Federal Court Cour fédérale

Date: 20240424

Docket: T-1225-23

Citation: 2024 FC 618

Ottawa, Ontario, April 24, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

TROPHY LODGE NWT LTD

Applicant

and

THE ATTORNEY GENERAL OF CANADA,
THE PARKS CANADA AGENCY and
ŁUTSËL K'É DENE FIRST NATION

Respondents

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JUDGMENT AND REASONS

I. Overview

[1] The Applicant Trophy Lodge NWT Ltd [the Applicant or Trophy Lodge] is a commercial tourism and sport fishing lodge located at the extreme eastern end of Great Slave Lake in the Northwestern Territories [NWT] that has been operating since 1965.

[2] Trophy Lodge was subject to NWT regulations until 2019, when the Thaidene Nëné National Park Reserve [Thaidene Nëné Park] was created, following a Land Transfer Agreement between Canada and the Government of the NWT [GNWT] and the *Agreement to Establish the Thaidene Nëné Indigenous Protected Area and National Park Reserve* [the Establishment

Agreement] and related agreements between Canada and various First Nations in the NWT. Since then, the Parks Canada Agency [Parks Canada] regulates the Thaidene Nëné Park.

[3] Any business wishing to operate in a national park subject to Parks Canada's jurisdiction must obtain a licence to do so. In considering whether to issue a license, the superintendent of the park must consider, *inter alia*, the factors set out in subsection 5(1) of the *National Parks of Canada Businesses Regulations*, SOR/98-455 [the *Regulations*].

[4] In 2022, Trophy Lodge was sold to its current owners, who applied for a business licence from Parks Canada. Under the Establishment Agreement, Parks Canada must submit any new licence request to a board established under the Establishment Agreement, for its consideration and recommendation. Following the board's recommendation, the Superintendent of the Thaidene Nëné Park refused to issue the business licence to the Applicant.

[5] Following a request by the Applicant for a review of the Superintendent's decision, the President and Chief Executive Officer of Parks Canada [PCEO] denied the application for a business licence to operate the lodge, in part because in denying the licence, Parks Canada is honouring the spirit and intent of the shared management regime under the Establishment Agreement and its commitment to reconciliation.

[6] For the reasons that follow, the PCEO's decision is unreasonable. While the PCEO can consider Canada's commitment to reconciliation as a relevant ground upon which to evaluate the licence application to operate Trophy Lodge, the PCEO's decision must rely on evidence and the

business licence application package filed by the Applicant. In this case, the PCEO failed to review the Applicant's business licence application and failed to provide reasons as to why the business licence had to be denied on the basis of reconciliation, especially considering the fact that the First Nation most affected by the business licence supported its issuance.

[7] Because the Applicant's business licence, had it been issued, would have expired on March 31, 2024, no remedy may be granted in this case – the issue is moot. Nevertheless, at the invitation of the parties, the PCEO's decision is set aside. The Applicant has filed a new licence application, and the board and Parks Canada may consider the current licence application with the benefit of these reasons.

II. Background facts

A. *Thaidene Nëné Park*

[8] Łutsël K'é Dene First Nation [LKDFN] is a band under the *Indian Act*, RSC, 1985, c I-5. LKDFN has approximately 800 Łutsël K'é and Kaché Denesǫłine members, 400 of whom live in the remote community of Łutsël K'é, in the Northwest Territories. Łutsël K'é is located on the eastern tip of Tu Nedhé, also known as "Great Slave Lake."

[9] LKDFN, the Northwest Territory Métis Nation [NWTMN], the Deninu Kue First Nation and the Yellowknives Dene First Nation comprise the Akaitcho Dene First Nations. The Akaitcho Dene First Nations are working to advance reconciliation and renew their relationship with the Crown by concluding a modern treaty agreement with Canada and the GNWT, pursuant

to a framework agreement signed in 2000. The area comprising the Thaidene Nënë Park is subject to unresolved claims of Aboriginal rights and title by these four Indigenous governments.

[10] Seven bilateral agreements [the Park Agreements] provide for shared management of the Thaidene Nënë Park. For the purposes of this judicial review, the Establishment Agreement between Parks Canada and the LKDFN, and the Land Transfer Agreement between Canada and the GNWT are most important. It is also important to note that the Park Agreements together establish and empower two management boards: a Regional Management Board and an operational management board called Thaidene Nënë Xá Dá Yáłtı, which means "the people that speak for Thaidene Nënë" [TDNXDY]. Of the two boards, only TDNXDY is relevant to this judicial review application.

