Federal Court Cour fédérale

Date: 20190730

Docket: T-853-18

Citation: 2019 FC 1023

Ottawa, Ontario, July 30, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

ROBERT GRANDJAMBE JR. ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF MIKISEW CREE FIRST NATION

Applicant

and

PARKS CANADA AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND SUPERINTENDENT OF WOOD BUFFALO NATIONAL PARK

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the April 6, 2018 decision of the Superintendent of Wood Buffalo National Park [Superintendent] refusing the Applicant’s application seeking a permit to construct a harvesting cabin at the location proposed by the

Applicant, within Wood Buffalo National Park. This application is brought on behalf of the Applicant, Robert Grandjambe Jr., and the members of the Mikisew Cree First Nation.

Background

[2] The Applicant is a member of the Mikisew Cree First Nation [Mikisew], which is an Indian band within the meaning of the *Indian Act*, RCS 1985, c I-5, s 2(1). Mikisew is a signatory to Treaty 8.

[3] The Parks Canada Agency [Parks Canada] is a body corporate established pursuant to the *Parks Canada Agency Act*, SC 1998, c 31. As set out therein, it exercises, on behalf of the Minister of Environment and Climate Change [Minister], the powers and performs the duties and functions that relate to national parks, national historic sites, national marine conservation areas, and national heritage areas and programs. It is also responsible for the implementation of policies of the Government of Canada that relate to national parks (s 3, 4(1)(a), 5, and 6). The Superintendent is appointed under the *Parks Canada Agency Act*. He is responsible for the management of Wood Buffalo National Park.

[4] Wood Buffalo National Park [WBNP or the Park] is Canada’s largest national park. Indigenous harvesters from many First Nations and Métis communities carry out harvesting activities, such as hunting, trapping, and fishing, within the Park. Four First Nations have reserves in WBNP, these include Salt River First Nation [Salt River], Smith’s Landing First Nation [Smith’s Landing] and Mikisew. Salt River and Smith’s Landing have reserves adjacent to Pine Lake. Mikisew’s reserve is located approximately 100 km south of Pine Lake.

[5] The Respondent acknowledges that Mikisew and other signatories to Treaty 8 have a constitutional right under s 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*] and Treaty 8, as modified by the Natural Resources Transfer Agreement (*Natural Resources Transfer Act*, SC 1930, c 3), to hunt, trap, and fish for food in WBNP, subject to lawful regulation and the Crown's ability to take up lands for specific purposes. These rights include the building and maintaining of harvesting cabins, also referred to as trapping cabins, which are necessarily incidental to the exercise of treaty rights. As a member of Mikisew, the Applicant individually exercises this collective right. Approximately 11 Indigenous groups are located in and around the Park.

[6] It is undisputed that the Applicant has exercised his Treaty rights to hunt, fish, and trap since he was young, and continues to do so. He states that he uses the pelts of the animals that he traps to make mitts, hats, moccasins, slippers, and other crafts, some of which he trades and some of which he provides to community members. Further, he consumes the meat from the trapped animals and shares it with members of his family and community. Trapping also allows the Applicant to pass on traditional knowledge and skills to other Mikisew members. For Mikisew trappers, a harvesting cabin can be necessary for the exercise of their Treaty rights as it provides shelter in winter, allows them to be near their trap lines, which must be tended, and provides a place to prepare bait and snares and to thaw and dry furs.

[7] In the summer of 2014, the Applicant attended at Parks Canada's office and requested an application package for a harvesting cabin. He indicated that he was planning to build on Pine Lake. At that time he was told that harvesting cabins were not permitted within 800 metres of the shore of Pine Lake for public safety reasons and because it is the primary recreational area within

WBNP. In October 2014, Parks Canada found an unauthorized road cut from Kettle Point Road, along an official hiking trail, to Pine Lake and the start of construction of a cabin about 34 metres from the shore of Pine Lake. Parks Canada contacted the Applicant who confirmed that the construction was his and that he intended to continue to build there. In November 2014, Parks Canada met with the Chiefs of Salt River, Smith's Landing and Mikisew Cree First Nations to discuss the construction of the harvesting cabin by the Applicant. Salt River and Smith's Landing expressed support for the restriction on harvesting cabins within 800 metres of Pine Lake and were of the view that Parks Canada should enforce the restriction. Many communications with the Applicant followed, including explanations as to why the location he had chosen for the cabin was not appropriate and that construction must stop. The Applicant refused to halt his construction and, ultimately, Parks Canada removed the partially constructed cabin and attempted site restoration. Parks Canada advised the Applicant that his building supplies were available for pick up.

[8] On July 11, 2017, the Applicant submitted to Parks Canada an Application for Traditional Harvesting Cabin [Permit Application], including a detailed addendum in which he described his background as a trapper and a treaty person, why he wanted to build a cabin, why he selected the location that he had – which was the same location where he had previously commenced construction – and other factors which he submitted supported his application. The Permit Application also included letters of support from individual members of Salt River, Mikisew, and Smith's Landing.

[9] On July 28, 2017, the Applicant requested an update on the application and offered to assist in the application process by answering questions, providing clarification, or consulting

with potentially affected Indigenous groups. By email of August 15, 2017, the Superintendent confirmed receipt of the Permit Application. He noted that the application, in effect, sought an exemption to Parks Canada's policy of not allowing traditional harvesting cabins within 800 metres of Pine Lake. The Superintendent stated that Parks Canada had begun reviewing the package along with correspondence and information collected between 2014 and 2016 related to the cabin's proposed location, and would let the Applicant know should further information be required. On August 30, 2017, the Applicant wrote to the Superintendent again, stating that he was entitled to a fair process and if he was not to be included in consultations with other Aboriginal groups or people, then he expected the Superintendent would share the details of those consultations and provide the Applicant with the opportunity to respond. Further, that his Permit Application was to be assessed in a timely manner which took into account his Treaty rights. By email of September 21, 2017, the Superintendent responded, addressing timelines and stating that Parks Canada was currently gathering information on the positions of the three Indigenous groups who had been involved in the file. Once responses from those groups were received, Parks Canada would share their positions with the Applicant, who would then have an opportunity to respond to the views expressed. The Applicant sent follow-up letters on December 21, 2017, and February 26, 2018.

[10] On April 6, 2018, the Superintendent wrote to the Applicant advising him that his Permit Application had been denied. That decision is the subject of this application for judicial review.

Decision Under Review

[11] In his letter, the Superintendent stated that, as indicated in past correspondence, Parks Canada recognized that the Applicant has Treaty 8 harvesting rights within WBNP. However, it

was of the opinion that the location proposed for the harvesting cabin was not appropriate for a number of reasons, including the five that were then listed.

[12] First, both Salt River and Smith's Landing have reserve lands on Pine Lake. Their Treaty Land Entitlement Agreements [TLEAs] with Canada commit them and Parks Canada to work co-operatively through ongoing consultation in relation to land use and management issues around Pine Lake, both on Reserve lands and on adjacent Parks Canada lands. As harvesting and harvesting cabins had historically not been permitted within 800 metres of Pine Lake, any change of policy regarding land use would trigger the commitments under the TLEAs and require consultation and discussion with Salt River and Smith Landing.

[13] Second, Salt River had indicated its opposition to the construction of a harvesting cabin at the location proposed by the Applicant.

[14] Third, the proposed location is at the junction of two public trails and close to a trailhead parking lot. The trails and trailhead parking areas form part of the Pine Lake recreational area visitor facilities. Although WBNP is the largest national park in Canada, Parks Canada maintains a very small number of visitor facilities for public use. Harvesting infrastructure on or adjacent to these facilities is incompatible with the use and enjoyment of the area by all Park visitors.

[15] Fourth, for public safety reasons, harvesting is not permitted within 800 metres of Pine Lake between April 1 and October 31 of each year, as this is a period of high visitor use. An alternative cabin location, away from visitor facilities and more than 800 metres from the lake, would be more appropriate as it could be used for harvesting throughout the year with fewer

safety concerns and lower potential impacts to reserve lands of other Indigenous groups and other Park users.

[16] Finally, the 2010 Park Management Plan (WBNP Management Plan 2010 [Management Plan]) highlights the Pine Lake area and indicates the important role that Salt River and Smith's Landing have in that area, stating that "The purpose of this Pine Lake Area Management Approach is to provide Wood Buffalo National Park, SLFN [Salt River] and SRFN [Smith's Landing] with a plan that promotes compatible land-use and development for reserve and park lands at Pine Lake".

[17] The Superintendent stated, as had been previously discussed, that the majority of WBNP lands are available for the construction, with a permit, of a harvesting cabin ancillary to Treaty 8 harvesting rights, that Parks Canada had offered to work with the Applicant to find another location that would be mutually acceptable and, had explained the basis of its concerns with the current proposed location. Parks Canada reiterated its desire to work with the Applicant in this regard and wished to be clear that it fully supported the Applicant's Treaty 8 harvesting and ancillary rights, while making every effort to be equally respectful of the rights of other Treaty 8 beneficiaries as well as to provide basic recreational facilities to park visitors in a few limited locations.

[18] I note that the certified tribunal record [CTR] also contains a 12-page document, with attachments, entitled "Record of Decision – Robert Grandjambe Jr's request for an exemption to build a harvesting cabin at Pine Lake Wood Buffalo National Park" [Record of Decision], which sets out the rationale for the decision. The Record of Decision is to be considered as part of the decision and can be considered in assessing the adequacy of reasons (*Mitchell v Canada*, 2015

FC 1117 at paras 28–31). Similarly, it is open to a court, if necessary, to look to the record for the purpose of assessing the reasonableness of a decision. The record can also be utilized by a reviewing court to supplement, but not supplant, the analysis of the decision-maker (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15); *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at paras 23–24; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para 116).

Relevant Legislation and Guidelines

Wood Buffalo National Park Game Regulations, SOR/78-830

[19] Trapping within WBNP is governed by the *Wood Buffalo National Park Game Regulations*, SOR/78-830 [*WBNP Game Regulations*], made pursuant to the *Canada National Parks Act*, (SC 2000, c 32). Relevant to this application are s 7, 13, 14, and 50(1) – (4):

7 No person shall hunt, trap or discharge a firearm within eight hundred metres of the shoreline of Pine Lake from April 1 to October 31 in any year.	**7** Il est interdit, entre le 1er avril et le 31 octobre de chaque année, de chasser, piéger ou décharger une arme à feu dans un rayon de 800 m de la rive du lac Pine.
…	[…]
13 A trapping permit authorizing the holder thereof to hunt fur bearing animals may be issued by the superintendent to any person who **(a)** is the holder of a general hunting permit; and **(b)** is named in a certificate of registration for the trapping area, whether or	**13** Le directeur du parc peut délivrer un permis de piégeage autorisant la chasse d'animaux à fourrure au détenteur d'un permis général de chasse dont le nom paraît sur un certificat d'enregistrement applicable à un secteur de piégeage, qu'il en soit le détenteur ou non.

not he is the holder of the certificate.

14 (1) A certificate of registration for a trapping area may be issued by the superintendent to a person either on his own behalf or on behalf of two or more persons, if each person is the holder of a general hunting permit.

