicant's directors sought approval of their redevelopment proposals and a new lease under the reasonably held belief that when the lease was granted they could choose their preferred rental option from those set out in the *Regulations*. I accept the applicant's evidence that this belief was encouraged by statements made by Parks Canada officials to the effect that the *Regulations* would have to be amended before the new rent regime in the Revised Policy Directive could be imposed. That said, an agreement was not reached and the applicant cannot now insist on the exercise of the Minister's discretion to grant a new lease on the terms it found most favourable.

[42] In the circumstances, I will exercise my discretion not to award costs in favour of the respondent.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is dismissed. The parties shall bear their own costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Judson E. Virtue	FOR THE APPLICANT
Bruce F. Hughson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JUDSON E. VIRTUE MacLeod Dixon LLP Calgary, Alberta	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT