IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Glacier Resorts Ltd. v. British Columbia (Minister of Environment),* 2018 BCSC 1389

Date: 20180817
Docket: S1510513
Registry: Vancouver

Between:

Glacier Resorts Ltd.

Petitioner

and

Minister of Environment

Respondent

and

Jumbo Creek Conservation Society and Wildsight

Intervenors

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Petitioner:	G.J. Tucker, QC G.J. Roper
Counsel for the Respondent:	D.G. Cowie
Counsel for the Intervenors Jumbo Creek Conservation Society and Wildsight:	R.L. Christensen O. French
Place and Dates of Hearing:	Vancouver, B.C. June 25-27, 2018
Place and Date of Judgment:	Vancouver, B.C. August 17, 2018

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Introduction

[1] The petitioner, Glacier Resorts Ltd. ("Glacier"), seeks an order to quash and set aside the decision of the Minister of the Environment (the "Minister") dated June 18, 2015, pursuant to s. 18(5) of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 [*EA Act*], that the Jumbo Glacier Resort Project (the "Project"), for which Glacier is the proponent, was not "substantially started" by October 12, 2014 (the "Decision").

[2] Glacier seeks the following further relief:

a) a declaration and order in the nature of *mandamus* that the Project was, as of October 12, 2014, substantially started;

b) a declaration and order that the Environmental Assessment Certificate (the "EAC") issued in connection with the Project is in good standing and is in full force and effect;

c) alternatively, an order in the nature of *certiorari* that the question of whether the Project was, as of October 12, 2014, "substantially started" be remitted to the Minister to be determined in accordance with directions of the Court; and

d) costs.

Factual Background

1990–2004: Environmental assessment process

[3] The Project is a ski resort approximately 55 km west of Invermere, BC. At full build out, the Project will have lift service access to the Jumbo Glacier and several other glaciers for year-round skiing, at elevations up to 3,400 metres, within a controlled recreation area of approximately 6,000 hectares. The base area and resort village are planned to be located at a previously cleared but now abandoned sawmill site at the head of the Jumbo Creek Valley.

[4] Glacier is a corporation under the laws of the Province of British Columbia ("the Province"). In 1990, Glacier began initial discussions with the Province concerning the Project. These involved the Ministry of Lands and Parks in accordance with the Province's Commercial Alpine Skiing Policy ("CASP").

[5] In March 1993, the Province signed an interim agreement with Glacier that provided exclusive development rights and required the issuance of a project approval certificate prior to the negotiation of a master development agreement ("MDA") with Glacier. The interim agreement was reaffirmed in July 1995.

[6] Following the enactment of the *Environmental Assessment Act*, S.B.C. 1994, c. 35 [*EA Act, 1994*] – the predecessor of the current *EA Act* – Glacier was required to submit its draft master plan ("Master Plan"), being prepared under CASP, to the Environmental Assessment Office (the "EAO") by June 30, 1995. In July 1995, the Project entered the environmental assessment ("EA") process, and the EAO commenced public consultations and discussions in connection with drafting project specifications. In May 1998, the EAO published project specifications for the Project. On December 31, 2003, Glacier submitted a project report to the EAO.

[7] In August 2004, the EAO issued an environmental assessment report and recommendations ("Project Assessment"), which concluded the Project's review under the *EA Act, 1994* and the then recently enacted *EA Act*. The Project Assessment recommended the issuance of an EAC, which the Minister issued on October 12, 2004. The EAC set October 14, 2009 as the deadline for substantial commencement of the Project, and set a number of conditions including that:

> 6. The Proponent must obtain the appropriate zoning and other necessary approvals for the Project from the Regional District of East Kootenay prior to the commencement of construction of the Project.
>
> …
>
> 8. This Certificate does not constitute a permit, license, approval or any other authority required under any other enactment that may be required by the federal provincial or local government or their agents, for the construction or operation of the Project, in addition to requirements referenced in Condition 6 and 7.

> 9. The Proponent must negotiate with the Ktunaxa/Kinbasket Tribal Council and attempt to conclude an Impact Management and Benefits Agreement prior to submission of the final Ski Area Master Plan.

[8] Also of particular relevance to this petition is that Glacier committed, under the EAC, "that the proposed residential and commercial structures will be located completely outside the avalanche hazard area" ("Condition 36").

[9] In October 2005, a judicial review application was pursued against the EAC. That review and an appeal were unsuccessful.

2005–2012: Master plan and agreement, and extension of EAC

[10] In or about the summer of 2005, Glacier submitted its Master Plan for the Project for approval under CASP. On July 12, 2007, following a period of public review under CASP, the Province approved the Master Plan.

[11] In January 2009, the Province extended the EAC for five years, to October 12, 2014.

[12] In March 2011, a signed copy of the Master Development Agreement ("MDA") was received from Glacier by provincial staff upon completion of the approval process. On March 20, 2012, the Minister of Forests, Lands and Natural Resource Operations announced the signing of the MDA by the Province and Glacier.

[13] In January 2014, the Ktunaxa Nation Council ("KNC") pursued a judicial review of the MDA decision in the BC Supreme Court based on constitutional freedom of religion and Aboriginal rights. Glacier was successful in having the petition dismissed and in opposing appeals by the KNC in the BC Court of Appeal and Supreme Court of Canada.

2012: Creation of mountain resort municipality

[14] On or about November 19, 2012, the Province formed the Jumbo Glacier Mountain Resort Municipality (the "Municipality") by letters patent pursuant to Order-in-Council. The Municipality held its first meeting on February 19, 2013 and began preparing zoning processes and an Official Community Plan ("OCP").

After public hearings held on May 13 and 21, 2013, the Municipality passed a rezoning bylaw that would permit construction at the Farnham Glacier drainage. The timeline for the creation of an OCP, as set out in the Municipality's Letters Patent, was February 28, 2015.