(2) Where a certificate of registration is issued pursuant to subsection (1), the superintendent may add the name of a person to the certificate if written permission is obtained from

(a) the holder of the certificate, where the certificate is issued on behalf of one person;

(b) the holder of the certificate and the second group member, where the certificate is issued on behalf of two persons; or

(c) the holder of the certificate and the majority of the other group members, where the certificate is issued on behalf of three or more persons.

…

50 (1) The superintendent is authorized to issue a trapper's cabin permit to any person named in a certificate of registration.

(2) An application for a trapper's cabin permit shall

(a) be made on a form supplied by the

14 (1) Le directeur du parc peut délivrer un certificat d'enregistrement applicable à un secteur de piégeage au nom d'une ou de plusieurs personnes à condition que chacune détienne un permis général de chasse.

(2) Au certificat d'enregistrement visé au paragraphe (1), le directeur du parc peut ajouter le nom d'une autre personne, à condition d'en obtenir l'autorisation écrite

a) du détenteur du certificat, lorsqu'il a été délivré au nom d'une seule personne;

b) du détenteur du certificat et de la seconde personne, lorsque le certificat a été délivré au nom de deux personnes; ou

c) du détenteur du certificat et de la majorité des membres du groupe, lorsque le certificat a été délivré au nom de trois personnes ou plus.

[…]

50 (1) Le directeur du parc est autorisé à délivrer un permis de cabane de trappeur aux personnes inscrites sur un certificat d'enregistrement.

(2) Pour obtenir un permis de cabane de trappeur il faut remplir le formulaire distribué à cette fin par le directeur du

superintendent; and **(b)** contain the information required by the form and any additional information requested by the superintendent.	parc et fournir, le cas échéant, les renseignements complémentaires qu'il peut exiger.
(3) No person shall erect or alter any building, cabin or structure in the Park unless he does so under and in accordance with a trapper's cabin permit.	**(3)** Il est interdit de construire ou de transformer un bâtiment ou une construction dans le parc, en contravention aux conditions d'un permis de cabane de trappeur.
(4) The superintendent may refuse to issue a trapper's cabin permit if the proposed trapper's cabin is not compatible in design or size with the proposed location.	**(4)** Le directeur du parc peut refuser de délivrer le permis de cabane de trappeur si la forme ou les dimensions de la cabane prévue sont incompatibles avec l'emplacement proposé.

Wood Buffalo National Park Application for Traditional Harvesting Cabin

[20] In accordance with s 50(2) of the *WBNP Game Regulations*, which states that an application for a trapper's cabin permit shall be made on a form supplied by the superintendent and contain the information required by the form and any additional information requested by the superintendent, Parks Canada developed the "Wood Buffalo National Park Application for Traditional Harvesting Cabin".

[21] This application seeks information from an applicant as to the proposed cabin and also includes the "WBNP Generic Environmental Assessment Screening Guidelines for Traditional Harvesting Cabin Applications" [Harvesting Cabin Application Guidelines]. These are stated to apply to Treaty 8 members and Métis individuals who are registered trappers in the Park. They also describe the application process, including: that a minimum of six weeks will be allocated for the processing of applications; that, when practical, a site visit by Park staff and the applicant

will take place during which potential impacts to natural and cultural resources, public safety hazards, and any other concerns will be identified and assessed for significance; that an environmental impact analysis will be completed to assess impacts and to identify any changes to the cabin construction that could mitigate them; and, that WBNP will consult with relevant Aboriginal organizations around the Park and that applicants are encouraged to engage in these consultations on their own initiative with the objective of obtaining support from the harvesters in the area. The Harvesting Cabin Application Guidelines also set out that some restrictions apply to the construction of traditional use cabins to ensure visitor safety and conservation stating that:

> Cabins will not be approved in the following locations, these locations include but are not limited to:
>
> All Zone 1 designated areas including the Whooping Crane Nesting grounds and the Salt Plains
>
> Within 800m of Pine Lake, day use areas, recreational trails, group camps, backcountry campgrounds (example: Rainbow Lakes)
>
> Sweetgrass Landing and Sweetgrass Stations

[22] The Harvesting Cabin Application Guidelines also address cabin site guidelines, including, for example, that the cabin and any associated buildings (*e.g.* outhouse and fuel storage shed) must be at least 31 metres (100 feet) from the nearest body of water.

Preliminary Issue – Admissibility of Affidavits

[23] In support of this application for judicial review, the Applicant has filed an 89-paragraph affidavit sworn on July 9, 2018 [Grandjambe Affidavit], as well as an affidavit of Chief Archie Waquan of the Mikisew Cree First Nation, sworn on July 9, 2018 [Waquan Affidavit].

[24] The Respondents note that much of this affidavit evidence is duplicative of the content of the record that was before the Superintendent or is not challenged. However, some of the content of the affidavits was not before the Superintendent when he made the decision under review. The Respondents have identified this content in Appendix B of their written representations and submit that this evidence should be given little or no weight.

[25] As a general rule, the evidentiary record before the Court on judicial review is restricted to the record that was before the decision-maker. That is, evidence that could have been placed before the decision-maker is not admissible before the reviewing court. This is because Parliament gave administrative decision-makers and the courts different roles. Administrative decision-makers, and not the courts, have jurisdiction to determine certain matters on their merits. A court cannot allow itself to become a forum for fact finding on the merits of the matter. However, there are recognized exceptions to this general rule, including the acceptance of an affidavit that: provides general background in circumstances where that information might assist the Court's understanding of the issues relevant to the judicial review; brings to the attention of the Court procedural defects that cannot be found in the evidentiary record; or, highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19, 20; *Bernard v Canada Revenue Agency*, 2015 FCA 263 at paras 13–28).

[26] While the Applicant acknowledges the general rule, he submits that the challenged affidavit evidence should be admitted because it contains information that would have been before the Superintendent had he fulfilled his promise to provide the Applicant with an

opportunity to respond to concerns raised regarding the Permit Application. Additionally, because it is necessary given the constitutional nature of the issues raised by the applications. That is, the Superintendent's decision unjustifiably infringed the Applicant's Treaty rights and was unreasonable, in part, because it failed to uphold the honour of the Crown.

[27] In my view, to the extent that the Applicant is suggesting that he would have put the information contained in the affidavits before the Superintendent had he known that the Superintendent was not going to advise him of the results of the Superintendent's consultations with Salt River and Smith's Landing, this does not make the content admissible. This is because the challenged content of the affidavits primarily concerns his trapping history and that of his family. It does not directly pertain to the allegation of a breach of procedural fairness arising from the Superintendent's failure to provide the results of his consultation with Salt River and Smith's Landing to the Applicant and the concerns of those First Nation with the proposed harvesting cabin location. The Respondents acknowledge that paragraphs 59, 62, 68, 87, and 89 of the Grandjambe Affidavit do pertain to the alleged breach of procedural fairness and therefore fall within the procedural fairness exception, they do not challenge the admissibility of those paragraphs. I also note that the challenged content was known to the Applicant before the Superintendent's decision, and there is also no explanation provided as to why it could not have been put before the Superintendent in the Permit Application. Other challenged paragraphs of the Grandjambe Affidavit directly respond to the Superintendent's decision or express the Applicant's view of how the decision impacted his ability to trap on his trapline.

[28] To the extent that the challenged evidence goes to the merits of the matter and could have been, but was not, previously provided, it is not admissible. Evidence that speaks directly to the

alleged breach of procedural fairness is admissible. As to evidence that is said to speak to the infringement of the Applicant's Treaty rights, given my finding below that this issue cannot be resolved by way of this application for judicial review, it is not relevant.

[29] In the result, paragraphs 5, 7, 9, 13–15, 18, 20–24, 26–44, 50–53, 56, and 69–77 of the Grandjambe Affidavit are inadmissible as this evidence was not before the Superintendent and does not fall under the any of the exceptions to this general rule. Exhibits D–H, referenced in those paragraphs, are therefore also inadmissible.

[30] As to the Waquan Affidavit, the Respondents note that it contains new information and opinion, not found in the record, with respect to hunting in WBNP, Mikisew, and the *WBNP Game Regulations*. The Respondents submit that, while much of the content is not in dispute, nor was it before the Superintendent. In my view, for the same reasons as set out with respect to the Grandjambe Affidavit, paragraphs 2–20 and paragraph 22, in part (the third sentence, opinion evidence), of the Waquan Affidavit are also in admissible.

Issues and standard of Review

[31] In my view, the issues to be determined in this application for judicial review can be framed as follows:

1. Was the decision to refuse the Permit Application reasonable?
2. Was there a breach of procedural fairness?
3. Is this the appropriate venue to consider whether the decision infringed upon the Applicant's Treaty rights? If so, were those rights infringed?

[32] The parties submit, and I agree, that a standard of reasonableness applies to the decision itself. This Court has previously found that a discretionary decision made by the superintendent of a national park, pursuant to his or her statutorily-granted authority, is reviewable on a standard of reasonableness (*Canadian Parks and Wilderness Society v Maligne Tours Ltd*, 2016 FC 148 at para 27; *Sunshine Village Corporation v Parks Canada Agency*, 2014 FC 604 at para 30; *Burley v Canada (Attorney General)*, 2008 FC 588 at para 39). The parties also agree that the decision must be constitutionally sound (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 205, 224, 226 [*Tsleil-Waututh*]) and that consideration of constitutional issues in the decision can be viewed as an aspect of reasonableness (*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources Operations)*, 2017 SCC 54 at paras 77 and 82.

[33] As to the second issue, the standard of review of correctness applies to issues of procedural fairness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *(Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). That said, Justice Rennie of the Federal Court of Appeal recently stated that a court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances, including the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]. And, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed. Regardless of how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56).

Issue 1: Was the decision refusing the Permit Application reasonable?

Applicant's Position

[34] The Applicant submits that the decision is unreasonable because it falls outside of the range of possible, reasonable outcomes and is not adequately explained by the reasons. Further, the Superintendent unreasonably exercised the narrow discretion afforded by s 50(4) of the *WBNP Game Regulations* in a manner that is inconsistent with the honour of the Crown. The Applicant then sets out why he thinks each of the five reasons offered by the Superintendent is unreasonable.

[35] First, the Applicant argues that the Superintendent fettered his discretion by relying on the policy which prohibits the construction of harvesting cabins within 800 metres of Pine Lake. The policy is unwritten, and the decision does not explain why harvesting cabins differ in principle from other cabins which currently exist within the 800-metre buffer zone, and no consideration was given to the specific circumstances of the case. Instead, the Superintendent impermissibly deferred to the policy. Additionally, the Superintendent explained that a change in the policy to allow harvesting cabins within 800 metres of Pine Lake would require consultation with Salt River and Smith's Landing, but he did not explain why a requirement to enter into consultation renders the proposed location unreasonable.

[36] Next, the Applicant submits that it was also unreasonable for the Superintendent to rely, without explanation, on the opposition of Salt River to the construction of the harvesting cabin at the proposed location. According to the Applicant, the record contains no basis for Salt River's opposition and ignores his evidence of support for the construction. Nor does the record contain

any evidence that the proposed cabin would have an adverse impact on the rights or interests of Salt River. In deferring to Salt River's opposition, the Superintendent again fettered his discretion.