[11] Parks Canada and the four Indigenous governments therefore jointly manage the Thaidene Nënë Park pursuant to the Park Agreements signed in 2019 and 2020 that provide for a collaborative and consensus-based shared management regime. These agreements underpin the establishment of the Thaidene Nënë Park.

[12] One of these agreements is an agreement between Canada and the GNWT. On August 21, 2019, following negotiations between Canada, the GNWT, and the Akaitcho Dene First Nations, a Land Transfer Agreement transferred lands from the NWT to Canada for the creation of the Thaidene Nënë Park, so that the lands could become a national park subject to the *Canada National Parks Act*, SC 2000, c 32 [the *Parks Act*] and its regulations, and managed by the Parks Canada under the *Parks Canada Agency Act*, SC 1998, c 31 [the *PCA Act*].

[13] On September 4, 2019, the Thaidene Nëné Park was established by Order in Council, PC 2019-1315, (2019) C Gaz II, 6338. The Thaidene Nëné Park is dedicated to the benefit, education, and enjoyment of all Canadians.

[14] The shared vision of LKDFN and Parks Canada for the Thaidene Nëné Park is reflected in the preamble of the Establishment Agreement:

> "Thaidene Nëné is the homeland of the people whose ancestors here laid down the sacred, ethical and practical foundations of their way of life. This land has nurtured and inspired countless generations whose prosperity continues to be ensured by a deep intimacy between the people and the land. For the well being of future generations, this way of life needs to be exercised, nurtured and passed on."
>
> (Certified Tribunal Record, Applicant's Record, at p 2271)

[15] Canada and the LKDFN, through the Establishment Agreement, intended to guide the management of the Thaidene Nëné Park. The establishment of boards demonstrates an intention to collaborate in order to maintain and foster the Denesǫłine Way of Life, and to incorporate Łutsël K'e Denesǫłine Knowledge into the planning, management, operation, monitoring and evaluation of the National Park Reserve. The Establishment Agreement also provides for dispute resolution processes if the parties disagree on specific implementation issues.

[16] For example, the Establishment Agreement requires that Parks Canada refer all new business licence applications for access to and use of the lands in the Thaidene Nëné Park to TDNXDY for consideration and recommendation. This includes all proposals, activities, or developments that affect the planning, management, operation, monitoring, and evaluation of

Thaidene Nënë Park. TDNXDY must make all recommendations by consensus within 30 days of referral and provide written reasons for their recommendation on request by a party.

[17] TDNXDY recommendations are referred to Canada and the LKDFN for their consideration. The recommendations of the TDNXDY must be implemented by one or both of Canada and/or LKDFN, unless there are objections from either of the parties. Where an objection is raised by Canada or the LKDFN to a TDNXDY recommendation, the Establishment Agreement sets out a detailed "Issue Resolution Process" intended to build consensus between Canada and the LKDFN about how to proceed. The Establishment Agreement is therefore an example of a broader process of reconciliation.

[18] However, and notwithstanding the Establishment Agreement, a TDNXDY recommendation is not binding on Parks Canada. Regardless of whether the parties to the Establishment Agreement triggered the Issue Resolution Process, the Superintendent of the Thaidene Nënë Park must consider TDNXDY's recommendation in their assessment of the proposed licence application under the applicable *Regulations* in order to approve or deny the issuance of the licence.

[19] While the Establishment Agreement aims at protecting important lands and the Denesǫłine Way of Life for future generations, and to incorporate Łutsël K'e Denesǫłine Knowledge into the planning, management, operation, monitoring and evaluation of the Thaidene Nënë Park, the intent of reconciliation is not limited to the relationship between Canada and the LKDFN. Indeed, one of the main objectives of the Thaidene Nënë Park is to

enable tourists to appreciate and understand the relationship between LKDFN and Thaidene Nënë Park. The Establishment Agreement therefore provides that Canada and the LKDFN will develop a visitor guide and orientation materials to inform visitors of the LKDFN's rights, history, aspirations, cultural practices and the Denesǫłine Way of Life, as well as LKDFN businesses operating in Thaidene Nënë Park.

B. *Trophy Lodge and the business licence application process*

[20] Trophy Lodge is located near Fort Reliance, at the extreme eastern end of Great Slave Lake, in the NWT. Trophy Lodge, at full capacity, may accommodate up to 16 people in a lodge facility that includes a small concession store. Trophy Lodge also includes historical buildings that were part of a former detachment for the RCMP that was operating between 1927 and 1963.

