

IT MAY BE WRONG, BUT IS IT ILLEGAL? – *CASTLE-CROWN WILDERNESS COALITION v. FLETT* AND THE LIMITS OF DISCRETIONARY DECISION-MAKING

Article by Steven A. Kennett*

Introduction

Alberta's environmental protection and resource management legislation is riddled with discretionary powers.¹ One consequence of this preference for a 'flexible' as opposed to 'legalistic' approach to decision-making has been to limit the scope for judicial review. Clear legal standards relating to the substance of matters to be decided are often difficult to identify and the courts are reluctant to intervene on questions where Ministers and officials claim special expertise. In fact, one might ask whether or not there are any effective legal constraints on the substance of decision-making pursuant to statutory powers that confer broad discretion.

*Castle-Crown Wilderness Coalition v. Flett*² (hereinafter *Flett*), a recent decision by Madam Justice Kenny of Alberta's Court of Queen's Bench, raises this issue directly. This case is important for three reasons. First, it marks a new chapter in the ongoing conflict over the expansion of Castle Mountain Resort, a recreational, commercial and residential development in the West Castle Valley of southwestern Alberta. Second, it provides a compelling explanation of the legal structure for discretionary decision-making within Alberta's environmental assessment (EA) regime. Finally, it is a timely reminder that the exercise of discretionary powers is indeed subject to legal limits.

The Context – Resort Development in the Castle

Castle Mountain Resort is located in the heart of Alberta's Castle River region, a scenic and environmentally significant area of mostly public land

between Waterton Lakes National Park and the Crowsnest Pass.³ The original development was a modest downhill ski operation that, until the mid-1990s, had a daily capacity of about 900 skiers and consisted of 20 ski runs, three T-bar lifts, a day lodge, an ancillary building, and forty mobile homes on leased lots.

In 1993, Alberta's Natural Resources Conservation Board (NRCB or Board) reviewed a proposal to transform these facilities into a four-season resort with a daily capacity of 3,200 skiers, two 18-hole golf courses, and a village complex consisting of hotels, restaurants, other commercial facilities, condominiums, townhouses and recreational vehicle (R.V.) sites. The Board rejected the application as submitted on the grounds that it would contribute to cumulative effects on an already-stressed regional ecosystem. Concerns included the obstruction of wildlife movement and the use of the resort as a staging ground for increased public access, particularly motorized access, to surrounding public land.⁴

The NRCB stated, however, that development in the West Castle Valley would be acceptable under two conditions: (1) redesign of the project footprint to minimize direct impacts; and (2) designation of a large protected area on surrounding public land to ensure ecosystem-based management of cumulative effects. Its decision was therefore phrased as a 'conditional approval'. When the Government of Alberta declined to meet the second condition in 1995, the NRCB process concluded definitively with a denial of the project application.





RÉSUMÉ

Cet article commente la cause *Castle-Crown Wilderness Coalition v. Flett*, une affaire récente portant sur l'expansion de la station de sports d'hiver de Castle Mountain au sud-ouest de l'Alberta. Les raisons invoquées par la cour pour annuler les décisions d'un haut fonctionnaire et d'un ministre ont des conséquences importantes pour les prises de décisions discrétionnaires dans le cadre du régime d'évaluation environnementale de l'Alberta.

What followed was the incremental but significant expansion of facilities between 1996 and 2001. Additions included two chair lifts to increase ski terrain, a new 12,000 square foot day lodge, a three-story building with commercial space and staff accommodation, a 1,500 square foot restaurant and bar, and upgraded water and wastewater systems. The trailer sites were replaced by 88 residential leasehold lots, most with conventional wood-frame dwellings, and approximately 50 R.V. sites. These changes were not presented as a unified and comprehensive development proposal and were not subject to an EA.

While this expansion was less extensive than the four-season resort proposed in 1993, it nonetheless established the type of permanent residential and commercial development that the NRCB had identified as raising particular environmental concerns.⁵ It also provided the springboard for a formal expansion proposal in 2002.