[37] As to the Superintendent's third reason, the Applicant argues that the Superintendent failed to explain why the proposed cabin is incompatible with the use of the Park by visitors. While the Superintendent notes the presence of a parking lot, hiking trails, and a road, he fails to explain why these features are incompatible with the presence of a harvesting cabin. A proposed use will only be incompatible if it is contrary to the purpose underlying the Crown's occupancy of the Park and prevents the realizing of that purpose (*R v Sundown*, [1999] 1 SCR 393 at paras 9, 41 [*Sundown*]). There is no suggestion in the evidence or the reasons that the proposed harvesting cabin would prevent Park visitors from engaging in recreational activities. Rather, the Applicant's uncontested evidence shows that the proposed cabin is perfectly compatible with that purpose and it was not open to the Superintendent to conclude otherwise without reasons. Moreover, the unreasonableness of the decision is heightened by its constitutional context. To be consistent with the honour of the Crown, the refusal was required to be reasonable and to be accompanied by a meaningful explanation for the denial of the Applicant's Treaty right. However, the reasons provided by the Superintendent do not meet that standard.

[38] Fourth, the Applicant submits that the Superintendent unreasonably concluded that there were safety concerns associated with the proposed location of the harvesting cabin. This finding ignores the Applicant's evidence that he would not harvest within 800 metres of Pine Lake. Additionally, the Superintendent neglected to explain how the proposed cabin would have an

impact on reserve lands and other Park users so as to render the cabin incompatible with the chosen location.

[39] Finally, the Applicant submits that it was unreasonable for the Superintendent to rely on the Management Plan. The Pine Lake Area Management Approach has not yet been developed and the decision does not disclose why the Superintendent believes that the proposed cabin is incompatible with the Management Plan.

[40] The Applicant submits that, in whole, the reasons do not provide a statutory, constitutional, or administrative law basis to deny his Permit Application and admits of only one reasonable outcome – being that the cabin and its proposed uses are compatible with the proposed location.

Respondents' Position

[41] The Respondents submit that, read as a whole and in light of the record, the decision was reasonable. Significant deference should be afforded to the view of park officials that a particular action was consistent with the discharge of broad statutory duties (*Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 at paras 45, 68–69, 99). The Superintendent was obliged to weigh competing, and to some degree irreconcilable, interests. In doing so, he identified key policy considerations, including the Applicant's Treaty rights, the Treaty rights and interests of nearby First Nations, ecological integrity, visitor experience – including safety concerns, the availability of alternative suitable locations, and the Management Plan. He then weighed the specific merits and concerns of the Applicant's proposed cabin location with relevant policy concerns.

[42] As to the Applicant's Treaty rights, the decision appropriately considered the Applicant's and Mikisew's Treaty rights as a fundamental issue in considering the Permit Application. It repeatedly affirms the Treaty right to have a harvesting cabin within WBNP, and the Superintendent indicated that there would likely be no concern with a harvesting cabin located outside the 800-metre recreational zone around Pine Lake. Further, a 2013 map shows dozens of Mikisew harvesting cabins within WBNP. Here, the Superintendent's concern was with the precise location of the proposed cabin and its impact on other rights and interests.

[43] The Superintendent also appropriately consulted the two First Nations situated closest to the proposed harvesting cabin, and Mikisew. This respected Salt River and Smith Landing's Treaty rights and fulfilled the obligations contained in the TLEAs. It was also reflective of Parks Canada's policy of working collaboratively in relation to land use and management, as reflected in the Management Plan.

[44] The Superintendent also considered ecological preservation and the impact on Park visitor use. The broad authority of the Superintendent to manage the Park and harvesting activities go beyond location compatibility with design and size of harvesting cabins. And, in any event, a harvesting cabin of any design and size would be incompatible with the Applicant's proposed location within the 800-metre zone. The reasons set out the importance of Pine Lake as the most visited location in WBNP and as one of the few areas accessible to the public by vehicle. Further, the proposed cabin is located at the junction of two trails and close to a trailhead parking lot, and harvesting activities are incompatible with the use and enjoyment of these areas by all Park visitors. The 800-metre restriction on harvesting or harvesting cabins protects visitor enjoyment and public safety.

[45] The decision also discusses the possibility of other locations for the Applicant's cabin and reasonably concludes that a harvesting cabin could be located elsewhere and still meet the Applicant's needs. The Superintendent is very familiar with WBNP, and his exercise of discretion on this issue is owed deference. And, while by way of the Grandjambe Affidavit the Applicant now offers new reasons why other locations are unsuitable, these were not before the Superintendent and cannot be used to impugn the reasonableness of the decision.

[46] In sum, the decision reasonably concludes that the Applicant's chosen location is not the only place in WBNP that would meet his needs or that would allow him to exercise his Treaty rights without undue hardship.

Analysis

[47] In my view, it is helpful to first set out some of the legislative and other backdrop information to provide context to this issue.

[48] In that regard, it is of note that s 2(2) of the *Canada National Parks Act* states that nothing in that Act shall be construed so as to abrogate or derogate from the protection provided for existing Aboriginal or Treaty rights of the Aboriginal Peoples of Canada by the recognition and affirmation of those rights in s 35 of the *Constitution Act, 1982*. Subsection 4(1) states that the national parks of Canada are dedicated to the people of Canada for their benefit, education, and enjoyment, subject to the Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations. The Minister is responsible for the administration, management, and control of parks (s 8(1)). Maintenance or restoration of ecological integrity, through the protection of natural resources

and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks (s 8(2)). As to management plans, the Minister is required, within five years after a park is established, to prepare a management plan for the park containing a long-term ecological vision for the park, a set of ecological integrity objectives and indicators, and provisions for resource protection and restoration, zoning, visitor use, public awareness, and performance evaluation, which shall be tabled in each House of Parliament. In this case, that plan is the Management Plan.

[49] The Management Plan states that WBNP encompasses an area of 44,807 square kilometres. It is Canada's largest national park, a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site, and the second largest national park in the world. It also sets out three key strategies, the first of which is "Towards a Shared Vision", which focuses on building relationships between local Aboriginal groups and communities. Parks Canada will work towards the establishment of a management structure with local Aboriginal groups, recognizing that ecological integrity and cultural resources will be improved with support from local Aboriginal groups. Local communities will be aware of, and provided with, opportunities to actively and meaningfully participate in Park management decisions, and visitor experience in the Park and public outreach education efforts for the Park will involve both local Aboriginal groups and local communities. As to Area Management Approaches, the Management Plan notes that there are two, one of which is Pine Lake, and that area management approaches are effective for specific geographic locations within the Park that require more detailed planning. The Pine Lake Area Management Approach promotes compatible land-use and development for reserve and Park lands at Pine Lake. The Management Plan states that the

key strategies and areas management approaches will improve ecosystem conservation and facilitate visitor experience initiatives.

[50] Section 6.2 of the Management Plan concerns the Pine Lake Area Management Approach. This section states that the aquamarine waters of Pine Lake are a WBNP landmark. The lake is formed by several sinkholes that have merged together and is fed by underground springs. It is surrounded by mixed-wood boreal forest and is "a highly-prized community recreational asset". The land surrounding Pine Lake is shared amongst three groups, Parks Canada, Salt River, and Smith's landing. TLEAs grant both of these First Nations a parcel of land on the east side of Pine Lake. These lands, which abut one another at the edge of the lake, are accessible via foot around the lake's perimeter or by boat across the lake; no development at either site currently exists. On the west side of Pine Lake, Parks Canada land accommodates the only serviced campground in the Park. This facility receives moderate use throughout the summer months. There is also an interpretive theatre and a day use area which can accommodate ten groups is nearby. At the south end of the lake is a group camp, accessible via a low-grade road, which can accommodate 50 people. At the northwest edge of the lake are Park cabins with a public parking area and a boat launch facility. There are also 16 private cottages situated on the west shore on Crown lands.

[51] The Management Plan states that:

> The purpose of the Pine Lake Area Management Approach is to provide Wood Buffalo National Park, Smith's Landing First Nation and the Salt River First Nation with a plan that promotes compatible land-use and development for reserve and park lands at Pine Lake. The Pine Lake Area Management Approach will provide opportunities for sustainable land-use that meet the needs and requirements of the Smith's Landing First Nation and the Salt River First Nation as defined in their Treaty Land Entitlement

> Agreement and Parks Canada as defined under the *Canada National Parks Act*.
>
> The Pine Lake Area Management Approach links to the key strategies: Towards a Shared Vison and Connecting to the Magic of the Boreal Plains.

[52] The Management Plan also speaks to cooperative management of national parks with surrounding Aboriginal groups. Section 8.0 of the Management Plan is entitled “Zoning and Wilderness Area Declaration”. This section states that Parks Canada’s zoning system provides a means to reflect principles of ecological integrity by protecting park lands and resources and ensuring a minimum of human-induced change. The zoning system classifies areas in national parks according to their need for protection and establishes limits on what uses can occur in each park, including the suitability of these areas for visitor activities. There are five zones in WBNP:

Zone I – Special Preservation (10% of the Park)

Zone II – Wilderness (86% of the Park)

Zone III – Natural Environment (3% of the Park)

Zone IV – Outdoor Recreation (1% of the Park)

Zone V – Park Services (0% of the Park)

[53] The Management Plan states that Zone IV accommodates a broad range of opportunities for understanding, appreciating, and enjoying the Park’s heritage. Essential services are provided in ways that have the least possible impact on the ecological integrity of the Park. Pine Lake is defined as a Resort Subdivision as per Schedule II of the Lease and License of Occupational Regulations and is designated Zone IV. In 1961, cottage lots were put up for lease and there are currently 16 cottages within a formally surveyed cottage sub-division.

[54] Section 9.0, “Parks Administration and Operations”, addresses administration of Treaty Land Entitlements, noting that recent negotiations with Mikisew, Smith’s Landing, and Salt River have produced TLEAs that have led to the creation of reserves within Park boundaries. Negotiations with other groups are ongoing, each of which will have some impact on the management of the Park and, based on precedent, they are expected to produce new opportunities for collaboration on Park ecological and cultural resource management and the development of the Park’s visitor experience.

[55] The record also contains the TLEAs that Salt River and Smith’s Landing have entered into with Parks Canada. Schedule I of the Salt River TLEA describes that Parks Canada and Salt River seek to establish their shared objectives and a consultation framework in relation to reserve lands within the Park, to work co-operatively with Smith’s Landing in relation to land use and management issues affecting the Salt River reserve located adjacent to the Smith’s Landing reserve, and that Parks Canada and Salt River are committed to ongoing consultation with each other in relation to land use planning in respect to reserve lands and adjacent lands in the Park. Section 8.1 provides that each of these three entities shall appoint members to a Pine Lake Land Use Advisory Committee, which will strive for consensus and provide its advice to the respective Chiefs, Councils, and the Park Superintendent on listed matters which include policies and procedures in respect of land use planning requirements as well as hunting and public safety. Similar provisions are found in the Smith’s Landing TLEA.