2012–2015: Farnham-side, KM 15 Bridge, and Jumbo-side work

Farnham-side

[15] Following the passing of the initial zoning bylaw, Glacier began working at the Farnham Creek side of the Project. This work included soil testing, design development, road construction, and other pre-construction work. In August 2013, construction on the Farnham Glacier side was blockaded by protesters.

[16] In September 2013, in response to the protestors, Glacier pursued an injunction to remove the blockade, which was eventually withdrawn as the protestors voluntarily removed the blockade. Glacier returned to the site but the construction window was lost due to the accumulation of snowfall.

KM 15 Bridge

[17] The only existing road to the Project is a forest service road that runs along the Jumbo Creek. There was a bridge that crossed the Jumbo Creek at the 15.8 km marker ("KM 15 Bridge"). This bridge was the only existing access point to the Project development site. In August 2012, the Province removed the KM 15 Bridge and installed an earth dam with a sign indicating official road closure, without notifying Glacier. In August 2014, Glacier obtained permits for the construction of a replacement bridge at KM 15. In August 2014, construction on the replacement bridge at KM 15 commenced and access was restored to the Project development site.

Jumbo-side

[18] In August 2014, Glacier obtained limited zoning from the Municipality for the construction of the ski area and related facilities in the upper Jumbo Creek drainage.

[19] In late August 2014, upon gaining access to the south side of the Project, Glacier discovered a diversion of the Karnak Creek, crossing the location of the day lodge. In September and October 2014, the Municipality issued partial building permits for the construction of the relocated day lodge and service building. Glacier continued construction on the site, including the foundations to the relocated day lodge and service buildings, foundation anchors for the chairlift, bridge well for portable water, new roadways, and sediment and erosion measures.

2014–2015: Decision on substantial start

[20] On October 3, 2014, the EAO contacted Glacier to inform it of the Minister's pending determination of whether the Project had been "substantially started" in accordance with s. 18 of the *EA Act.* The determination process centred on consultations with Glacier, the KNC, and the Shuswap Indian Band ("SIB").

[21] On or about November 7, 2014, Glacier submitted to the EAO a report titled "Making the Substantially Started Determination", in which Glacier described and summarized matters relevant to whether the Project had been "substantially started". Opponents of the Project, including KNC and SIB, also submitted materials to the EAO, to which Glacier replied.

[22] On May 15, 2015, the EAO provided Glacier, KNC, and SIB a draft copy of its "Substantially Started Determination Report" (the "Report"). On May 28, 2015, Glacier provided comments to the EAO; KNC provided comments the following day. The Report was finalized on June 5, 2015. It comprised 36 pages, including sections for historical background and regulatory timelines, a review of physical works undertaken by Glacier, Project compliance, and permits related to the work. The Report was provided to the Minister along with all of the submissions of Glacier, KNC, and SIB.

[23] On June 18, 2015, the Minister made the Decision, pursuant to s. 18(5) of the *EA Act,* that the Project had not been "substantially started" by October 12, 2014.

[24] The Decision is comprised of 10 pages of reasons. First, it outlines the Project background, the statutory scheme of the *EA Act*, the "EAO User Guide", and recent case law interpreting "substantially started". It then considers nine physical works identified by Glacier that had been undertaken for the Project:

> 1. The first floor slab and foundation preparations for the day lodge at the resort base;
> 2. The first floor slab of the service building at the resort base;
> 3. The foundation anchors for the departure station of a quad chairlift;
> 4. A seasonal bridge to span Karnak Creek within the resort base area;
> 5. A temporary bridge at kilometre 15.8 of the Jumbo Forest Service Road;
> 6. The permanent bridge at kilometre 15.8 of the Jumbo Forest Service Road;
> 7. A well to provide potable water to the resort has been drilled and tested;
> 8. Clearing and grading of approximately 250 metres of construction access road within the resort base to allow access to the day lodge, service building and the lift base foundation locations from the Jumbo Forest Service Road; and,
> 9. Improvements to site specific locations along approximately 4 km of the existing Jumbo Forest Service Road, including brushing, installation of culverts and ditch maintenance.

[25] In response to issues raised by KNC about Glacier's compliance with the EAC's conditions, the Minister stated that:

> … non-compliance with conditions other than Condition 36 is not a factor in my determination. While I want to stress that I do not in any way condone non-compliance, it must also be recognized that it is not unusual for a project to need to address issues of non-compliance, during the course of its development.

[26] The Minister then stated that "EAO Compliance and Enforcement conducted an investigation and determined that the day lodge and the service building were not in compliance with Condition 36". In considering the impact of this non-compliance on the overall Decision, the Minister wrote that "the question of impact of non-compliance should be addressed as a matter of weight". The Minister ultimately credited these structures with less weight than other structures, stating that "it is

not reasonable to count them to the full extent I would have if they were compliant". The Minister also discounted the weight attributed to a seasonal bridge over Karnak Creek because of its temporary character, as well as temporary and permanent bridges constructed along the Jumbo Forest Service Road because they were not part of the final road access solution for the resort.

[27] Next, the Minister considered the building plans, design work, environmental plans, studies and permits related to the works constructed, as well as the work done and money spent to develop these plans, studies, and permits.

[28] Then the Minister discussed the appropriate benchmark for measuring whether the Project had been substantially started. The Minister acknowledged that "[i]n most circumstances, the elements of the project as described in the EAC and the project description are the logical and principled place to start", but that "a ski resort is developed in phases on a projected, but not binding, timeline". Ultimately, the Minister concluded that "the more reasonable approach is one based on what is described as the phase 1 of the project", which contains the following:

> Lifts and Ski Areas
>
> Glacier Dome gondola
> Two chairlifts in Jumbo Valley
> Three glacier lifts on Glacier Dome
> Mountain top restaurant/refuge
> Glacier Dome mid-station
> Glacier Dome base day lodge
> Main resort day lodge
>
> Services
>
> Tertiary sewer treatment plant
> Emergency power generation
> Water wells
> Piped propane system
> BC Hydro connection
>
> Development
>
> Lodge/hotel/condominiums
> Bed and breakfast establishments
> 30 townhouse condominiums
> 25 chalets
> A heli-ski lodge location with overnight accommodation for guests that will be offered to RK Heliski Panorama to provide for a base of operations in the heart of its territory.