The *Castle Mountain Resort Area Structure Plan*⁶ (ASP) is a municipal planning document, reflecting the fact that most of the proposed facilities are to be located on the enclave of private land at the base of the ski hill. Describing Castle Mountain Resort as "a special community occupying an exceptional location in the Westcastle Valley",⁷ the ASP proposes:

- expanded ski terrain and additional lifts, bringing capacity to 2,400 skiers per day;
- total build-out for accommodation equivalent to 225 housing units (including a hotel, a hostel, numerous multifamily housing units, possibly single family units, and at least 50 R.V. stalls);
- "complementary base area facilities" including restaurants, pubs, retail space, a recreational centre, arcades and amusement facilities, and offices; and
- ancillary development (e.g., parking and a maintenance and storage compound).

The ASP is thus similar in many respects to the proposal reviewed by the NRCB ten years earlier, although it

emphasizes skiing as the primary purpose and does not include golf courses.⁸ Some measures intended to reduce direct environmental impacts are proposed and the project design generally conforms to the footprint specified in NRCB's first condition for the earlier development proposal.

The ASP does not, however, address access management and other issues relating to cumulative effects on surrounding public land. Furthermore, the Alberta government has taken no action to meet the NRCB's second condition – the establishment of a large protected area in the Castle.

The ASP was approved by the Council of the Municipal District of Pincher Creek (M.D. Council) pursuant to its planning authority under the *Municipal Government Act*.⁹ Although the M.D. Council received many submissions regarding potential impacts on public land, these issues were beyond its authority.

Alberta Environment also reviewed this proposal, but both the Director of Regulatory Assurance and the Minister of the Environment decided not to require further consideration of its potential environmental impacts through Alberta's EA process. *Flett* was an application for judicial review of these decisions.

Alberta's EA Regime

The *Environmental Protection and Enhancement Act*¹⁰ (EPEA) provides for two levels of EA review – a screening report and a more detailed environmental impact assessment (EIA) report. It also establishes several mechanisms for determining whether or not a "proposed activity" is subject to review. These 'trigger' mechanisms are central to *Flett*.

An EIA report must be prepared for activities that are designated by regulation as "mandatory" (s. 44(1)(a)). These activities are identified by type, often with a numerical threshold or other condition attached.¹¹ For



example, the construction of a tourism facility is a mandatory activity if it is expected to attract more than 250,000 visitors per year and will be immediately adjacent to an ecological reserve, natural area or wilderness area.¹²

Activities that do not meet the criteria for mandatory review may nonetheless be subject to the EA regime by order of the Director or the Minister. Section 44(1)(b) requires the Director, under specified circumstances, to decide whether or not the potential environmental impacts of a proposed (non-mandatory) activity “warrant further consideration”. If the Director determines that further assessment is required, he or she must prepare a screening report and then decide whether or not to order an EIA report (s. 45(1)). The Minister has independent authority to order an EIA report (s. 47).

Flett considers both the application of mandatory review criteria to the expansion of Castle Mountain Resort and the discretionary decisions of the Director and the Minister not to require an EA of this proposed project. Madam Justice Kenny’s reasons for judgment addressed four principal issues.

The Issues

The first issue in *Flett* was the appropriate standard for judicial review. Madam Justice Kenny concluded that the decisions in question warrant a high degree of judicial deference and that the appropriate standard is one of “patent unreasonableness”.¹³ This issue will not be discussed further.

The second issue was whether or not the expansion of Castle Mountain Resort was a “proposed activity”, a precondition for engaging the EA process under *EPEA*. This term is defined to include: (1) activities that have not been “commenced”; and (2) ongoing activities requiring an approval or registration that has yet to be obtained (s. 39(e)). The Alberta government argued that since the resort was already established and in operation, the activity in question had already commenced and the EA regime did not apply.