[56] It is also important to note at the outset that, in this matter, there is no issue as to the existence of the Applicant’s Treaty 8 harvesting rights, as demonstrated from the record. For example, in its November 30, 2014 letter to the Applicant, following up on a call with the then-

superintendent’s and Parks Canada’s concerns about the Applicant’s construction of a harvesting cabin on a public trail at Pine Lake, the then-superintendent stated that he wanted to make it clear that Parks Canada recognized that the Applicant has Treaty 8 harvesting rights in WBNP and stated that Parks Canada has taken a broad approach to cabin construction insofar as it is reasonably incidental to traditional harvesting in the Park. The letter describes the process Parks Canada has developed for approving construction of traditional harvesting cabins in WBNP and describes why the cabin site selected by the Applicant was unsuitable. This was repeated in the Parks Canada letter of August 6, 2015, wherein the Superintendent stated that Parks Canada agreed that the Applicant has harvesting rights within WBNP, including the ancillary right to build a cabin for the exercise of those rights, but it had concluded that the particular location where the Applicant had commenced construction (without a permit) was not appropriate for a harvesting cabin and set out Parks Canada’s reasons for this. In the first sentence of the April 6, 2018 decision letter, the Superintendent again acknowledged that Parks Canada recognizes that the Applicant has Treaty 8 harvesting rights within WBNP but that it is Parks Canada’s considered opinion that the proposed harvesting cabin location was not appropriate.

Scope of Discretion of the Superintendent

[57] The parties disagree about the scope of the Superintendent’s discretion to deny or approve the harvesting cabin Permit Application.

[58] The Applicant and the Respondents agree that s 50(1) of the *WBNP Game Regulations* is discretionary. It permits the Superintendent to issue a trapper’s cabin permit to any person named in a certificate of registration.

[59] Where they part ways is that the Applicant interprets s 50(4) to severely narrow the Superintendent's discretion to refuse a permit to the circumstance where the proposed cabin is not compatible in design or size with the proposed location. Further, that compatibility is a high standard which has not been adequately addressed and is not met in this case. More specifically, the Applicant submits that the Superintendent's discretion is prescribed by s 50(4) of the *WBNP Game Regulations*. The Permit Application could only be refused "if the proposed trapper's cabin is not compatible in design or size with the proposed location", and the Superintendent was required to exercise that narrow discretion in a manner that upheld the honour of the Crown. Here, the Applicant was added to a certificate of registration for trapping area 1204, he had a right to trap and, therefore, a right to have a trapper's cabin permit issued to him unless it was not compatible in design or size with the proposed location (*WBNP Game Regulations*, s 2(1), 14(2), 50(4)). The Applicant submits that the existence of this narrow discretion is explained by *R v Adams*, [1996] 3 SCR 101 at para 54 [*Adams*], which also demonstrates that unstructured discretion is not permitted. Further, that s 50(4) of the *WBNP Game Regulations* does not deal with alternate locations and that the issuance of permits is not a matter of land planning and zoning as the Respondents submit.

[60] The Respondents see the Superintendent's discretion as broad and, flowing from his general mandate and obligations to manage and administer the Park, guided generally by the *Canada National Parks Act*, the Management Plan and Parks Canada's obligations under the TLEAs. Further, s 50(4) states only one circumstance in which the Superintendent "may refuse" to issue a trapper's cabin permit. Pursuant to s 50(1), it is open to the Superintendent to reasonably exercise his discretion to refuse a permit based on other factors and his knowledge and expertise, which is what he has done in this case. The Respondents submit that it was

reasonable for the Superintendent to consider key policy considerations, including the Treaty rights of the Applicant, Treaty rights and interests of nearby First Nations, ecological integrity, visitor experience – including safety concerns, the availability of alternative suitable sites, as well as the Management Plan and the key strategies it identifies, including the facilitation of visitor experiences, public outreach, education, and the building and improving of relationships with partners and stakeholders.

[61] I am not persuaded that *Adams* assists the Applicant. There, the Supreme Court was considering whether there was an infringement of an Aboriginal right and stated:

> 54 I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982*. In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

[62] The Supreme Court found the scheme both imposed undue hardship on the appellant and interfered with his preferred means of exercising his rights.

[63] The Applicant's submission implies that, based on *Adams*, the intention of Parliament in implementing s 50(4) of the *WBNP Game Regulations* was to limit the Superintendent's discretion to the narrow circumstance where the proposed cabin is not compatible in design or

size with the proposed location. However, the Applicant provides no evidence, authority, or other source to support this implied intention of Parliament or his submission that *Adams* explains the narrow discretion afforded to the Superintendent by s 50(4).

[64] I also note that, subsequently, in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, the Supreme Court appears to have recognized that policy and other initiatives may serve to guard against unstructured discretion and provide guidance for decision makers:

> 51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

[65] Here, the Harvesting Cabin Applications Guidelines, described above, form a part of the Permit Application and set out the application process and the considerations that come into play when assessing an application. In my view, this serves to mitigate the Applicant's submission of unstructured decision making, as does the previously described overall *Canada National Parks Act* regime.

[66] The Applicant is also of the view that the narrow discretion which he submits is afforded to the Superintendent is supported by the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another), relying on the dissenting reasons of the Supreme Court of

Canada in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 282 [*Trinity College*].

[67] I would first note that the Supreme Court of Canada has also indicated that caution should be exercised when relying on the use of *expressio unius est exclusio alterius* as an interpretive tool. In *Turgeon v Dominion Bank*, [1930] SCR 67 at page 70 the Court stated:

> The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela*, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.

[68] And, in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*, 2007 SCC 42:

> 15 The words used by Parliament in the *ITA* provisions concerning RCAAAs show no express intention that the RCAAA regime occupies the field for sports associations; that is, there are no words in the *ITA* which state that the only way for sports organizations to achieve the same tax treatment as charities is to qualify as an RCAAA. Therefore, to find an occupied field, it would be necessary to interpret the express creation of RCAAA status for nationwide amateur athletic associations as implying the exclusion of all other sports organizations from charitable status. However, arguments based on implied meaning must be viewed with caution. As Professor Sullivan notes:
>
>> While reliance on implied exclusion for this purpose [determining if a provision is exhaustive] can be helpful, it can also be misleading. What the courts are looking for is evidence that a particular provision is meant to be an exhaustive statement of

> the law concerning a matter. To show that the provision expressly or specifically addresses the matter is not enough. [Footnote deleted; p. 266.]

[69] However, as noted above, in this case the Applicant points to no evidence that s 50(4) of the *WBNP Game Regulations* was intended to be an exhaustive exclusionary provision.

[70] In any event, and in my view, *Trinity College* does not assist the Applicant. There, Justices Côté and Brown were discussing the limits of the exercise of discretion of an administrative decision-maker and, in that context, found that an exercise of discretion taken for an improper purpose or on the basis of irrelevant considerations will be unreasonable. They were of the view that the purpose of a rule relied upon by the Law Society of British Colombia [LSBC] was limited to the assessment of fitness of individual applicants for licences and that any exercise of the LSBC's discretion for a purpose extending beyond the express limits set out under its rule-making powers would be *ultra vires* and:

> [282] More particularly, the Rule does not grant the LSBC authority to regulate law schools. Applying the maxim of statutory interpretation *expressio unius est exclusio alterius* ("to express one thing is to exclude another"), we can presume that the legislator did not intend to include the governing of law schools among the LSBC's rule-making powers at s. 11. The scope of its mandate is limited to governance of "the society, lawyers, law firms, articled students and applicants". Had the legislator intended to grant the LSBC supervisory powers over law schools, it would have explicitly provided for such a significant grant of authority.

[71] Justices Côté and Brown went on to state that their interpretation was consistent with the purpose of the British Columbia *Legal Profession Act*, SBC 1998, ch 9 as a whole, and that a careful reading of that Act revealed that the scope of the LSBC's mandate was limited to the governance of the practice of law. The provisions of the *Legal Profession Act* only related to

matters relevant to the governance of the legal profession and its constituent parts (the LSBC, lawyers, law firms, articled students, and applicants).

[72] Here the Applicant has not asserted that the Superintendent's exercise of discretion was done for an improper purpose or on the basis of irrelevant considerations. Further, and significantly, the majority of the Supreme Court of Canada in *Trinity College* found that the *Legal Profession Act* required benchers to consider the overarching objective of protecting the public interest in the administration of justice when determining the requirements for admission into the profession, including whether to approve a particular school.

[73] Similarly, here, the Superintendent's mandate is an overarching one. In my view, as seen from the above, the Superintendent's mandate is broad and is not restricted only to a consideration of s 50(4) of the *WBNP Game Regulations*. That mandate is exercised, in part, by the application and enforcement of the *WBNP Game Regulations*, including s 50. It also undoubtedly requires considering the exercise of collective Treaty rights by individuals, such as the Applicant. But it also requires that the Treaty rights and interests of the various First Nations who have reserves within the Park are taken into consideration, as seen from the TLEAs, as well as the preservation of the ecology of the Park for the enjoyment of visitors and future generations of all Canadians, as demonstrated by the *Canada National Parks Act* and the Management Plan implemented pursuant to that Act.

[74] Put otherwise, I do not agree with the Applicant that s 50(4) is to be interpreted and applied in isolation from the remainder of that section as well as the Superintendent's broader mandate.

[75] Subsection 50(1) states that the Superintendent “may” issue a trapper’s cabin to any person named in a certificate of registration. Thus, pursuant to that provision, the Superintendent’s discretion to issue, or not issue, a permit is limited by the requirement that an applicant be named in a certificate. If the applicant is not so named, then the Superintendent cannot issue a permit. Nor is this a circumstance where the issuance of the permit is mandatory if certain stipulated conditions are met. Section 50(2), however, requires that the application must be made in the form supplied by the Superintendent and must contain the information required by that form and any additional information requested by the Superintendent. As this is a mandatory requirement placed on an applicant, the Superintendent does not have the discretion to issue a permit if s 50(2) has not been complied with. Pursuant to s 50(4), the Superintendent “may refuse” to issue a permit if the proposed “cabin is not compatible in design or size with the proposed location”. I do not agree with the Applicant that s 50(4), which itself utilizes discretionary language, must be read to restrict the Superintendent’s discretion under s 50(1) such that the only circumstance in which a permit could be refused would be if the design or size of the proposed cabin is not compatible with the proposed location.

[76] Were that the intent of Parliament, the provision would read “the superintendent may only refuse” to issue a permit based on incompatibility of design or size with the proposed location. However, s 50(2) requires an application for a permit to be submitted and s 50(3) precludes construction without a permit. Viewed in the context of the section as a whole, and in the context of the legislative scheme overall, this cannot mean that if an application is made that is deficient or, if a permit issued under an application would cause environmental or ecological damage that could not be appropriately mitigated, such as the destruction of rare habitat, nesting grounds, or other sensitive area, that the cabin must be nevertheless approved – unless its design

or size is not compatible with the proposed location. Further, in that example design and/or size are not the factors that would preclude the issuance of a permit; a cabin of any design or of any size would give rise to the ecological concern. Rather, as here, the superintendent would be exercising his or her discretion based on the proposed location of the cabin.