[29] The Minister noted that progress is not required on every element of phase 1, but it is a useful comparator in considering the substantial nature of work completed. She then stated that "mitigating factors" raised by Glacier in its submissions should not be considered in determining the substantial start threshold.

[30] In conclusion, the Minister found that the Project had not been substantially started, stating that:

> After consideration of the submissions of GRL, KNC and the Shuswap Indian Band, the guidance from the court, EAO's report and my own observations during my site visit, and having weighed carefully the evidence before me regarding activities undertaken to develop the project as outlined above, I have determined that the project, in my reasonable opinion, had not been substantially started by October 12, 2014.
>
> While it is clear that some construction has been started, I am not convinced that the physical activity undertaken on the various components meets the threshold of a substantially started project.
>
> I have reached this conclusion taking into account the fact that the service building and day lodge have been determined to be non-compliant, but balancing that with the possibility that GRL may, through an amendment to its EAC, ultimately been allowed to continue to use these buildings.
>
> I have also turned my mind to the question of whether the project would be substantially started if the service building and day lodge were fully compliant with Condition 36. I have concluded that even if there partially constructed structures were weighed fully, the work undertaken would still not be sufficient to meet the substantially started threshold.
>
> Accordingly, the environmental assessment certificate expired on October 12, 2014.

Law

Standard of review

[31] Section 18 of the *EA Act* provides that substantial start determinations are made on the "reasonable opinion of the minister". Accordingly, the standard of review for this Decision is reasonableness: *Taku River Tlingit First Nation v. British Columbia (Ministers of Environment)*, 2014 BCSC 1278 at para. 32 [*Taku River*]. As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47,

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals

> do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[32] In *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34 [*Irving*], the Court emphasized the importance of context in determining whether a decision is reasonable:

> [74] In recent years, this Court has emphasized that reasonableness is "a single standard that takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59; see also *Alberta Teachers*, at para. 47). The factual and legal context in which a decision is made is critical to assessing its reasonableness for the simple reason that "[r]easonableness is not a quality that exists in isolation" (*Paccar*, at p. 1018, *per* Sopinka J.). Rather, when a reviewing court brands a decision as "reasonable" or "unreasonable", it is necessarily making a conclusion about the relationship between the ultimate decision and the facts and law that underlie it. The context of a decision thus shapes the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47) or, more simply, the "range of reasonable outcomes" (*Khosa*, at para. 4).

Legislative scheme

[33] The applicable provisions of the *EA Act* are as follows.

[34] Section 1 defines "project" as:

> "**project**" means any
>
> (a) activity that has or may have adverse effects, or
>
> (b) construction, operation, modification, dismantling or abandonment of a physical work;

[35] Pursuant to s. 8, an EAC is required for every "reviewable project" as defined in the regulation (unless the executive director dispenses with the requirement pursuant to s. 10(1)(b)), and no work may be done on the reviewable project except as authorized in the EAC.

[36] Section 18 outlines the duration and effect of an EAC. Subsection (1) provides a deadline of three to five years for substantially starting a project, and subsection (4) allows a single extension of an EAC for no more than five years. Upon expiration of these deadlines, the determination of a substantial start is based on the "reasonable opinion of the minister":

> **18 …** (5) After the deadline specified under subsection (1) or, if an extension is granted under subsection (4), after the period of the extension, if the project has not yet been substantially started, in the reasonable opinion of the minister, the environmental assessment certificate expires.
>
> (6) After a reviewable project is substantially started, in the reasonable opinion of the minister as set out in subsection (1) or (5), the certificate remains in effect for the life of the project, subject to cancellation or suspension under section 37.

[37] The term "substantially started" is not defined in the *EA Act*. *Taku River* is the only case cited in which the term has been interpreted. At paras. 34–39 of that decision, Justice Macintosh discussed the meaning of the term:

> [34] …. The object of the *Environmental Assessment Act* is the protection of the environment. The definition of a project, therefore, is intended to address primarily physical activities affecting the land environmentally, as contrasted with bureaucratic activities, for example, which do not. Thus, in deciding whether a project has been substantially started, the decision maker should focus less on the permits which have been granted, and the money expended, as two examples, and more on what has taken place physically at the site, on the ground, as it were.
>
> [35] Similarly, temporary structures at the site, if they will be soon removed, followed by remediation, are less important to consider than structures which will be in place for the duration of the project.
>
> [36] The words "substantially started" in s. 18(5) are not defined in the Act. "oxforddictionaries.com" presents the following definitions of "substantial" having application here: "of considerable importance, size, or worth; concerning the essentials of something; real and tangible."
>
> [37] Thus, to have been substantially started, the project needed to have been started in its essentials, in a real and tangible way.
>
> [38] Also, I would say that the activity the decision maker needs to look at in the s. 18(5) assessment is activity since December 12, 2002, when the project certificate was issued. That is because of s. 18(1), which, in my view, treats the issuance of the certificate as the starting point.
>
> [39] In summary then, with regard to addressing whether the project was substantially started by December 12, 2012, the decision maker needs to

> focus primarily on physical activities, since December 12, 2002, having a long-term impact on the site.