[21] Prior to the establishment of the Thaidene Nënë Park, Trophy Lodge was subject to regulation by the GNWT and a land Lease. The terms of the Lease provided, *inter alia*, for renewals upon the same terms and conditions, when required. Following the creation of the Thaidene Nënë Park and the Land Transfer Agreement, Trophy Lodge became subject to Parks Canada's jurisdiction under the *Parks Act* and the *Regulations*.

[22] In January of 2021, Trophy Lodge's previous owner approached potential purchasers to sell the lodge. The Applicant purchased it on or about May 2022 under an Asset Purchase Agreement. On or about September 16, 2022, Parks Canada, having become the property owner following the Land Transfer Agreement with the GNWT, entered into an assumption agreement

whereby it, and the former owner of Trophy Lodge, assigned the existing commercial Lease on the lands to the Applicant.

[23] The Applicant applied to Parks Canada for a new business licence on September 26, 2022. Parks Canada reviewed the application package and wrote to Trophy Lodge to recommend changes. Trophy Lodge submitted a revised application package on November 9, 2022, which was then submitted to the TDNXDY for consideration. Trophy Lodge's business licence application package included the following information:

> Part B: Business Information
>
> **Type of business – Trophy Lodge will be a fishing lodge:** Trophy Lodge has been operating as a fishing lodge since 1965 and we will be operating the lodge the same way as it has been with the previous ownership. By 2025 season we are planning on completing multiple environmental improvements at the lodge, complete training requirements for guides and incorporate guides to assist with improving the lodge experience. We will be improving the Trophy Lodge concession store to offer a wider variety of Indigenous arts and crafts. We will work with local Indigenous communities across the NWT and allow their art, crafts and jewelry to be sold the way that most benefits to them. With the store improvements, it will allow people to stop into the lodge and stock up on supplies during their travels in the area. […]
>
> A large part of the reason for us being so prepared with being market ready is that the ownership has extensive business experience. Andrew Moore owns and operates Yellowknife Sportfishing Adventures out of Yellowknife. Andrew has operated Yellowknife Sportfishing Adventures since 2017 and his business has won tourism awards and been nominated year after year for being an outstanding small business. Trent Hayward and April Bell own and run the Booster Juice Franchise in Yellowknife. They opened Booster Juice in 2018 and have been extremely successful in their operations. Their Booster Juice store has broken multiple National franchise sales records and is properly run to handle traffic into the store. Trent also owns another store, Stocked Hat Store in Yellowknife. Stocked is the only hat store in Yellowknife which is in very high demand. April also owns and operates Et'oa's Earings. Et'oa's Earings is Indigenous made earrings and jewelry

by April and sold around the world. April regularly brings together other Indigenous jewelry and craft makers and host's pop-up shops. These pop-up shops have huge line ups of people wanted to buy hers and others Indigenous made jewelry. […]

Describe how your operations will be culturally sensitive to local Indigenous peoples:

Thaidene [Nëné] National Park Reserve is a significant area to Lutsël K'é Dene First Nation, Northwest Territory Métis Nation, Deninu Kue First Nation, and Yellowknives Dene First Nation. We are aware that the people of the Lutsël K'é Dene First Nation still hunt, fish and regularly conduct important cultural activities in the area of our operation. We are aware that there are very sensitive areas that are very close to Trophy Lodge. During the first 2 weeks of August, we will not go to the area of Tsakui Theda (Parry Falls) at any time as it is a sacred area for the people of Lutsël K'é. As a Lodge practice we will make sure that every guest that comes to the lodge is fully aware of the cultural importance of area surrounding the lodge and how not to interfere with any traditional activities or sensitive areas. We have been in contact with Lutsël K'é about the lodge and will continue to regularly be in contact and work with their people to make sure we are not interfering with their way of life in the area of the lodge.

When our communications start again we will be asking for proper wording for land use acknowledgement so we can include it on our social media, website and our advertising.