Madam Justice Kenny made short work of this argument, pointing out that many facilities in the ASP had yet to be built. She also noted that the government’s interpretation of “proposed activity” would allow existing tourism facilities to expand to any level without an EA, a result she found to be inconsistent with the purposes of *EPEA*. Finally, she rejected the argument that the second part of the definition of “proposed activity” could be relied upon to avoid this scenario, observing that significant incremental growth of Castle Mountain Resort had occurred without an approval

or registration engaging the EA process. She concluded, therefore, that the expansion plan was a “proposed activity” subject to *EPEA*’s EA provisions.

For anyone who believes that EA is an essential tool of modern environmental management, it is disappointing to see the Government of Alberta advancing in court an interpretation of *EPEA* that would undermine the integrity of its own EA process. Given the history of land use in the West Castle Valley, however, this legal strategy is not a complete surprise. The government’s argument has the hallmarks of an attempt to secure a formal legal basis in *EPEA* for the incremental approach to development that permitted the transformation of a small ski facility into a permanent residential and commercial “community”¹⁴ in the Castle without triggering a comprehensive EA.

Madam Justice Kenny recognized the threat posed by incremental development and project segmentation to an EA regime that uses numerical thresholds as trigger mechanisms. If activities can be initiated at levels below the applicable threshold and subsequently increased beyond that level without triggering review, creative proponents and compliant regulators could steer many projects clear of EA requirements. While *Flett* closed the door on the definition of “proposed activity” as a means for this type of subterfuge, incremental development remains a challenge for reasons discussed below.

The third issue in *Flett* was whether or not this activity met the criteria for mandatory review. Since the development is adjacent to a small ecological reserve, this issue turned on visitation estimates. Based on the evidence before her, Madam Justice Kenny found that the Director’s determination that visitation would be below the statutory threshold of 250,000 visits per year was not patently unreasonable. As a result, scrutiny of the proposed development under Alberta’s EA regime depends entirely on the discretionary trigger mechanisms.

Before turning to this issue, however, Madam Justice Kenny highlighted the implications of the visitation threshold for mandatory review in light of her suspicion that the total number of visitors to Castle Mountain Resort, including summer visitors, will increase significantly in the near future. The difficulty, she noted, is that when the threshold for mandatory review is crossed “it may be extremely difficult, if not impossible, to mitigate adverse environmental impacts if there are any.”¹⁵ Furthermore, “the number of visitors does not even arise unless or until further application is made for development.”¹⁶

The fourth issue, and the focus of this article, concerns the decisions by the Director and the Minister not to exercise





their discretion to order an EIA report. Madam Justice Kenny reviewed the factual basis and rationale for these decisions. The record provided ample evidence of potential environmental effects. Internal government documents – including briefing notes and a memorandum from the Director – enumerated concerns and recommended that an EIA report be ordered.

The Director's recommendation was based, in part, on the need for an overriding public interest decision on the project as a whole and the concern that other approval processes may be unable to address its complexities. As reported by Madam Justice Kenny, the Director also observed that "this proposal may be a turning point in the West Castle Valley and, therefore, an EIA report would provide the necessary information to make informed decisions in the future."¹⁷

Despite the well-documented concerns and recommendation, both the Director and the Minister concluded in the end that further scrutiny of the project through the EA process was not required. The rationale offered for these decisions was that the project's potential impacts could be adequately addressed in other ways.

Madam Justice Kenny examined the applicable approval processes – which she characterized as silos, each with its separate and narrow focus – and found that none of them could address cumulative effects and overall environmental impacts.¹⁸ In her view, the preparation of an EIA report pursuant to *EPEA* was the only mechanism available for evaluating the integrated effect of the proposed development and was intended precisely for this purpose.

This analysis led Madam Justice Kenny to conclude that the decisions by the Minister and the Director not to require an EIA report were "incorrect"¹⁹ because the cornerstone of their stated rationale – that potential environmental effects could be addressed through other processes – was simply wrong. The legal issue before her, however, was not the correctness of these decisions, but whether they were 'patently unreasonable.' She concluded that they were.