[38] Justice Macintosh also held that the EAO User Guide (the "User Guide"), although not binding law, may offer assistance in determining the meaning of "substantially started":

> [41] The user guide is not legislation, and if its provisions conflicted with the statute, it could offer no assistance. That is not the case here, and, as the Supreme Court of Canada said in *Baker v. Canada*, [1999] 2 S.C.R. 817, at para. 72, a government-published guide can be of great assistance to a court in determining how a legislative provision ought to be interpreted. I would note that the user guide, in this case, corroborates the legislative focus on long-term, physical works as the main object of the "substantially started" analysis.

[39] At the time of the Decision, p. 39 of the User Guide provided that:

> The term "substantially started" is not defined in the Act. Each situation is assessed in light of all relevant facts. Pertinent factors include, but are not limited to, the following:
>
> - Has there been a significant investment of time, effort, and resources to physically develop one or more main project elements?
> - Does the activity amount to a significant or important step to develop the overall project, or is the activity considered ancillary, secondary, or temporary?
> - Would the proponent have undertaken the activity regardless of the project?

Issues

[40] The pleadings, submissions, and evidence raise the following issues:

a) The admissibility of certain submitted affidavit evidence.

b) Was the Minister reasonable in determining that the Project had not been substantially started?

c) Is Glacier entitled to relief based on the doctrine of legitimate expectations?

d) Is Glacier entitled to relief based on public law estoppel?

e) If the Decision is quashed, what is the appropriate remedy?

f) Costs.

[41] At the hearing, counsel for Glacier resiled from the position that a reasonable apprehension of bias, which was pleaded in its petition, was also at issue.

Discussion

a) Admissibility of affidavits

[42] The Minister takes issue with the admissibility of affidavits filed by Glacier.

[43] First, the Minister notes several issues with the affidavit of Psyche Brown made November 26, 2015. Counsel highlights several paragraphs which were either speculation or opinion on the part of the witness. I agree with the Minister's argument, and I have given this affidavit no weight in these reasons.

[44] Second, the Minister objects to the affidavits of Oberto Oberti and Grant Costello. Counsel submits that the affidavits are largely extrinsic and are being used by Glacier to buttress the merits of its argument and challenge the reasonableness of the Decision. It does concedes that there may be some material germane to the procedural fairness issue that Glacier raises. Lastly, the Minister points out that four affidavits, which were filed in a different but related proceedings, were not properly filed for this proceeding.

[45] In *Dane Developments Ltd. v. British Columbia (Forests, Lands and Natural Resource Operations),* 2015 BCSC 1663 at paras. 42, 46, Justice Bracken noted that:

> [42] It is generally understood that a judicial review must be conducted on the record that was before the administrative decision-maker, subject to certain limited exceptions. Other evidence can be adduced to provide general background information, to bring the court's attention to procedural defects not apparent on the record before the decision-maker, or to identify and reconstruct the record that was before the administrative decision-maker.
>
> …
>
> [46] The court adopts a supervisory role on judicial review. Among other things, this means that the reviewing court must conduct the proceedings based on the record that was before the administrative decision maker: *Albu v. University of British Columbia*, 2015 BCCA 41, at paras. 35-36. Thus, a

> general rule precludes the receipt of new evidence on a judicial review, subject to certain exceptions respecting materials which tend to facilitate or enhance the court's supervisory task. Those exceptions contemplate evidence which:
>
> > provides "general background" information which will assist the reviewing court in understanding the issues on the judicial review;
> >
> > brings to the court's attention procedural defects that cannot be found in the evidentiary record of the administrative decision maker; or,
> >
> > identifies or reconstructs the record that was before the administrative decision maker. This includes materials which demonstrate the "complete absence of evidence" before the administrative decision maker with respect to a particular finding.
>
> See *Assn. of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, at para. 20; *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, at paras. 76-80; *Kinexus Bioinformatics Corp. v. Asad*, 2010 BCSC 33, at paras. 19-20.

See also *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paras. 38–531; *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 17; *Taku River* at para. 47.

[46] Glacier submits that the evidence tendered in this petition does not go beyond the issues raised in the Report and submissions to the EAO, and does not raise any new issues which would go to the merits of the Decision. Furthermore, Glacier is advancing arguments of public estoppel and procedural fairness.

[47] In my view, the Minister's concerns are valid. The identified evidence does not provide general background needed to assist this Court on the issue of reasonableness. The record that was before the Minister provides sufficient general background for the reasonableness issue. The additional evidence is not needed to identify or reconstruct the record. As a result, I have given no weight to the portions raised by the Minister in my determination on the issue of reasonableness. However, as some of this evidence is relevant to the procedural fairness issue raised by Glacier, it is therefore admissible for that purpose.

b) Reasonableness of the Decision

[48] Glacier submits that the Decision was unreasonable at law, that it cannot be supported on the basis of the material before the Minister or on the basis of the facts, and that the Minister failed to take into account relevant considerations. Glacier raises several points in support of its submission, the thrust being that: the Project faced several regulatory and environmental obstacles that delayed development; the standard to which Glacier was held by the Minister was contrary to mutual understandings and accepted practices; and the standard was impossible to satisfy given the regulatory and physical constraints.

[49] Glacier submits that the Minister ignored relevant evidence that ought to have been considered. At pp. 10–11 of Glacier's submission to the EAO, dated November 7, 2014, Glacier highlighted several "Limiting Factors" for the Minister to consider. It submitted that since the issuance of the EAC, it has encountered several obstacles and delays beyond its control, including that:

> - The project did not receive Provincial approval in the form of a Master Development Agreement until March 2012;
> - The Province did not resolve the permitting structure for the project until November 2012, with the establishment of the Jumbo Glacier Mountain Resort Municipality as had been requested by the regional district;
> - Answers to deal with blockades, legal challenges, and availability of access were not achieved until June 2014;
> - Access to the project site needed to be re-established following the Ministry of Forests decision to remove the only access bridge within the CRA after the MDA was signed;
> - Tendering of contracts and architectural and engineering design and permitting required time to be completed;
> - Rezoning for the ski area and related facilities in the Jumbo Creek drainage was not completed until August 19th, 2014; and
> - Environmental constraints limited the construction window to just under two months in 2014 (August 15th to October 12th).
>
> The proponent overcame impossibly tight timelines to achieve a substantial amount of construction in a difficult and remote environment. The project remains on track for a December 2016 opening.