[77] In my view, s 50(4) applies in a circumstance where a proposed cabin is otherwise acceptable, but its size or design is not compatible with the proposed location. For example, the Harvesting Cabin Application Guidelines state that the main purpose of a cabin is to afford shelter to harvesters while they are engaged in harvesting activities in WBNP. “Trapper’s Cabin” is defined in the *WBNP Game Regulations* as meaning a building or structure erected in a trapping area used as temporary living quarters by a person or persons actively engaged in trapping. Thus, the erection of a large accommodation that more resembles a permanent home than temporary living quarters for trappers may not be compatible in design or size with the proposed location, which is related to the active engagement in trapping.

[78] Finally, I note that when appearing before me at the hearing of this application for judicial review, Applicant’s counsel conceded that the Superintendent could consider factors other than the proposed cabin’s “design or size”. Specifically, the Court asked the Applicant’s counsel if he was relying on the suggestion that the only factor that the Superintendent was entitled to consider with respect to the Permit Application was whether the proposed cabin’s “design or size” was compatible with the proposed location and, if so, whether that meant the Superintendent was not entitled, for example, to consider the Treaty and other interests of Salt River and Smith’s Landing. Counsel responded that the Superintendent could consider other factors, such as the rights and interests of other First Nations and location. In his view, the issue

then becomes whether the Superintendent reasonably exercised his discretion in making a finding of incompatibility in accordance with the high standard that this attracts.

[79] In my view, for the reasons above, the Applicant's assertion that the Superintendent's discretion to refuse his Permit Application was restricted to s 50(4) cannot succeed.

[80] The Superintendent had discretion under s 50(1) of the *WBNP Game Regulations* to issue a trapper's cabin permit if the Applicant is named on a certificate of registration, which is undisputed in this case, and if the Applicant submitted an application in accordance with s 50(2). The Superintendent was entitled to assess the Permit Application and exercise his discretion in the context of the Harvesting Cabin Application Guidelines and his overall mandate. The Superintendent also had the discretion to refuse an otherwise compliant application on the basis that the proposed cabin's design or size was not compatible with the proposed location.

Fettering of Discretion

[81] The Applicant also submits that the Superintendent fettered his discretion. According to the Applicant, this is established by the Superintendent's statement that harvesting and harvesting cabins have historically not been permitted within 800 metres of Pine Lake and that any change of policy regarding land use would trigger the Salt River and Smith's Landing TLEA commitments to work cooperatively through ongoing consultation to in relation to land use and management issues around Pine Lake.

[82] I note that the fettering of discretion was addressed by Justice Stratas in *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299, who stated as follows:

> [24] *Dunsmuir* reaffirms a longstanding, cardinal principle: “all exercises of public authority must find their source in law” (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must per se be unreasonable.
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> …
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> [60] However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator’s law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

And, as stated by Justice McTavish in *Gordon v Canada (Attorney General)*, 2016 FC 643:

> [29] While decision-makers are permitted to consider, and indeed, base their decisions on administrative guidelines, a decision-maker will fetter their discretion if they treat a guideline as binding: *Waycobah First Nation v. Canada (Attorney General)*, 2011 FCA 191 at para. 28, 421 N.R. 193. Administrative guidelines do not have the force of law. They therefore cannot be relied on in a way that limits the discretion conferred on a decision-maker by statute: *Stemijon Investments*, above, at para. 60.

(Also see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 32).

[83] As to the “policy” of not permitting harvesting cabins within 800 metres of Pine Lake, it is correct that this is not a formal policy. The Superintendent refers to it as being a historic application. It does, however, appear in writing in the Harvesting Cabin Application Guidelines,

which state that cabins will not be permitted within 800 metres of Pine Lake, day use areas, recreational trails, group camps, and backcountry campgrounds.

[84] In my view, the Superintendent did not fetter his discretion. This is not a situation where the Superintendent treated a policy or guideline as binding upon him and excluded other valid or relevant considerations in the exercise of his discretion. Rather, here it is clear from the decision and the Record of Decision that the Superintendent considered a number of factors in reaching his decision, including consistency with land use planning, ecological integrity, visitor experience, the Management Plan, Treaty 8 rights, the TLEAs, Salt Lake's opposition to the proposed cabin location, and that he did so in the context of the specific circumstances of the Permit Application.

[85] As to the Applicant's submission that there is no explanation as to why the need to consult about potential exceptions to the application of the 800-metre policy with First Nations renders the cabin incompatible with the proposed location; in my view, this conflates an acknowledged consultation obligation with a conclusion as to the incompatibility of the proposed location as they are described in the decision.

[86] Specifically, in the decision the Superintendent first addressed the 800-metre exclusion policy and found that any change to this would trigger the consultation commitments under the Salt River and Smith's Landing TLEAs. In his third listed reason, the Superintendent addressed the proposed cabin location in relation to trails and other facilities that form a part of the Pine Lake recreational area visitor facilities. The Superintendent stated that "[h]arvesting infrastructure on or adjacent to those facilities is incompatible with the use and enjoyment of the area by all park visitors".

[87] The Record of Decision also includes information as to incompatible use and as to the consultation concern, including that:

- One percent of the Park is zoned for recreational use to allow for the development of visitor infrastructure and visitor experiences that encourages tourism and visitor experiences in the Park while reducing potential conflict with other uses such as the exercise of Treaty and Asserted Metis Rights. Most of the Zone 4 areas allow for traditional harvesting and building activities with three restricted areas, one of which is Pine Lake due to the presence of increased visitor traffic, visitor rental cabins, privately held lease lots, the Parks' only campground, a group campground and, a trail network; Pine Lake is the main recreational setting in WBNP. While WBNP is vast, the area set aside for visitor use is very small. Within the 1% zoned as recreational, less than .001% of that area has restrictions on harvesting and harvesting infrastructure. Pine Lake was originally excluded from cabin building and harvesting because of the density of visitor use, the presence of private lease lots, and, most importantly, the presence of reserves belonging to two First Nations;

- The Management Plan establishes that improvement of relationships with the 11 Aboriginal groups in WBNP is key to its future success and management. The Management Plan makes no direct statement on the subject of harvesting cabins at Pine Lake but does establish the need to work together and respect each other in making decisions and that Pine Lake is an area of special interest and concern. The Record of Decision states that this puts the Park in a difficult situation when Aboriginal partners are not in agreement about a course of action and there is not an agreed upon process for consensus or reconciliation between the different views and opinions of different partners as individuals and organizations;

- As to Treaty 8, a First Nation's treaty right to hunt in their traditional expeditionary style encompasses the right to build shelters as a reasonable incident to that right (*R v Sundown*). A number of harvesting cabins have been built in WBNP over the past decade to facilitate the ongoing traditional use of the Park. The Record of Decision states that this is the first harvesting cabin application for an area which is both opposed by neighbouring First Nations and where the Crown's pre-existing use of the land (primary visitor use infrastructure) is incompatible with the treaty right being exercised. Various considerations are set out, including the Applicant's right to conduct traditional harvesting activities in the Park and the ancillary right to build a cabin; the TLEAs, which commit Parks Canada to work to develop shared objectives and a consultation framework with Salt River and Smith's Landing in the management of the Pine Lake area, the record noting that while progress has stalled, the commitment still exists; and, that Salt River has a development plan that will see a number of cabins and lodges built on the edge of Pine Lake and will include considerations as to human waste management so as not to impact the lake. The Record of Decision states that the Applicant's cabin proposal is closest to Salt River's reserve. It has effectively cut this large sink hole off from the rest of the lake isolating its waters from the rest of the lake; the issue is the location selected with respect to Salt River and Smith's Landing reserves and the existing Park visitor infrastructure

and the lack of consensus between Parks Canada's Aboriginal partners on a solution they can all support. Past applicants for traditional harvesting cabins around Pine Lake have accepted the park policy and built away from the lake to minimise any conflict. The Applicant's request placed the Park in a situation where it could not consider changing the restriction on harvesting infrastructure within 800 m of Pine Lake unilaterally while respecting its TLEA requirements for consultation and planning with regard to Pine Lake development as well as the administrative requirement for public consultation due to the Management Plan's Pine Lake Areas Management Approach. Parks Canada was therefore open it to a possible court challenge from its Indigenous partners and the general public or, if it denies the request, to a court challenge by the Applicant based on his Treaty rights and their application within the Park;

- Three Aboriginal communities were approached for input. Salt River was not supportive, Mikisew supported the Applicant's proposal, and Smith's Landing was not responsive to a request for their position.

- The Record of Decision indicates that, based on the above Parks Canada then conducted its analysis, setting out the key factors for consideration. It then weighed the various factors. Under "scope", it noted that the proposal encompassed a harvesting cabin, a shed and an outhouse. Further, that the proposed cabin would be directly on an existing park trail system and would be subject to visitors on location through the summer months who are hiking the trails and enjoying the wilderness. It then noted the merits of the location, including that the lake front is a spectacular location for a cabin; that the Park has offered to work with the Applicant to develop interpretive and educational programming at Pine Lake using Parks Canada existing infrastructure; the cabin would contribute to the Applicant's economic activities through trapping and teaching but that carrying out those activates in another location within the Park would have similar benefits; the TLEAs with Salt River and Smith's Landing preclude the uses of a firearms, hunting or trappings within 800 metres of Pine Lake between April 1 and October 31 of any year and the Applicant had indicated that he would respect this. As to concerns, these are listed and include that:

> "This single cabin, taken in isolation on the lakefront, may not seem large but with the proposed plans and development of Salt River's Pine Lake Reserve and localized improvements to Park's Canada's visitor infrastructure, in this very small area that has been set aside for visitor development, it would detract from the area's exceptional values and be in conflict with the character and use of the area, an could adversely affect enjoyment for many Park visitors"

[88] The decision states that a harvesting cabin in the proposed location is incompatible with the use and enjoyment of the area by all Park visitors. Contrary to the Applicant's submission,

the decision does not make a finding that the need to consult with other First Nations renders the cabin incompatible with the proposed location. The obligation to consult was a discrete consideration, although it could, and did, give rise to concerns with the proposed location of the trapping cabin.

Adequacy of Reasons

[89] The Applicant submits that, in a variety of ways, the Superintendent's reasons were inadequate, including in finding that the location of the proposed harvesting cabin was incompatible with the use of the Park by visitors.

[90] I now note, as a preliminary point, that as stated by the Federal Court of Appeal in *Tsleil-Waututh* at paragraphs 293 and 295:

> [293] … the adequacy of reasons is not a "stand-alone basis for quashing a decision". Rather, reasons are relevant to the overall assessment of reasonableness. Further, reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraph 14).
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> …
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> [295] Reasons need not include all of the relevant arguments, statutory provisions or jurisprudence. A decision-maker need not make an explicit finding on each constituent element leading to the final conclusion. Reasons are adequate if they allow the reviewing court to understand why the decision-maker made its decision and permit the reviewing court to determine whether the conclusion is within the range of acceptable outcomes.

[91] Further, in my view, the record adequately explains why the harvesting cabin at the proposed location is incompatible with the use and enjoyment of the area by all Park visitors.