The basis for this conclusion is her finding that the decisions in question cannot be reconciled with the legislative scheme. Madam Justice Kenny referred to key elements of that scheme – "purpose", "policies and objectives", the consideration of "patently relevant factors", and the "statutory duty" that must be fulfilled.²⁰ There is some value, however, in unpacking this legal reasoning and exploring how the legislative scheme was "defeated"²¹ by the decisions not to order an EIA report for Castle Mountain Resort.

Statutory Purposes

The purpose sections of *EPEA* are the first source of guidance regarding the discretionary trigger mechanisms. The EA process is intended "to integrate environmental protection and economic decisions in the earliest stages of planning an activity", predict effects, assess mitigation plans, and involve the public, proponents and government in the review process (s. 40). These provisions reflect the broader purposes of the Act, which include recognition of "the importance of preventing and mitigating the environmental impact of development" (s. 2(d)).

The government documents reviewed by Madam Justice Kenny and the public record dating back to the NRCB decision in 1993 show clearly that the type of development proposed for Castle Mountain Resort could have significant adverse environmental impacts on surrounding public land. While the unofficial 'planning' of this development is evident in the incremental facility expansion since 1995,²² the first official plan for Castle Mountain Resort as a whole – at least as currently envisaged²³ – is the *Castle Mountain Resort ASP*.

The decisions not to order an EIA report mean that there is no public process to integrate environmental and economic decisions *early* in the planning of this development. A systematic and comprehensive EA to predict environmental consequences and assess mitigation plans would occur, if at all, only after many irreversible decisions have been made. By that time, the opportunity for a global assessment of project acceptability will be long past.

Furthermore, as Madam Justice Kenny stated, it may be difficult or impossible to mitigate adverse environmental effects once the project is largely built. For this type of incremental development, deferring review until the mandatory threshold is reached renders the EA process largely ineffective. The discretionary trigger mechanisms are the only means within the legislative scheme for ensuring a meaningful review. As a result, the refusal by the Director and the Minister to use these triggers frustrates key purposes of *EPEA*.

The Function of an EIA Report

The role assigned to the EIA report within the legislative scheme is the second source of statutory guidance regarding the exercise of discretionary trigger mechanisms. Section 49 of *EPEA* states that, unless the Director decides otherwise, an EIA report shall identify baseline environmental information and associated areas of concern and shall describe potential environmental, social, economic



and cultural impacts, “including cumulative, regional, temporal and spatial considerations.” An EIA report must also analyze the significance of these impacts and include information on mitigation plans.

The reason for including this mechanism in the legislative scheme is not a mystery. As noted by Madam Justice Kenny, the issues identified in section 49 cannot be adequately addressed through narrow regulatory processes that tend to view project components in isolation from each other and from the broader context and that often occur relatively late in project planning and decision-making.

The EIA report is thus specifically designed for circumstances where baseline environmental conditions, cumulative effects, regional considerations (e.g., regional land and resource management) and the implications of development over broader spatial and temporal scales are of central importance when evaluating potential environmental effects and identifying appropriate mitigation measures. The internal government documents reviewed by Madam Justice Kenny and the public record relating land-use issues in the West Castle Valley provide overwhelming evidence that the expansion of Castle Mountain Resort raises precisely this constellation of issues.

Factors to be Considered by Decision-Makers

The final source of legal guidance regarding the discretionary triggers is the list of factors to be considered by decision-makers. For the Director’s initial decision regarding the need for further review, this list includes the “location, size and nature of the proposed activity”, public concerns, “the presence of other similar activities in the same general area”, and any other factors that he or she considers to be relevant (s. 44(3)). The Director must also “give due consideration to all statements of concern that have been submitted” when determining the need for an EIA report (s. 46). The Minister may order an EIA report if, in his or her opinion, such a report “is necessary because of the nature of a proposed activity” (s. 47).