(Collectively, the "Mitigating/Limiting Factors")

[50] At p. 10 of the Decision, the Minister addressed the Mitigating/Limiting Factors. The Minister held that although relevant to an application for extension of an EAC, she would not consider them in the determination of a substantial start:

> GRL also raised in its submissions a number of mitigating factors that they felt should be considered in my evaluation. While many of these factors would be relevant in determining whether an extension should be granted to the EAC, I do not think I should consider them in the context of a final substantially started threshold. Put another way, I do not think the threshold can be adjusted based on these mitigating factors. While I am sympathetic to the challenges that all projects face in proceeding to construction, it is not unusual or unique for projects to need to overcome challenges. In addition, the source of these challenges may be varied and subject to competing points of view. For these reasons, it is more appropriate to focus on the physical elements of the project as they were present on October 12, 2014.

[51] Glacier submits that there is no reasonable interpretation of "substantially started" that makes the Mitigating/Limiting Factors irrelevant. It argues that an interpretation of "substantial start" that ignores the regulatory constraints and delays not attributable to the proponent is fundamentally incompatible with the purpose of the *EA Act*, i.e., to ensure projects proceed in an environmentally sensible fashion. Furthermore, as stated by the Supreme Court of Canada, reasonableness is a single standard that takes its colour from context; therefore, the full factual and legal contexts surrounding the Decision are critical to assessing reasonableness: *Irving* at para. 74.

[52] In *C.U.P.E. v. Ontario (Minister of Labour),* 2003 SCC 29 at paras. 172–176, Binnie J. for the majority discussed, in the context of pre-*Dunsmuir* standards of review, the exclusion of relevant criteria by a statutory decision maker:

> 172 The principle that a statutory decision maker is required to take into consideration relevant criteria, as well as to exclude from consideration irrelevant criteria, has been reaffirmed on numerous occasions. …
>
> …
>
> 175 More recently, in *Suresh*, at paras. 37-38, the Court restated this basic principle of administrative law:
>
> > *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of

> ministerial delegates to consider and weigh implied limitations and/or patently relevant factors. . . .
>
> . . . The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. *It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion*. [Emphasis added by SCC.]
>
> 176 In applying the patent unreasonableness test, we are not to reweigh the factors. But we are entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here, as stated, is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the HLDAA legislative scheme.

[53] Glacier submits that it is not reasonable to ignore evidence merely because of competing points of view. The Minister is at the very least obligated to consider the evidence of delay and resolve conflicts in the evidence.

[54] The question I must therefore address is whether the ignored considerations were relevant to the Decision and of some importance in the context of the legislative scheme.

[55] The modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[56] In *Friends of Davie Bay v. Province of British Columbia,* 2012 BCCA 293 at paras. 34–35, the Court of Appeal discussed the object of the *EA Act* and the correct approach to interpreting environmental legislation:

> [34] Here, the object of the legislation is environmental protection. This important object must not be lost in the minutia. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71, La Forest J., for the majority, cited with approval the fundamental purposes of environmental impact assessment identified by R. Cotton and D.P. Emond in "Environmental Impact Assessment" in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 245 at 247:

> (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

[35] I adopt, as a correct approach to the interpretation of environmental legislation, the following passages from *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4th) 50 (N.L.C.A.) at paras. 11–12, to which the chambers judge also referred at para. 72:

> [11] Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA); *Environmental Assessment Act*, R.S.N. 1990, c. E-13 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.
>
> [12] The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

See also Bill 32–2002, *Environmental Assessment Act*, 3rd Sess, 37th Parl, BC, 2002, explanatory note.

[57] The Minister submits that non-physical considerations such as permits, planning, and expenses incurred are not acceptable markers of a substantial start. Concluding otherwise would result in the loss of effective control for the amount of time that could pass between an environmental assessment and the actual physical implementation of the project. Such an interpretation would risk undercutting the environmental protection purpose of the *EA Act*.

[58] In my view, the Minister's concern about losing effective control over timeframes is inflated. Section 18 of the *EA Act* plainly states that the determination of a substantial start is "in the reasonable opinion of the minister". The Minister retains this discretion as long as it is exercised reasonably. The weighing of non-physical considerations would not relieve the Minister of the duty to exercise "reasonableness". A scenario in which the Minister relinquishes effective control of his or her own discretion would itself be unreasonable. Therefore, in my view, the consideration of non-physical factors and delays would not lead to situations of indefinite timeframes.

[59] The Minister also submits that *per* Justice Macintosh's reasons at paras. 34 of *Taku River*, the focus of a substantially started determination should be on the physical works completed on a project:

> [34] … The definition of a project, therefore, is intended to address primarily physical activities affecting the land environmentally, as contrasted with bureaucratic activities, for example, which do not. Thus, in deciding whether a project has been substantially started, the decision maker should focus less on the permits which have been granted, and the money expended, as two examples, and more on what has taken place physically at the site, on the ground, as it were.
>
> …
>
> [39] In summary then, with regard to addressing whether the project was substantially started by December 12, 2012, the decision maker needs to focus primarily on physical activities, since December 12, 2002, having a long-term impact on the site.

[60] *Taku River* does not stand for the proposition that physical activities are the only consideration when making a substantial start determination. It merely states that more focus should be put on physical activities than, for example, permits granted and money spent. In my view, the permit history of a project and the money spent during its early development may be relevant depending on the circumstances.