[92] In that regard, I would also note that, in the letter from the then-superintendent dated November 30, 2014, it was explained that Pine Lake is a unique area, being the primary recreational area in the Park. Further, the role of the Management Plan and Area Management Approach to ensure compatible land use and development was explained, and the letter stated that the 800-metre harvesting restriction reflected the special status of Park land which Smith's Landing and Salt River had agreed to follow in their TLEAs. Additionally, that Parks Canada has developed a process for approving the construction of traditional harvesting cabins in WBNP, which process had the support of the Park's Aboriginal constituency "This process is used to ensure that construction of a cabin does not have an impact on the park's culture or ecological character, or conflict with the Treaty or Aboriginal rights of other rights holders and is compatible with other park uses and activities related to the location". As to the specifics of the proposed cabin, the letter noted that it is situated beside Lane Lake Trail, an established hiking trail which leads from Pine Lake to Lane Lake, and on the Lake Side Trail, which leads to the day use areas. It is also located near a popular public swimming beach, which means it has a high likelihood of impacting the use and enjoyment of the immediate area for other Park users. Thus, the selected cabin site was unsuitable.

[93] By letter of August 6, 2015, the then-superintendent listed five reasons why the proposed location was not appropriate, which are included the above reasons. He also pointed out that the *WBNP Game Regulations* preclude harvesting within 800 metres of Pine Lake between April 1 and October 31 every year. Use of the cabin for recreational purposes would not be permitted during that time. Another location for the cabin, 800 metres from the lake, would be more appropriate as it would have no impact of other Park users, or other Aboriginal groups, and could be used for harvesting at other times of the year. Further, the TLEAs commit all parties to the

development of a Pine Lake Advisory Committee to discuss, amongst other things, the harmonization of policies, plans, regulations, and by-laws. Since harvesting cabins have historically not been permitted within 800 metres of Pine Lake, a change of policy to allow for harvesting cabins in this area required consultation and discussion with both Salt River and Smiths' Landing. Construction of the cabin was not in accordance with that approach. By letter of November 5, 2015, Parks Canada again noted that it had explained to the Applicant that cabin applications are not provided for the Pine Lake area due to its high recreational use.

[94] Compatibility is not defined in the *WBNP Game Regulations*, and it is only referenced there in the context of s 50(4). Nor is compatibility otherwise defined in the *Canada National Parks Act* or other relevant legislation. While the Superintendent could perhaps have provided explicit, concrete examples as to how the proposed harvesting cabin is incompatible with the recreational use of the area, in my view, why it is incompatible is apparent from the Record of Decision. Further, the Superintendent has expertise as to Park usage and visitor expectations, and his assessment of compatibility is to be afforded deference.

[95] The Applicant submits that while incompatibility is not defined in the *WBNP Game Regulations*, the treatment of that concept in *Sundown* is instructive. There, Mr. Sundown, a First Nation member, hunted and fished in a provincial park. In order to carry out those activities, he constructed a log cabin in the park. He was convicted of building a permanent dwelling on park lands without permission. The conviction was overturned. On appeal to the Supreme Court of Canada, the question was whether the cabin was reasonably incidental to the hunting and fishing rights of the First Nation and if so, whether the park regulations infringed upon the hunting rights of the First Nation set out in Treaty 6 and modified by the Natural Resources Transfer

Agreement. The Court concluded that a hunting cabin was reasonably incidental to that First Nation's right to hunt in their traditional expeditionary style. For that First Nation, the treaty right to hunt encompassed the right to build shelters as a reasonable incident to that right and the small log cabin was an appropriate shelter for expeditionary hunting in today's society.

[96] The Court also found that by building a permanent structure, such as a log cabin, the respondent was not asserting a proprietary interest in the park. Treaty rights, like aboriginal rights, must not be interpreted as if they were common law property rights. Any interest in the hunting cabin was a collective right that was derived from treaty and the traditional expeditionary method of hunting. The right belonged to the band as a whole, not to the respondent or any individual band member. Further, that there are limitations on permanency implicit within the right itself. First, provincial legislation that relates to conservation and passes the justificatory standard in *R v Sparrow*, [1990] 1 SCR 1075, could validly restrict the building of hunting cabins and restrict treaty rights to hunt. The Court noted that in many, if not most, situations, the conservation of fish and game requires the preservation of their habitat (para 38). The second limitation on permanency is that there must be compatibility between the Crown's use of the land and the treaty right claimed. In considering this, the Supreme Court referenced *R v Sioui*, [1990] 1 SCR 1025 at paras 39–41 [*Sioui*]. The third limitation on the treaty right to hunt was found in the terms of the treaty that restricted the right to hunt on lands not "required or taken up for settlement". The Court found that this was, in essence, a subset of the second limitation since, by definition, the use of lands taken up for settlement is a Crown use of land wholly incompatible with the right to hunt.

[97] *Sundown* and *Sioui* are matters where courts were considering incompatibility in the context of exercising treaty rights within a park, whether this amounted to an unjustifiable infringement of those rights and the concept of permanency. Here the existence of the Applicant's Treaty 8 rights to hunt in WBNP and to build a trapper's cabin incidental to that right was acknowledged by the Superintendent and what is at issue is the reasonableness of the Superintendent's decision that the particular location chosen by the Applicant for his trapping cabin is incompatible with the use and enjoyment of the Park by all Park visitors. While the Applicant asserts, in this application for judicial review, that the Superintendent's decision infringes on his Treaty rights, the Superintendent in making his decision was considering compatibility in the context of the Park's regulatory regime. It is not clear to me that the high standard of compatibility that the Applicant subscribes to an unjustifiable infringement determination based on *Sundown* would apply in the same manner in these circumstances.

[98] In my view, given the regulatory backdrop set out above, and in the absence of a regulatory definition of compatibility, the Superintendent was entitled to exercise his expertise in order to arrive at a finding on whether the Permit Application should be granted, including compatibility of usage, on the basis of the existence of the Applicant's Treaty 8 rights, as well as other factors such as policy, scientific, and planning considerations.

[99] And although the Applicant submits that the decision was also unreasonable because the Superintendent failed to explain why the relative size of the Park and visitor facilities has any bearing on the compatibility of the cabin location, why its location is relevant to trails, why the trailhead parking lot or the road is relevant, and how the cabin would interfere with the use and enjoyment of the area and other matters, in my view and as I have found here, it is apparent from

the decision, the Record of Decision, and the content of the CTR why the Superintendent was of the view that the location the Applicant proposed for the harvesting cabin was incompatible with other Park uses.

[100] Similarly, while it is true that there are 16 existing private leasehold properties, these are all for recreational use. None are harvesting cabins. I do not accept the Applicant's submission that the decision does not contain any explanation as to why harvesting cabins differ in principle from other cabins constructed within 800 metres of the lake. It is clear that that the difference is their intended use.

[101] The Applicant also submits that the decision does not make reference to the content of the Permit Application, more specifically, to the Addendum in which the Applicant described why he needs a harvesting cabin. This is true. However, the Record of Decision identifies that the Applicant had made a conceptual proposal of the cabin focusing on historical and family connections to the Pine Lake area; unparalleled access to the cabin and his trapline; unmatched proximity to a reliable fresh water source; proximity to more stable resources; and, facilitation of community teaching opportunities. Further, that he also addressed other factors that he felt supported his proposal, including that the cabin poses no safety or conservation concerns; it will have no impact on Aboriginal harvesters in the area or on reserve lands; it is compatible with other land use in the area; and, it is an opportunity, not an obstacle.

[102] The Applicant submits that in the face of his "uncontested evidence", being the Addendum that was before the Superintendent, it was not open to the Superintendent to conclude that the cabin was incompatible with the proposed location without providing reasons. I do not agree that the Superintendent was required to accept the Applicant's submissions at face value.

The role of the Superintendent was to consider the submissions in the context of his knowledge and expertise and in view of all of the other policy factors that came into play. Further, as discussed above, the record indicates the reasons why the cabin was incompatible being that it was within 800 metres of the shores of Pine Lake and within an area zoned for recreational use.

[103] Part of this context is that hunting, trapping, and the discharge of a firearm within 800 metres of the shoreline of Pine Lake from April 1 to October 31, in any year, is prohibited by regulation (s 7 *WBNP Game Regulations*). This is in recognition of the area's high recreational use during that time and related safety concerns. The need for traditional hunting or trapping cabins is, of course, tied to the conducting of hunting and trapping. As hunting and trapping are prohibited in the area where the Applicant seeks to build his cabin for seven months of every year, it was not unreasonable for the Superintendent to suggest that an alternate location away from visitor facilities and more that 800 metres from Pine Lake would be more appropriate as it could be used throughout the year with fewer safety concerns, as well as lower potential impacts both to other First Nations reserve lands and other Park users. Put otherwise, the suggestion that an alternate location would be better suited and more compatible with such usage was not unreasonable or an irrelevant consideration.

[104] Further, and as noted in the Record of Decision, the area that is excluded comprises .0001% of WBNP and is the only recreational area in the Park accessible by vehicle to visitors. If an exemption to the recreational zoning were granted to the Applicant, other trappers could expect the same exemption. This cumulative effect, as recognized by the reasons, would also impact the recreational use of the area and could potentially impact future joint planning.

[105] Further, the Superintendent was aware of, acknowledged, and considered the Applicant's Treaty 8 harvesting rights. He stated that a Permit Application outside the 800-metre exclusion zone would likely be approved. Parks Canada offered to work with the Applicant to identify another cabin location outside the 800-metre exclusion zone which would meet his needs and also offered the Applicant the use of existing Park infrastructure and facilities to advance his desire to provide educational services and experiences. In my view, it is important to again recall that what is at issue here is not a general refusal to permit the construction of a harvesting cabin within WBNP in hunting area 1204. Rather, it is the refusal to provide a permit to build a harvesting cabin on the precise location chosen by the Applicant, which location is within a very small area zoned as recreational within the Park, in which hunting and trapping are prohibited by regulation for seven months of every year, and in which, by policy, as identified in the Harvesting Cabin Application Guidelines, harvesting cabins have not been permitted within 800 metres of the shore of Pine Lake.

[106] In his Addendum, the Applicant submits that cabins, per se, are clearly compatible with the character of Pine Lake as there are already a number of cabins located there. However, as noted above, this does not acknowledge the differing use of these cabins. The existing cabins being for recreational use while the proposed cabin is a harvesting cabin which the Applicant describes as providing him with a space to gather, keep, and prepare his bait, snares, firewood, tanning tools, and other equipment needed for his trapping rotations; providing him with shelter in the winter months; and, is also necessary throughout and between trapping rotations to thaw out and process animals, to tan hides, and to prepared traditional foods and clothing. In the Addendum the Applicant also submits that he will not be undertaking any activities that could interfere with the use of Pine Lake for recreational activities such as swimming, boating,

camping, hiking, picnicking, or bird watching. He submits that the cabin will not interfere with recreational users or activities in the area. It is located three kilometres from Kettle Point Beach swimming area and, as to the small beach in front of the proposed cabin, he has yet to see a beach user at the site. The cabin would also be at least a kilometre from the nearest cabin and campground. As to Park trails and roads, although the cabin is located near the Lane Lake Trail, the main entrance to the trail is about 500 metres from the cabin, and the trail "faces" south while the cabin will be located due north of the trail so it will not pose interference to trail users. As to his access to the Kettle Lake Road through a hiking trail, he states he uses a path that used to be a bison path. At one point he widened the path to bring in building supplies but it will not be necessary for him to widen or clear the path every year. He states that he does not see his access through the path as changing or interfering with the character of the trail. Further, to his mind, the suggestion that a trapping cabin on Pine Lake will offend the recreational users of the lake is based on outdated and discriminatory views that have no place in a national park or in Canadian society, and is inconsistent with Parks Canada's priority of strengthening indigenous connections with traditionally used lands. His cabin would enhance visitor experiences and land use around Pine Lake.