The rationale for specifying these factors within the legislative scheme is not hard to discern. The numerical thresholds for mandatory activities – such as the requirement of 250,000 visitors per year for a tourism facility – are inevitably crude and somewhat arbitrary proxies for the significance of environmental effects. The enumeration of factors to consider indicates clearly that the discretionary trigger mechanisms are intended to supplement the use of numerical thresholds in cases where non-mandatory activities warrant an EA because of their

particular characteristics or context.

Applied to the expansion of Castle Mountain Resort, this fairly general statutory language translates into a set of very specific factors that should inform the exercise of the discretionary trigger mechanisms. Potential environmental impacts are directly related to the particular “location, size and nature” of this proposed activity. Furthermore, it constitutes a significant change in land use in the Castle; the project is not simply the addition of another “similar” activity in an area where this type of development is already well established and accepted. As noted above, the specific factors that the Director identified as relevant to her decision are also well documented. Finally, there is an extensive record of public concerns relating to potential direct, indirect and cumulative impacts on surrounding public land.

There would be little point in explicit statutory direction to consider these factors if they could simply be ignored by decision-makers or addressed in a *pro forma* manner and then arbitrarily dismissed. However, neither the Director nor the Minister provided a convincing explanation of how they considered these factors and why they refused to trigger the EA process in the face of substantial evidence that an EIA report is the appropriate mechanism to address the potential environmental effects of the proposed activity. The finding that they acted in a ‘patently unreasonable’ manner reflects this failure to meet the legal standard of transparent and rational decision-making that is implicit in the logic of the legislative scheme.

Implications for the Scope of Discretion

The legal analysis presented above shows that the expansion of Castle Mountain Resort is a textbook illustration of circumstances where one would expect to see statutory discretion exercised to order an EIA report. Madam Justice Kenny did not, however, substitute her opinion for that of the Director and the Minister by making this order herself. Instead, she quashed their decisions and returned the matter “to the Director for determination in accordance with the legislation”.²⁴

This demonstration of significant judicial restraint gives rise to a further question. Would a decision not to order an EIA report on the facts presented in *Flett* inevitably be patently unreasonable? For reasons discussed above, the purpose and logic of the legislative scheme suggest that such a decision would be extremely difficult to justify. This conclusion is reinforced when one considers the function of EA within the spectrum of decisions that apply to land and resource use.





The final decision to approve or reject a project such as the expansion of Castle Mountain Resort involves reconciling, or trading off, conflicting values and interests. This determination of the broad public interest is not, however, the issue facing decision-makers at the front end of the EA process.

The role of EA is simply to apply the 'look before you leap' principle to the ultimate determination of project acceptability. For that reason, courts should scrutinize very carefully decisions that an EA is not required when credible scientific evidence suggests that the project in question may have significant environmental effects. The time for weighing those impacts against other values is after completion of the EA, not before the scientific evidence, public concerns and options for mitigation have been subject to a thorough and transparent review.

A decision not to engage the EA process on the facts of *Flett* should also be assessed in light of the Government of Alberta's failure to address effectively a series of important regional land-use issues that are relevant to development at Castle Mountain Resort.²⁵ These issues have been well documented for more than a decade, beginning with the NRCB's West Castle decision in 1993.²⁶

Concerns with the existing management regime in the Castle have also been raised by the Castle Local Committee under the Special Places 2000 process,²⁷ the Alberta Energy and Utilities Board,²⁸ and the Council for the Municipal District of Pincher Creek.²⁹ The recently released *Report of the Southern East Slopes Task Force* reiterates these concerns across a broader area of southwestern Alberta.³⁰ In all cases, specific recommendations were offered.

The Government of Alberta has not, however, implemented the significant changes to environmental and resource management that are required to address these issues. The situation documented by the NRCB in 1993 still prevails – there are no effective regional processes for managing cumulative effects and ensuring ecosystem sustainability in the Castle.³¹ For a project like the expansion of Castle Mountain Resort, an EIA report under *EPEA* and subsequent review by the NRCB remain the only mechanisms available for addressing these types of concerns. The government's failure to resolve the broader management issues is yet another reason why the decisions not to trigger the EA process for this project can be characterized as 'patently unreasonable'.