[61] In the Decision at hand, the Minister did put minor weight on the work and money undertaken to the development plans, studies, and permits. However, as mentioned, she chose not to consider any of the Mitigating/Limiting Factors raised

by Glacier. In my view, that was unreasonable. In the context of the Project and the legislative scheme, I find that the delays linked to the regulatory history, including the timings of the Master Plan, MDA, the Municipality formation, and the various zoning authorizations, were sufficiently relevant for consideration.

[62] For example, at 5.1 of Glacier's submissions to the EAO, it contends that:

> Because of the delay in granting the MDA, [Glacier] had only **two years** to apply for zoning, achieve building permits and start construction before the final EA Certificate deadline—far less time that the five years plus extension, contemplated by the Act.

[63] At 5.2, Glacier states that:

> In 2008, bulldozers began work on the construction road to the lodge, thus starting construction under the limited license within the five-year window of the EA certificate while waiting for the MDA, but work had to be stopped. The reason was that the director of planning of the regional district advised that an application for rezoning was required to install the single electrical lift that GRL had acquired.

[64] And at 5.4.1 and 5.4.2, Glacier states that:

> In 2012, shortly after the MDA was completed for the project, without informing the Minister and without any consultation with [Glacier], regional Minister of Forests staff based in Cranbrook, at the request of [KNC] removed access to the project site by decommissioning a bridge at km 15.4 of the Jumbo [Forest Service Road] …
>
> …
>
> At the beginning of April 2014, the engineering design for the northern access to the project was finalized and reviewed by environmental consultants. Unfortunately there remained a disagreement with provincial staff regarding the minimum applicable standards for a mountain road.

[65] In the context of the legislative scheme and the case at hand the Mitigating/Limiting Factors are sufficiently relevant to a "substantial start" that it was unreasonable for the Minister to ignore them. Weighing these factors would not have rendered the scheme "empty rhetoric", whereas by ignoring them the Minister failed to reconcile, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

[66] Furthermore, in the Decision the Minister noted that:

> There is no specific formula to determine if a project is substantially started and the practice of EAO is to consider each project on a case by case basis in its particular context. This makes sense given the wide range of projects reviewed under the Act.

[67] The applicable User Guide notes that "all relevant facts" should be assessed. The Mitigating/Limiting Factors should have been considered as part of the relevant facts of this Project.

[68] In the context of this particular Project, the use of the entire phase 1 as a benchmark by the Minister or in her words a "useful comparator in considering the substantial nature of work completed" was unreasonable. The entire phase 1 of the Project included the development of various structures, including hotel, condominiums, and bed and breakfast establishments; townhouses and chalets; a heli-ski lodge; and several ski lifts and substantial infrastructure related to the provision of services, including electricity, sewers, hydro and propane. The Minister's use of this comparator was unreasonable in light of the record, which provides much evidence of the implausibility of Glacier to start such structures by the October 12, 2014 deadline. The Minister's holdings that the benchmark should be the entirety of phase 1 did not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. This failed to take into account the unique challenges that Glacier faced through no fault of its own.

[69] Counsel for the Minister points out that an EAC is not a "guarantee" that the proponent will obtain all of the necessary permits to actually proceed with a project. While I agree with that statement, I disagree with counsel's description of the environmental assessment process as "a permit to go out and get a bunch of other permits". As I have already quoted, it "must not be lost in the minutia" that one of the fundamental purposes of environmental impact assessment legislation is reconciling "to the greatest extent possible, the proponent's development desires with environmental protection": *Friends of Davie Bay* at para. 34. In the unique circumstances of this case, it was not reasonable to impose such a threshold on aspects of the Project for which Glacier was significantly delayed in starting because of regulatory and physical constraints.

[70] This is particularly relevant in light of the record before the Minister, which supported that some of the delay can be directly attributed to the Province, such as:

a) the request by the Regional District of East Kootenay ("RDEK") to the Province in 1996 for the creation of a municipality. In response to this request, the Minister at the time stated that the Province would not act before the completion of the EA review process. RDEK restated this request in 2009, but the Province did not sign the letters patent to create the Municipality until November 2012 – a 16-year period in total;

b) the EA of the Project commenced in July 1995, but the final project specifications were not issued until May 1998 – almost a three-year period;

c) the Master Plan was approved in July 2007, following a two-year public review period;

d) in March 2011, provincial staff received a signed copy of the final draft MDA from Glacier, on completion of the approval process. The Province did not execute the MDA until March 2012 – a one-year period; and

e) in August 2012, the Province removed the KM 15 Bridge cutting off access to the Project site. This was the only bridge and also part of the approved Master Plan. In August 2014, Glacier obtained a permit for construction of a replacement bridge at KM 15 over the Jumbo Creek, gained access to the Project and commenced construction – a two-year period.

[71] These delays become crucial when there is a regulated timeline for the substantial start of a project. If the project cannot be started because of these types of delays, then the delays should become far more relevant in considering a substantial start. The scheme of the *EA Act* justifies this.

[72] Additionally the delay factor is relevant as this Project site is not available for construction throughout the full year. Because of the elevation, location, and terrain of the Project, the construction season is limited and therefore the delay factor is

amplified. For example, Glacier submitted to the EAO that in 2014 the construction season was just under two months because of freshet that delayed the bridge construction and therefore access to the Project site. EAO suggested that the construction season is four to five months long, when the construction site would be free of snow.

[73] Considering the above discussion as a whole, I find that the Minister was unreasonable.

[74] Although this is sufficient to set aside the Decision, I will address Glacier's other submissions in the event that this case reaches appeal.

c) Procedural Fairness: legitimate expectations

[75] Glacier submits that the Decision is contrary to its reasonable and legitimate expectations concerning the manner in which "substantial start" would be considered, based on all of the dealings between the Province and Glacier, and based on the common understanding of Glacier and those representatives of the Province most closely involved in regulation and development of the Project.