Part of our ownership, April Bell is an NWT Indigenous person, and we also have an employee that is an NWT Indigenous person. Her job with the RCMP is the NWT's liaison officer for Indigenous policing and directly works with all Indigenous communities. All of the ownership are RCMP employees and regularly take cultural sensitivity awareness courses and have all work in Northern communities throughout the NWT. […]

Describe what economic benefits (employment, procurement, etc.) that your operations may offer to local Indigenous communities:

We hope that our offers economic benefits will be accepted. We will be looking to hire employees and will be requiring contractors. We will have a company policy that will require us to offer any employment, procurement, contractors etc in the following order:

1. Lutsël K'é Dene First Nation

> 2. Northwest Territory Métis Nation, Deninu Kue First Nation, and Yellowknives Dene First Nation
>
> 3. NWT Dene First Nation
>
> 4. NWT Residents
>
> If we go through our list in that order, we do not see us having ever having to hire or contract anyone outside of the NWT.
>
> We will generate more interest that we will be able to accommodate, and other businesses will benefit from that. We expect our social media and web presence to create a lot of interest for the area aside from just finishing for wildlife photography, Aurora viewing, cultural experiences that will benefit other Tourism Operators. We will not be offering cultural tours as Trophy Lodge. We want these tours through local cultural tourism operators from Lutsël K'é if requested from our guests.
>
> (Uunila Affidavit at Exhibit V, Applicant's Record, at p 1745-1748)

[24] Prior to the submission of the business licence application to the TDNXDY, Parks Canada worked with LKDFN to develop proposed terms and conditions for the licence that could be accepted and endorsed by LKDFN Chief and Council.

[25] On January 17 and 18, 2023, Parks Canada and the LKDFN jointly presented Trophy Lodge's application for a business licence to the TDNXDY, and supported the issuance of the licence.

C. *TDNXDY process to review Trophy Lodge's application for a business licence*

[26] The TDNXDY was presented with a briefing note from Parks Canada for its evaluation of Trophy Lodge's proposed business licence (Uunila Affidavit at Exhibit V, Applicant's

Record, at p 1740). The briefing note included the application package of Trophy Lodge and the evaluation criteria on which the TDNXDY was to assess the request. Notably, the briefing note states that the TDNXDY must use the *Regulations* to assess Trophy Lodge's application. More specifically, the briefing note explains that Parks Canada and the LKDFN worked together to develop proposed terms and conditions, and that these terms and conditions are "compatible with the [Park] [A]greements and regulations" (Uunila Affidavit at Exhibit V, Applicant's Record, at p 1740).

[27] The briefing note then sets out subsection 5(1) of the *Regulations*, and also states that the TDNXDY may consider "[f]actors from the [P]ark [A]greements to consider that correlate to section 5(1) of the regulations." The briefing note then includes, at Appendix 2, the "economic opportunities clauses" from the Establishment Agreement including, *inter alia*, clause 3.7.1 of the Establishment Agreement, which provides:

> 3.7.1 The Parties will develop and implement policies and procedures for procuring goods and services and allocating Business Licenses that maximize Łutsël K'é Denesǫłine participation in economic opportunities relating to Thaidene Nëné.
>
> (Certified Tribunal Record, Applicant's Record, at p 2280)

[28] Notably, however, the Establishment Agreement, and the "economic opportunities clauses" criteria contained therein, was never disclosed to the Applicant prior to their business licence application. Moreover, the briefing note submitted by Parks Canada to the TDNXDY, including the evaluation criteria established by Parks Canada and the business licence application package put together by the Applicant, along with the terms and conditions supported by the LKDFN, were not provided to the PCEO in its review of the Superintendent's decision.

D. *The TDNXDY reasons denying the issuance of Trophy Lodge's business licence*

[29] On January 18, 2023, TDNXDY stated verbally that it had reached a consensus recommendation that Trophy Lodge's business licence application should not be granted.

[30] On January 30, 2023, TDNXDY issued its reasons. TDNXDY opined that issuing the business licence to Trophy Lodge would undermine the spirit and intent of the shared management agreement between Parks Canada and the LKDFN, despite LKDFN supporting the business licence application.