The Challenges of Incrementalism and Cumulative Effects

The facts in *Flett* raise two of the most difficult challenges for project-specific EA – incremental development and cumulative effects. These issues are problematic both for the triggering of the review process and for the subsequent scoping of EAs through the identification of relevant issues and appropriate mitigation measures.

Flett addresses the trigger issue in a context where the purposes of *EPEA*'s EA regime would be frustrated by the mechanical application of numerical thresholds for mandatory review. As discussed above, reliance on the visitation threshold yields an unsatisfactory result because it fails to take into account the consequences of incremental development for the EA process and because it is insensitive to important contextual considerations, notably the project's contribution to cumulative effects.

Madam Justice Kenny's reasons for judgment show how these issues can be addressed, to some degree at least, by establishing legal limits on the exercise of discretion within the EA process itself. Incremental development and cumulative effects will nonetheless remain significant challenges for EA. The discretionary trigger mechanisms in *EPEA*, even with a judicial backstop, may be somewhat cumbersome and unreliable mechanisms to address these fundamental issues.

Incremental development can take many forms, from the division of a single project into sub-components to the initiation of multiple independent activities that, while individually insignificant, yield important cumulative effects. Where many activities are occurring on a given landscape, it will not always be easy to identify the point at which one or more of them should be subjected to an EA that includes consideration of cumulative effects.

The facts will not always be as clear-cut as in *Flett*, nor will there necessarily be a formal application like the *Castle Mountain Resort ASP* to crystallize the legal issues. Ministers and officials will continue to face pressures to exercise their discretionary powers in ways that are inconsistent with the purpose and logic of the legislative EA scheme. When they do so, applicants with the expertise and financial resources to initiate judicial review may not always be available.

Furthermore, some situations are inherently problematic for project-specific EA. While it may be possible to reduce the risk of intentional or inadvertent avoidance of EA through project segmentation, the EA process is not well suited to situations where a multitude of independent activities



contribute to regional cumulative effects.³²

These structural problems can only be solved by establishing a solid policy and planning framework for project-specific EA, including landscape-level objectives and cumulative impact or activity thresholds identified through regional land-use planning.³³ From this broader perspective, addressing the twin challenges of incrementalism and cumulative effects requires the combination of a truly integrated regime for environmental and resource management³⁴ with the principled and legally enforceable approach to EA that is set out in *Flett*.

Conclusion

The key general lesson from *Flett* is that decision-makers exercising discretionary powers do not have a *carte blanche* to act in ways that systematically undermine the integrity of legislative schemes. While Madam Justice Kenny's decision is far from American-style judicial activism, it clearly affirms that the 'rule of law' is alive in Alberta and that the courts are prepared to play their critically important role as guarantors of legality and accountability within our democratic system of government.

More specifically, this case demonstrates that legal limits on discretion can be derived from the purpose and logic of *EPEA's* EA regime. *Flett* provides a particularly graphic illustration of how incremental development and the refusal to use discretionary triggers can defeat this legislative scheme and how judicial oversight can play an important corrective role in these circumstances.

The Government of Alberta has appealed Madam Justice Kenny's decision and the Alberta Court of Appeal will likely hear the case later in 2005. The outcome of this appeal will have important implications for the future expansion of Castle Mountain Resort, cumulative effects management in the Castle, the integrity of Alberta's EA process, and the exercise of the discretionary powers that permeate environmental and resource management in Alberta. It warrants close attention.

- ♦ Mr. Kennett is a Research Associate at the Canadian Institute of Resources Law. The author gratefully acknowledges project funding from the Alberta Law Foundation and very helpful comments on an earlier draft from Mike Wenig.