[76] The principle of legitimate expectations, a subset of procedural fairness, operates to provide a right to a particular procedure in the making of a decision, which the common law would not otherwise require, as a result of some promise, undertaking or action by a decision maker that leads to a reasonable expectation that the procedure would be followed. The Supreme Court of Canada summarized this principle in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 94:

> [94] The particular face of procedural fairness at issue in this appeal is the doctrine of legitimate expectations. This doctrine was given a strong foundation in Canadian administrative law in *Baker*, in which it was held to be a factor to be applied in determining what is required by the common law duty of fairness. If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been. Likewise, if representations with respect to a substantive result have been made to an individual, the duty

> owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.
>
> [95] The specific conditions which must be satisfied in order for the doctrine of legitimate expectations to apply are summarized succinctly in a leading authority entitled *Judicial Review of Administrative Action in Canada*:
>
> > The distinguishing characteristic of a legitimate expectation is that it arises from some conduct of the decision-maker, or some other relevant actor. Thus, a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process, or that a positive decision can be anticipated. As well, the existence of administrative rules of procedure, or a procedure on which the agency had voluntarily embarked in a particular instance, may give rise to a legitimate expectation that such procedures will be followed. Of course, *the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified*. [Emphasis added by SCC.]

[77] In addition, the five factors from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 838–840, inform the content of procedural fairness:

i. the nature of the decision being made and the process followed in making it;

ii. the nature of the statutory scheme and terms of the governing statute;

iii. the importance of the decision being made to the affected party;

iv. the legitimate expectations of the person challenging the decision; and

v. the respect for the procedure adopted by the tribunal.

[78] The standard of review for procedural fairness is correctness.

[79] Glacier submits that it had the following legitimate expectations:

a) That the delays [Glacier] faced between the granting of the EAC and the substantial start deadline would be taken into account during the determination;

b) That, consistent with normal and proper practice in connection with ski resort development, “substantial start” would not be assessed against the entirety of the first phase, but rather against what was necessary to achieve initial skiing operations, without overnight accommodation; and

c) That, to the extent that the "avalanche hazard area" may have changed after the substantial start deadline based on newly acquired knowledge, [Glacier] would have been given an opportunity to amend Condition 36 before the determination of substantial start.

[80] In my view, the record falls short of establishing that the Minister or the EAO provided clear, unambiguous, and unqualified representations to Glacier that the process leading to the substantial start determination would be something other than the process that was provided by the EAO. Moreover, it is unclear what remedy Glacier seeks pursuant to this procedural ground for review.

[81] Accordingly this argument fails.

d) Public law estoppel

[82] Glacier submits that the Decision is based on an interpretation of the "substantial start" requirement that the Minister is estopped from adopting in the circumstances.

[83] In *Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34 at para. 19, the Court held that the following elements must be proven to establish estoppel against a public authority:

> [19] In the public law context, promissory estoppel requires proof of a clear and unambiguous promise made to a citizen by a public authority in order to induce the citizen to perform certain acts. In addition, the citizen must have relied on the promise and acted on it by changing his or her conduct [citations omitted].

[84] Glacier contends that at all material times, it and the Province proceeded with certain shared fundamental understandings, including that:

a) The decades of procedural delays leading up to October 12, 2014 would be taken into account on the determination of substantial start;

b) That the Project would commence with a limited stage of construction;

c) That the definition of "avalanche hazard zone" in Condition 36 would be based upon the accepted avalanche mapping referred to in the Master Plan; and

d) Condition 36 would only apply to "residential and commercial structures", which the day lodge and service building were not.

[85] In support, Glacier points to various evidence at paras. 555–596 of its written argument. In my view, this evidence is insufficient to establish unambiguous promises by the Province to find any public law estoppel.

[86] Accordingly this argument fails.

e) Remedy

[87] In addition to an order quashing the Decision, Glacier seeks a declaration and order in the nature of *mandamus* that the Project was, as of October 12, 2014, "substantially started", and a declaration that the EAC is in good standing and in full force and effect.

[88] In support, Glacier cites authorities from Ontario and British Columbia. In *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 [*Gehl*], the Ontario Court of Appeal granted an order in the form of *mandamus,* replacing the administrative decision maker's decision with its own. At para. 54, Sharpe J.A. noted that:

> [54] Ordinarily, in a proceeding of this nature, a court will not substitute its decision for that of an administrative decision-maker, but rather will remit the matter back to the administrative decision-maker for further consideration. However there is an exception where doing so would be "pointless" as there is only one possible outcome in view of the court's decision: *Giguère v. Chambre des Notaires du Quebec*, 2004 SCC 1 (CanLII), [2004] 1 S.C.R. 3, at para. 66.

[89] At para. 88, Lauvers and Miller JJ.A. agreed, stating that "this falls within the category of exceptional cases in which remitting the matter to the decision-maker would be pointless since there is only one possible outcome".

[90] A similar result was reached by the court in *2274659 Ontario Inc. v. Canada Chrome Corp.*, 2016 ONCA 145 at paras. 73–75.

[91] In *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516 at paras. 26–27 [*Pointon*], the Court of Appeal granted an order in the nature of *mandamus*, relying on the "good administration of justice" and on temporal considerations:

> [27] That brings me to the question of remedy. In the *Dennis* case this court said that the normal order to be made when a review hearing decision is set aside would be an order for a new review hearing. But here Mr. Pointon has been through two review hearings, two Judicial Review Procedure Act petitions, and three full-scale arguments in court. The interests of the good administration of justice and of the reputation of the good administration of justice would not be served by ordering a further review hearing in this case.
>
> [28] Accordingly, for these reasons I would grant the orders requested in the nature of *certiorari* and in the nature of *mandamus*, as sought in the petition.