[107] In my view, what this demonstrates is that the Applicant disagrees with the 800-metre exclusion within the recreational zone and, ultimately, the Superintendent's view that the precise location that the Applicant has chosen for his harvesting cabin is not compatible or appropriate usage for that area. The existence of disagreement, however, does not make a decision unreasonable.

[108] In this matter, the Superintendent found himself in the unenviable position of having to balance a wide variety of factors and competing interests, many of which were difficult to reconcile. It is not the role of this Court to re-weigh the particular factors which were duly considered by the Superintendent (*Suresh v Canada (Citizenship and Immigration)*, 2002 SCC 1 at para 37). Rather, the Court must determine if the decision was reasonable. In that regard, it must be kept in mind that reasonableness is a deferential standard. Some 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. In judicial review, reasonableness is concerned with the existence of justification, transparency, and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In this matter, the Superintendent's decision was reasonable, and was not made in a manner that was inconsistent with the honour of the Crown.

Opposition of Salt River

[109] The Applicant submits that the Superintendent unreasonably and without adequate explanation relied on Salt River's opposition to the proposed harvesting cabin. He submits that the record does not disclose any basis for Salt Lake's opposition and, even if it had, this does not bind the Superintendent who, by deferring to Salt River, again fettered his discretion.

[110] The record includes a timeline of events. This indicates that the Chief of Smith's Landing contacted Parks Canada on October 6, 2014, expressing concern that the Applicant was building a cabin near Pine Lake along the Chief's father's original trap line. On November 12, 2014, Parks Canada met with Salt River, Smith's Landing, and Mikisew to discuss the construction of

the harvesting cabin that the Applicant had commenced without a permit. Notes from the meeting are also found in the record. The Chief of Salt River stated her view that Parks Canada should not use Aboriginal leadership to enforce the Park's rules, should not be meeting with Aboriginal leadership over the issue, that the cabin needed to be dismantled, and that Parks Canada needed to hold everyone in the future to the same standard. The Chief of Mikisew said that Treaty rights supersede Park rules and regulations but that the cabin should be removed because the area belongs to an elder and the Applicant was moving in there with no consideration for that elder. The Chief of Smith's Landing stated that the cabin could not be allowed because it is within 800 metres of Pine Lake, and that it was up to Parks Canada to enforce the cabin removal. The then-superintendent stated that everyone was invited to the meeting out of respect for their opinions and, while it would be Parks Canada's decision, Parks Canada wanted to talk to the Aboriginal leaders and get their input before making that decision.

[111] The timeline indicates that on June 1, 2015, Parks Canada again spoke with the Chief of Smith's Landing, who indicted that that First Nation was still adamantly opposed to the proposed cabin. On June 30, 2015, Parks Canada again spoke with the Chief of Salt River who indicated that Salt River was also still opposed to the cabin location. On September 17, 2015, the Superintendent spoke with the Mikisew Chief and Counsel who repeated their support for the removal of the cabin as it was in an inappropriate location. On September 28, 2015, the Chief of Smith's Landing called Parks Canada and the two other Chiefs to a meeting to discuss the unauthorised cabin and how to deal with it. The other two Chiefs did not attend. The Chief of Smith's Landing expressed Smith's Landing's opposition to the site and his concern that if this cabin was not challenged, then others would also build on the lake without a permit or other limitations. His desired outcome was to have the cabin removed and built further from the lake.

He also noted that the Applicant had been in contact with the Chief personally, and the Chief had indicated his opposition to the cabin location. The record also contains an October 25, 2015 letter from Salt River to Parks Canada, which officially confirmed Salt River's position that it did not support the construction of traditional harvesting cabins that violate Parks Canada rules and criteria for such projects. The letter states that Salt River would not support a construction project by one of its own members in violation of the policies, and all three First Nations had agreed on this at the November 2014 meeting. Salt River encouraged Parks Canada to enforce its policy and remove the unauthorized structure as soon as possible.

[112] On December 7, 2015, the Applicant contacted Parks Canada and requested a meeting with the two First Nations who had concerns, Parks Canada advised that it saw little value in calling a meeting as Salt River and Smith's Landing had been clear in their views and the meeting called by Smith's Landing had been poorly attended.

[113] As to what was communicated to the Applicant, the Parks Canada letter of November 30, 2014, explained that Salt River, Smith's Landing, and Mikisew had been consulted about the proposed cabin and had all expressed concern that, if no action was taken, it might lead to further construction of harvesting cabins on Pine Lake by other traditional harvesters, and that all agreed that the location chosen was not appropriate and that the best solution would be for Parks Canada to work with the Applicant to identify an alternate location. By letter of August 6, 2017, the then-superintendent again noted that, as of November 2014, the Chiefs of the three First Nations with an interest in the issues had agreed that the location was not appropriate. Further, that more recently the Salt River and Smith's Landing Chiefs had confirmed that they continued to hold that view.

[114] After the Applicant made the Permit Application, the Superintendent sent an email to the Chief of Salt River advising of the application to build in the same location. The email stated that Parks Canada was reviewing the application but, as fellow land owners at Pine Lake, it wanted to reach out and confirm Salt River's support or lack of support for the proposal. The email noted that previously Salt River had provided a letter which clearly indicated that it did not support traditional harvesting cabins within 800 metres of the lake, as Parks Canada's current traditional harvesting cabins policy indicates, and asked that Salt River let it know if that position had changed or if it would like to discuss the issue further. By reply of the same date, Salt River advised that "the position of Salt River First Nation on traditional harvesting cabins in the shores of Pine Lake, within 800 m of the lake, has not changed. Council continues to support the policy as outlined below".

[115] The record is clear that Salt River maintained its opposition to the construction of the proposed cabin. This was initially because it was being constructed without authorization, which gave rise to a risk that others would follow suit, and because of its location which was not in compliance to the Parks Canada 800-metre exclusion policy. Once the Applicant made his Permit Application, Salt River continued its opposition of building within 800 metres of the lakeshore.

[116] In my view, it was open to the Superintendent to take into consideration Salt River's opposition as a factor to consider in determining whether to exercise his discretion to grant the Permit Application. Contrary to the Applicant's submissions, the Superintendent did not treat the Salt River position as a veto to the permit. Rather, he afforded it considerable weight, explaining that Salt River's reserve is on Pine Lake, it too has Treaty 8 rights, and the consultation

contemplated by the TLEAs. It is true, as the Applicant submits, that the decision and the Record of Decision do not mention the 25 form letters from individual members of Mikisew, Smith's Landing, and Salt River supporting and accompanying his Permit Application. However, the Superintendent was not compelled to mention every piece of evidence before him (*Florea v Canada (Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL); *Laframboise v Canada (Attorney General)*, 2017 FC 832 at paras 40-41) and, in any event, although some individual members of Salt River indicated support of the proposed cabin location, this did not alter the stated position of Salt River First Nation. Nor in the decision did the Superintendent suggest that any other First Nation opposed the Permit Application, he referenced only Salt River in that regard.

[117] To summarize, having viewed the decision, the Record of Decision, and the record in whole, I do not find that the Superintendent fettered his discretion. The Superintendent did not rely exclusively on the 800-metre exclusion policy in making his decision. He considered a number of factors that were relevant to his broad mandate of Park administration and management. I am also not persuaded that the Superintendent ignored the Applicant's evidence or failed to provide adequate reasons. Nor was his decision, based on all of the relevant factors, unreasonable.

Issue 2: Was there a breach of procedural fairness

[118] The Applicant submits that he was owed a high degree of procedural fairness given that the nature of the decision involves constitutionally protected Treaty and Aboriginal rights. Specifically, the decision has a potential impact on activities incidental to the exercise of Treaty 8 rights within WBNP. The decision is also important as it affects the Applicant's ability

to exercise his Treaty 8 right to trap, his connection to his traditional land, culture, and livelihood, and his ability to pass traditional knowledge on to other community members. Further, he had a legitimate expectation that the Superintendent would share details about consultations with other First Nations and that the Applicant would have a chance to respond to information considered by the Superintendent. The Applicant submits that the Superintendent breached the duty of procedural fairness by failing to provide the Applicant with this information. At the very least, the Applicant was entitled to receive notice of the case to be tried and an opportunity to respond. In particular, the Applicant should have been afforded a right to reply to Salt River's opposition to the approval of his Permit Application. The Superintendent's conduct in this regard fell below the required minimum standard of procedural fairness that was applicable and was promised.

[119] The Respondents acknowledge that the Applicant had legitimate expectations that were not met, however, they submit that there was no breach of procedural fairness. While legitimate expectations can shape the content and scope of duty of procedural fairness owed to an individual, they afford only procedural rights and do not guarantee a particular outcome. In this case, the Applicant had a legitimate expectation that he would be updated about the positions of Salt River, Smith's Landing, and Mikisew. However, procedural fairness was satisfied because the disclosure of Salt River, Smith's Landing, or Mikisew's responses would not have provided the Applicant with information that he did not already know and to which he had already been given an opportunity to make submissions on by way of the Permit Application. This is because Salt River continued its opposition for the reasons previously provided to the Applicant and provided no further information on its position; Smith's Landing did not respond to Parks Canada's request for Smith's Landing's position; and, in his Permit Application, the Applicant

provided a letter from Mikisew indicating that it now supported his position. Nor was the Applicant prejudiced as he had notice of Salt River's opposition at the time of this Permit Application and an opportunity to respond to it. He has not identified any new information or submissions that he would have provided in response to the communication of Salt River's continued opposition to his proposed cabin that would have affected the reasonableness of the decision. In any event, even if there was a procedural defect in the process, this does not mean that procedural fairness was breached as immaterial procedural defects do not justify the quashing of a decision (*Canada (Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56).

[120] I note that the Applicant relies on three of the factors set out in *Baker* to assert that he was owed a high degree of procedural fairness in the making of the decision to refuse his Permit Application and submits that consideration of constitutionally entrenched Aboriginal and Treaty rights may require a greater degree of procedural fairness (*Métis Nation of Alberta Association Fort McMurray Local Council 1935 v Alberta*, 2016 ABQB 712 at paras 164–165).

[121] In *Baker*, the Supreme Court of Canada referenced its prior decision in *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at p 682, which stated that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" and that all of the circumstances must be considered in order to determine the content of the duty of procedural fairness (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at p 654; *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170). *Baker* concluded that the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the

participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and, (5) the choices of procedure made by the agency itself. This list is not exhaustive.

[122] In my view, considering the *Baker* factors and that what is at issue here is the precise location of the proposed harvesting cabin, the degree of procedural fairness owed likely falls between the mid-to-high range. However, given that the Respondents concede that the Applicant had a legitimate expectation that the responses of the other involved First Nations would be shared with the Applicant, the precise level of the duty owed is not determinative.