Notes:

1. Steven A. Kennett & Monique M. Ross, "In Search of Public Land Law in Alberta" (1998) 8 *Journal of Environmental Law and Practice* 131; Steven A. Kennett, "Integrated Watershed Planning for the Northern River Basins: Thirty Years and Counting" (2001) 26 *Canadian Water Resources Journal* 325 at 334-335.
2. 2004 ABQB 515 [hereinafter *Flett*] (available at: www.albertacourts.ab.ca/jdb/2003-qb/civil/2004/2004abqb0515.pdf).
3. The following description is based on: Steven A. Kennett, *Spinning Wheels in the Castle: A Lost Decade for Sustainability in Southwestern Alberta*, CIRL Occasional Paper #14 (Calgary: Canadian Institute of Resources Law, 2003). Detailed footnotes are omitted here, but are included in the earlier publication.
4. NRCB, *Application to Construct Recreational and Tourism Facilities in the West Castle Valley, near Pincher Creek, Alberta*, Decision Report – Application #9201 (December 1993) at 9-28 to 9-32, 9-75.
5. *Ibid.* at 9-4.
6. *Castle Mountain Resort Area Structure Plan* (n.d.) (available at: www.castlemountainresort.com/insidecmr/ASP/asp-full.pdf).
7. *Ibid.* at 3.
8. *Ibid.* at 34, 15, 6-7.
9. R.S.A. 2000, c. M-26.
10. S.A., c. E-12.
11. *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, A.R. 111/93.
12. *Ibid.*, s. 3(f).
13. *Flett*, par. 30-31.
14. *Supra* note 7.
15. *Flett*, par. 56.
16. *Ibid.*, par. 56.
17. *Ibid.*, par. 74.
18. *Ibid.*, par. 82-86; See also Kennett, *supra* note 3 at 33-35 and Kennett & Ross, *supra* note 1.
19. *Ibid.*, par. 88.
20. *Ibid.*, par. 86, 88.
21. *Ibid.*, par. 88.
22. The expansion of water and wastewater treatment facilities, for example, suggests that some thought had been given to the expected total build-out of the resort.
23. A spokesman for Castle Mountain Resort has been quoted as saying that, if required to prepare an EIA report, the developer may "completely redo" the ASP, redesign and expand the scope of its project, and purchase additional land in order to pay for the cost of the review. See, Darby Gilbertson, "CMR opposes land sale" *Pincher Creek Echo*, 3 August 2004 (available at: www.pinchercreekecho.com/story.php?id=111187).
24. *Flett*, par. 89.
25. See Kennett, *supra* note 3, for a discussion of the documents referred to in notes 26-29.





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26. NRCB, *supra* note 4.
27. Castle Local Committee, "A Living Document" – Recommendations of the Castle Local Committee to the Minister of Environmental Protection on the Castle Candidate Area (4 July 1997).
28. Alberta Energy and Utilities Board (EUB), *Shell Canada Ltd., Application to Drill Four Critical Sour Gas Wells and Construct and Operate Related Pipeline and Facilities, Castle River Area*, Decision 2000-17, 8 March 2000.
29. Letter to the Honourable Mike Cardinal from the Reeve and Councilors of the M.D. of Pincher Creek, *Re: Proposed Development at Castle Mountain Ski Resort* (3 July 2002) (on file with the author).
30. *Report of the Southern East Slopes Task Force*, Report Submitted by: Clearwater County, M.D. of Bighorn, M.D. of Ranchland and M.D. of Pincher Creek (June 2004).
31. Steven A. Kennett, "The Castle – A Litmus Test for Alberta's 'Commitment' to Sustainable Resource and Environmental Management" (2003) 83/84 *Resources* 1.
32. Steven A. Kennett, *Towards a New Paradigm for Cumulative Effects Management*, CIRL Occasional Paper #8 (Calgary: Canadian Institute of Resources Law, 1999).
33. Steven A. Kennett, "New Directions for Public Land Law" (1998) 8 *Journal of Environmental Law and Practice* 1.
34. Steven A. Kennett, *Integrated Resource Management in Alberta: Past, Present and Benchmarks for the Future*, CIRL Occasional Paper #11 (Calgary: Canadian Institute of Resources Law, 2002).

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