[31] The written reasons note that the parties agreed to protect the Denesǫłine Way of Life, promote culturally relevant visitor experiences, and maximize LKDFN participation in economic opportunities related to the Park Reserve. TDNXDY further noted that a key consideration for their recommendation was the business' geographic location within the Kaché region, a sacred and culturally significant site in Thaidene Nëné. TDNXDY also references the colonial history of the site as a former RCMP post. The TDNXDY's reasons were, in part, as follows:

> […]
>
> It is the TDNXDY's opinion that granting a Parks Canada business license to the owners of Trophy Lodge will serve to undermine the spirit and intent of the Establishment Agreement signed between the PCA and the LKDFN, particularly with respect to the parties' mutual agreement to protect the [Denesǫłine] Way of Life, promote culturally relevant Visitor Experiences, and to maximise [Łutsël K'é Denesǫłine] participation in economic opportunities related to Thaidene Nëné. The geographic location of this property and business is a key consideration in this case. Specifically, the TDNXDY is concerned about:
>
> - Whether the owners can adequately support the vision of the Parties for Kaché (Reliance) area; and,

- The long-term impact that the indeterminant nature of Trophy lease (and by extension the right to apply for a license to carry out business activities) will have in undermining the Agreement objectives in the Kaché area.

Can Trophy Lodge serve to protect the [Denesǫłine] Way of Life, promoting culturally relevant Visitor Experiences, and maximize [Łutsël K'é Denesǫłine] participation in economic opportunities related to Thaidene Nëné?

Trophy Lodge is located in the Kach[é] area (Reliance). The Kach[é] area is the heart's center of Thaidene Nëné, and one of its most sacred and culturally significant sites.

The parties to the Agreement hold a collective understanding that the Kaché area is not only a sacred place for the LKDFN, but also a strategic area for tourists who will be visiting the Thaidene Nëné, who will either stay at a lodge to enjoy land-based and cultural activities showcasing the [Denesǫłine] Way of Life or use the lodge as a staging area to access the barrens, or both. This location is critical and strategic for the long-term viability of a conservation economy in Thaidene Nëné.

The issuance of a business license to a lodge operator that has no operational history of lodge ownership and that may not have the interest or the capacity to uphold the vision that the parties have for the Kach[é] area is, in the opinion of the Board, a failure on the part of Parks Canada to meet the objectives of the Agreement, which includes objectives towards facilitating the building of an Indigenous-led conservation economy that can promote and support Indigenous-owned tourism businesses and other ancillary economic development opportunities for the Indigenous people of the area. It is the opinion of the Board that Parks Canada should have acquired the lease and assets of Trophy Lodge during the establishment process and worked with the other parties to the Agreements to establish joint control and management of this strategic and important ecological and cultural area within Thaidene Nëné, such that the vision for the Kach[é] area can be realized.

Addressing historic and ongoing alienation of land in the Kach[é] area

There is also a very serious problem with the leasehold interest associated with Trophy Lodge that has a history of colonial occupation associated with it, and that may continue to place barriers in front of the parties with respect to the vision for the

> Kach[é] area. The TDNXDY has written to the parties negotiating modern treaties and self-government agreements in the region about the way in which this Territorial lease, and other leases, were transferred to the PCA by the Government of the Northwest Territories (GNWT). […]
>
> When Thaidene Nëné was established in 2019, a land transfer agreement between the GNWT and PCA was signed. Within that agreement there were provisions to ensure that the existing GNWT leases would transfer to the PCA, however, this commercial lease was transferred in a form that granted the lessee with an indeterminate right of land occupancy. LKDFN was not notified of these changes. In the opinion of the TDNXDY, the GNWT's actions to change the term of this commercial lease before its transfer to Parks Canada is a continuation of bad faith actions on behalf of the Crown in the Kach[é] area.
>
> […]
>
> (Certified Tribunal Record, Applicant's Record, at pp2233–2234)

E. *The Superintendent's Decision*

[32] On February 15, 2023, the Acting Field Unit Superintendent at the time [Superintendent] of Parks Canada wrote to the Applicant to provide its reasons for denying their application for a business licence. It is important to note that the Applicant was not able to provide submissions to the Superintendent in response to the TDNXDY's recommendation to deny the issuance of the business licence.

[33] The letter states that in making the decision, the Superintendent considered the business licence application package, relevant agreements that create the shared management regime, TDNXDY's recommendation, and the fact that LKDFN and NWTMN did not object to TDNXDY's recommendation.

[34] In the Superintendent's reasons, it is noted that the proposed business supported visitor use and enjoyment of the Park Reserve (*Regulations*, paragraph 5(1)(b)) and that the application proposed a number of improvements related to guest safety and environmental protection (*Regulations*, paragraph 5(1)(c)). The Superintendent recognized these elements as supporting the issuance of a business licence, but ultimately placed greater weight on factors relevant to paragraphs 5(1)(a) and 5(1)(d) of the *Regulations*.