[123] The record indicates that on July 28, 2017, the Applicant requested an update on the status of his July 10, 2017 Permit Application and indicated his willingness to assist or participate in the application process, including consultation with relevant Aboriginal groups. By email of August 15, 2017, the Superintendent confirmed receipt of the Permit Application. He noted that the application, in effect, sought an exemption to the Parks Canada policy of not allowing traditional harvesting cabins within 800 metres of Pine Lake. The Superintendent stated that Parks Canada had begun reviewing the package along with correspondence and information collected between 2014 and 2016 related to the cabin's proposed location, and would let the

Applicant know if it needed further information. The Applicant again wrote to the Superintendent on August 30, 2017, stating that he was entitled to a fair process and if the Applicant was not to be included in consultations with other Aboriginal groups or people, then he expected that the Superintendent would share the details of those consultations and provide the Applicant with the opportunity to respond to any information gathered that would be used in the Superintendent's decision. Specifically, he sought confirmation that records were being kept of consultations, that they would be shared with him in a timely fashion if he was not being included in the consultations, and that he would have an opportunity to respond to any information or views gathered that may inform Parks Canada's decision. By email of September 21, 2017, the Superintendent responded, addressing timelines and stating that Parks Canada was currently gathering information on the positions of the three Indigenous groups who had been involved in the file and stated "Once we receive responses from those groups we will share their positions with you and you will then have a chance to respond to the views expressed". The Applicant sent follow-up letters on December 21, 2017, and February 26, 2018.

[124] As stated in *Baker*:

> 26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane*

> *v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, Administrative Law (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8J.L. & Social Pol'y 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[125] Here, it is beyond dispute that, by way of his September 21, 2017 email, the Superintendent informed the Applicant that when responses were received from the involved Aboriginal groups that their positions would be shared with the Applicant and that he would then have an opportunity to respond to the views expressed. Accordingly, the Applicant had a legitimate expectation that a certain procedure would be followed and, therefore, the duty of fairness required that the stated procedure be complied with. As it was not, there was a breach of the duty of fairness.

[126] That said, the Respondents are correct in saying that the Applicant was aware of Mikisew's position. In his Permit Application, the Applicant included the July 29, 2016 letter from Mikisew asserting that the removal of the cabin materials was an unjustified infringement of the Applicant's Treaty rights and advising that, if Canada did not refrain from further actions that infringed those rights or were procedurally unfair, that Mikisew would take appropriate legal action to defend the Applicant's rights, which are shared by all Mikisew members.

[127] The record also indicates that, prior to the Permit Application, Smith’s Landing was opposed to the location of the proposed harvesting cabin. This was both on the basis of its initial construction without authorization and because it was within 800 metres of Pine Lake in contravention of Parks Canada policy. Further, that the Applicant had been in contact with the Chief of Smith’s Landing who had indicated opposition to the proposed location. By letter of October 29, 2015, the Chief of Smith’s Landing advised Parks Canada it was firm in its position that the construction of the cabin should be halted by Parks Canada and that Salt River had also agreed with the reasons set out in Parks Canada’s letter to the Applicant dated August 6, 2015, as to why the location chosen on the shore of Pine Lake was not appropriate. However, Smith’s Landing did not respond to Parks Canada’s subsequent inquiry made as a result of the submission of the Permit Application, and the decision itself states only that Salt River opposed the construction of a harvesting cabin at the proposed location. The Record of Decision indicates that Smith’s Landing has a new Chief and Council and, although they have concerns with the proposed location and a change in policy to allow harvesting cabins along the lakeshore, they had not yet provided clear direction to Parks Canada regarding their opposition or support of the cabin. In the result, and considering the record, Smith’s Landing’s position in response to the Permit Application would not appear to have been a material consideration in the Superintendent’s decision.

[128] As to Salt River, and as indicated above, prior to the submission of the Permit Application, Salt River had also formally advised Parks Canada that it did not support the construction of harvesting cabins that violated Parks Canada rules and criteria for such projects. In response to the Superintendent’s inquiry made after the submission of the Permit Application, Salt River provided an email indicating that its position that it did not support traditional

harvesting cabins within 800 metres of the shores of Pine Lake had not changed. It continued to support the Parks Canada policy in that regard. However, this response was not provided to the Applicant and it was a factor that the Superintendent considered in his decision.

[129] That said, the Applicant was aware of the concern surrounding the 800-metre exclusion zone. In its November 30, 2014 letter, Parks Canada stated that when the Applicant had inquired about the application process, it had been explained to him that Parks Canada does not provide applications for the Pine Lake area due to its priority recreational use, the areas management approach with Salt River and Smith's Landing, and the seasonal harvesting restriction under the *WBNP Game Regulations*. Having explained why the proposed location was not suitable for a harvesting cabin, Parks Canada then indicated that the three First Nations had been consulted and had all expressed concern that if the unauthorised construction was not halted, that it might lead to further construction of harvesting cabins on Pine Lake by other traditional harvesters and that all agreed that the selected location was not appropriate and that the best solution was for Parks Canada to work with the Applicant to identify an alternate location . Parks Canada's letter of August 6, 2015 also advised the Applicant that, at that time, all three First Nations agreed that the location chosen was not appropriate, and because harvesting cabins had not historically been permitted within 800 metres of Pine Lake, the existence of TLEAs meant that a change of policy would require consultation and discussion with Salt River and Smith's Landing.

[130] However, none of these communications stated, with the clarity of the August 30, 2017 email from Salt River responding to the Superintendent's inquiry made after the Permit Application had been received, that the basis of Salt River's continuing objection was that it supported the 800-metre exclusion zone. It is also clear from the decision that Salt River's

opposition to the construction of the harvesting cabin in the proposed location was a significant factor that led to the Superintendent's view that the proposed location was not appropriate. Accordingly, it is difficult to conclude that the procedural defect in this case is not material to the result. While the receipt of updated information on Salt River's response may not have disclosed information that was not generally discernable by the Applicant from the prior correspondence and communications, it did clarify the nature of Salt River's ongoing opposition, and the Applicant was denied the opportunity to respond to this. In these circumstances, while it seems unlikely that this opportunity would have altered the ultimate decision, nor can it be said with certainty that the response would have been futile. For example, given the basis of Salt River's opposition, further consultation with it and Smith's Landing may have been necessary to determine whether or not they were open to revising the exclusion policy.

Issue 3: Is this the appropriate venue to consider whether the decision infringed upon the Applicant's Treaty rights? If so, were those rights infringed?

[131] Issues of infringement of rights are, generally speaking, not best dealt with by way of judicial review. As stated in *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15, leave to appeal refused, [2017] SCCA No 115 (QL):

> [78] A judicial review is a summary proceeding and, generally, the only material that is considered by the Court is the material that was before the decision-maker. In the present case, for purposes of addressing the issue of whether the Site C Project infringes the appellants' treaty rights, a full discovery, examination of expert evidence, as well as historical testimonial and documentary evidence would be necessary and cannot be provided through an application for judicial review. Judicial review is not the proper forum to determine whether the appellants' rights are unjustifiably infringed. But more importantly, to contend otherwise ignores the jurisdiction of the province of British Columbia and its role in the environmental assessment process. Since the province of British Columbia is purporting to take up land under Treaty 8, it would

> necessarily have to be a party to the proceedings (*Grassy Narrows*).
>
> [79] The appellants also make reference to *Beckman* in order to support their contention, but again this case is of no assistance. More particularly, Beckman raised questions about the interpretation and implementation of modern comprehensive land claims treaties between the Crown and First Nations, namely the *Little Salmon/Carmacks First Nation Final Agreement* (LSCFN Treaty). In its decision, the Supreme Court observed that judicial review is a flexible process and thus "perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation" (para. 47). However, this statement cannot be read as implying that treaty rights can be adjudicated and infringement determined in the context of a judicial review.
>
> [80] *Beckman* dealt with the consultation provisions in the LSCFN Treaty and whether the honour of the Crown and the duty to consult had been breached. However, questions of Aboriginal and treaty rights and the issue of whether these rights have been infringed require full discovery, the examination of a myriad of expert evidence in the field of ethnography, genealogy, linguistics, anthropology, geography, as well as oral history and historical documentary evidence (*Tshilqot'in Nation*; *Delgamuukw*). It is not uncommon for a trial related to section 35 rights to exceed 300 days of evidence and argument (*ibid.*). Clearly, an application for judicial review is not typically the best forum for this kind of resolution.

(Also see *Kitkatla Band v Canada (Fisheries and Oceans)* (2000), 181 FTR 172 (TD) at para 19).

[132] Here the issue is much narrower, being whether the Applicant's Treaty rights are infringed by the decision refusing to issue a permit to build a harvesting cabin at the particular location selected by the Applicant. Regardless, to resolve that issue would require evidence beyond that which is available in the record that is before me.

[133] The decision and the CTR indicate that the Superintendent repeatedly sought to engage with the Applicant so as to identify other potentially suitable harvesting cabin locations, outside the 800-metre exclusion zone, which would, therefore, not be incompatible with the use and enjoyment of that part of the WBNP recreational area by other Park users. The Applicant did not engage with that process. And, while in support of this application for judicial review, he has included in his affidavit information addressing why he is of the view that the proposed cabin can only be built on his proposed site, that information was not before the Superintendent when the decision was made and, accordingly, could not be addressed by him in that process.

[134] I would also observe that in *Adams* the Supreme Court of Canada stated that governments "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance", here it is open to question as to whether, in these circumstances, an individual First Nation member's specific choice of location for a trapping cabin risks infringing collective Aboriginal rights in a substantial number of applications. Again, however, there is insufficient information before me to address that issue.

[135] Accordingly, I agree with the Respondent's submission that this application for judicial review of the Superintendent's decision is not an appropriate venue for determination of s 35 rights.

[136] And, in any event, this application for judicial review will be granted based on the breach of procedural fairness. Because of that breach, the decision cannot stand. It will be remitted back so that the Applicant can be provided with Salt River's position as to the construction of the harvesting cabin at the proposed site and an opportunity to respond to same.

[137] This also presents an opportunity for the Applicant to work with Parks Canada, as it, Salt River, and Smith's Landing have previously suggested, to identify any alternative harvesting cabin locations outside of the 800-metre exclusion zone. While an alternative location may not be as idyllic as the proposed location, it may still be suitable and not result in undue hardship to the Applicant. The previously offered use of the existing Parks Canada facilities so that the Applicant can educate others could also be explored during this time.

JUDGMENT in T-853-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the Superintendent was procedurally unfair and it is set aside on that basis. The matter is remitted back to the Superintendent so that the breach of procedural fairness can be cured and matter then redetermined.

3. There shall be no order as to costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-853-18
STYLE OF CAUSE:	ROBERT GRANDJAMBE JR. ON HIS OWN BEHALF AND ON BEHALF OF ALL MEMBERS OF MIKISEW CREE FIRST NATION v PARKS CANADA AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND SUPERINTENDENT OF WOOD BUFFALO NATIONAL PARK
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	APRIL 9, 2019
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	JULY 30, 2019

APPEARANCES:

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