[92] Glacier also relies on *Longstaff v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 1594 at para. 51, in which Justice N. Brown quashed a decision and declined to remit it because of temporal considerations. I note, however, that the *Longstaff* decision did not involve an order for *mandamus* because the original decision was merely a driving prohibition.

[93] Glacier submits that none of the underlying facts before the Minister were in dispute, and that it was the Minister's express decision to exclude highly relevant evidence. Glacier submits that when these are taken into account, the only reasonable outcome is that a "substantial start" had been achieved. As a result, nothing would be gained by referring the matter back for further determination. Furthermore, Glacier emphasizes that it is now three years from the Decision, 14 years from the issuance of the EAC, and 27 years from the initiation of the Project. As a result, further delays would be inconsistent with the good administration of justice.

[94] The Minister, on the other hand, submits that in the event I find the original Decision unreasonable (as I have), the only remedy available is to set it aside and remit it to the Minister – *mandamus* is not an option in the circumstances.

[95] In support, the Minister cites *Paldi Khalsa Diwan Society v. Cowichan Valley (Regional District)*, 2014 BCCA 335 at para. 56 [*Paldi*], in which the Court of Appeal listed the principles applicable for an order of *mandamus*:

> [56] The principles applicable to a claim for *mandamus* relief were summarized by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at 766-769 (citations omitted):

1. There must be a public legal duty to act.
2. The duty must be owed to the applicant.
3. There is a clear right to performance of that duty, in particular:

    (a) the applicant has satisfied all conditions precedent giving rise to the duty;

    (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which be either expressed or implied, e.g. unreasonable delay;

4. Where the duty sought to be enforced is discretionary, the following rules apply:

    (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

    (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

    (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

    (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

    (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant.
6. The order sought will be of some practical value or effect.
7. The Court in the exercise of its discretion finds no equitable bar to the relief sought.
8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

See also *British Columbia Nurses' Union v. Attorney General of British Columbia*, 2008 BCSC 321 at para. 53.

[96] The Minister submits that the determination of a substantial start is discretionary and therefore Glacier does not have a legal right to the Minister forming the opinion that the Project had been substantially started. The only requirement is that the Minister exercises discretion reasonably. For several reasons, I agree.

[97] First, I am bound to follow the principles set out by the Court of Appeal in *Paldi*. The authority conferred on the Minister pursuant to s. 18 of the *EA Act* is discretionary, therefore I refer to the five listed rules in *Paldi* at para. 56, subpara. 4. The fifth item, for example, plainly states that "*mandamus* is only available when the decision-maker's discretion is 'spent'; i.e. the applicant has a vested right to the performance of a duty". I have been provided no authority in which a vested right has been found in circumstances analogous to the case at hand.

[98] Second, I am not bound to follow the decision of the Ontario Court of Appeal in *Gehl* that permits *mandamus* upon an inquiry of whether there is only one reasonable outcome. I note that the statement in *Gehl* flows from a dissenting opinion of Deschamps J. in *Giguère v. Chambre des notaries du Québec,* 2004 SCC 1 at para. 66, which has not been cited with approval by BC courts.

[99] Third, the cited BC cases in which *mandamus* was granted are distinguishable. For example, in *Paldi* a licensing regulation imposed a duty on a municipality to execute a document for the purpose of a licensee's application. The municipality refused to provide this document to the petitioner and therefore the Court of Appeal ordered the municipality to provide it (at para. 57). That scenario differs greatly from the case at hand.

[100] In addition, the delays that Glacier has endured over the course of the Project are not analogous to those discussed by the BC Court of Appeal in *Pointon.* There, the petitioner had been through two petitions and three full-scale arguments in court by the time of the Court of Appeal's judgment. Although Glacier has faced delays linked to blockade injunctions and First Nation consultation, it submits that much of the total Project delay resulted from local regulatory processes, environmental factors, and seasonal constraints. As a result, the risk to the good administration of justice is not sufficiently analogous.

[101] Lastly, given the Minister's error at issue, i.e. the failure to consider relevant evidence, it would be inappropriate, given the role of the court in a reasonableness review, to weigh that evidence anew. As stated by Binnie J. in *Canada (Citizenship*

and Immigration) v. Khosa, 2009 SCC 12 at para. 61, "I do not believe that it is the function of the reviewing court to reweigh the evidence."

[102] As a result, I decline to grant an order in the form of *mandamus*. The Decision is remitted to the Minister. In the consideration of whether the Project was substantially started, the Minister should take into account my interpretation of the legislative scheme, at paras. 33-39 and a consideration of the Mitigating/Limiting Factors and legal analysis, at paras. 48-72 above.

[103] This is not a case in which Glacier showed a casual or dilatory approach to this Project or the granting of the EAC. On the contrary, the record before the Minister supported that Glacier had been proactively trying to move this Project forward since its initiation approximately 27 years ago. Glacier's actions demonstrated an understanding and desire to get on with the Project within a reasonable amount of time once the EAC was issued.

[104] There have been extensive delays in the regulatory process and hurdles that Glacier has been subjected to. In 2005, Justice Melnick noted that: "Glacier's plans for the Jumbo Valley ground along at a somewhat glacial pace": *R.K. Heli-Ski Panorama v. Glassman et al,* 2005 BCSC 1622 at para. 21. Thirteen years later, Glacier now faces the requirement for a further consideration under s. 18(5), which hopefully will be expeditiously carried out.

f) Costs

[105] In my view, Glacier was substantially successful in having the Decision found unreasonable. As a result, Glacier is awarded costs from the respondent unless there is some agreement or law precluding such a cost order.

[106] There is no cost order made against the intervenors and the intervenors are not entitled to any costs.

"The Honourable Madam Justice Forth"