[35] The Superintendent's decision stated in part:

> […]
>
> Following careful deliberation and consideration of many factors, including the content of the application, related agreements (Parks Canada's impact and benefit agreement with Northwest territory Métis Nation; the establishment agreement with Łutsël K'é Dene First Nation; and the Land Transfer agreement with the Government of the Northwest Territories), and the advice of the Board, LKDFN and Northwest Territory Métis Nation (NWTMN), Parks Canada has made the decision not to issue the licence. […]
>
> As part of the "preservation, control and management of the park" Parks Canada must consider all relevant park agreements, including the commitment to be guided by the Board in making operational decisions. […]
>
> The business activities proposed in your application support visitor use and enjoyment of Thaidene [Nëné] National Park Reserve, and would provide clients with an opportunity to connect to the natural environment through unguided fishing and remote lodge accommodations. In your application you also outline a number of proposed improvements to infrastructure and operations, which are related to the safety of guests and environmental protections on the site. Moreover, your application demonstrated a willingness to support economic benefit to local Indigenous communities via your proposed employment and procurement policy.
>
> Parks Canada also recognizes that you hold a lease for a "commercial – outpost camp." You have invested time, money and resources to acquire the leasehold and physical assets. Despite

> these supportive elements, there are other factors that Parks Canada is required to consider. […]
>
> Parks Canada's decision is based on: the effect of the business on the natural and cultural resources of the park (paragraph 5(1)(a) of the Regulations); and the preservation, control and management of the park (paragraph 5(1)(d)).
>
> In making the decision, Parks Canada considered the following two key factors:
>
> 1. Parks Canada has been advised by the Board and Indigenous governments that the Kaché area, where Trophy Lodge is located, is highly culturally sensitive. Management planning, zoning, and policy development for this area have yet to occur. Given the uncertainty of this area's future regarding visitor use, tourism and business operations, we are not able to issue a licence in good faith while undertaking a collaborative management planning process with Indigenous government partners (paragraph 5(1)(a) and (d)).
>
> 2. The spirit and intent of the Thaidene [Nëné] agreements is to support shared management of the park. In regards to this decision, the Board and two nations have indicated they do not support the issuance of the licence. Reconciliation and relationships with Indigenous partners are paramount for Parks Canada in regards to Thaidene [Nëné] National Park Reserve (paragraph 5(1)(d)).
>
> These factors outweigh the benefit that the proposed business may have in terms of the factors in section 5(1). As a result, Parks Canada must refuse the business licence.
>
> (Certified Tribunal Record, Applicant's Record, at pp 2260–2263)

F. *The PCEO's review of the Superintendent's decision*

[36] On March 13, 2023, the Applicant submitted a nine (9) page letter asking the PCEO to review the Superintendent's decision.

[37] Notably, the Certified Tribunal Record demonstrates that the PCEO did not receive the business licence application package put together by the Applicant, including the proposed terms and conditions that were supported by Parks Canada and LKDFN. The PCEO also did not receive a copy of the briefing note and evaluation criteria put together by Parks Canada and provided to TDNXDY for its evaluation of the licence application, which states that “Parks Canada and Łutsël K’é have worked together to develop proposed terms and conditions. […] They are compatible with the [Park] [A]greements and regulations” (Uunila Affidavit at Exhibit V, Applicant’s Record, at p 1740).

[38] On May 17, 2023, the PCEO dismissed the Applicant’s request for review [the Decision]. The PCEO stated that it carefully reviewed the Applicant’s submissions and explained that it does not doubt the Applicant’s “intent, experience, and goodwill” or “the potential economic, cultural, and environmental benefits” outlined, but that principles of “mutual trust-building and reconciliation after decades of exclusion and separation” supersede all other considerations in deciding the licence application. The letter explained that the Superintendent did not rely on those parts of TDNXDY’s recommendation that the Applicant’s submissions primarily impugn as erroneous, and that it was appropriate for the Superintendent to consider TDNXDY’s recommendation as it represents the interests of the Thaidene Nëné Park.

[39] The Decision concluded that the Superintendent correctly situated TDNXDY’s recommendation and appropriately based its decision to deny the business licence on considerations pursuant to paragraphs 5(1)(a) and 5(1)(d) of the *Regulations*. The PCEO found

that, in doing so, Parks Canada is honouring the spirit and intent of the shared management regime and its commitment to reconciliation.

[40] The PCEO's Decision stated, in part:

> […]
>
> I have reviewed your letter carefully, as well as all supporting documentation that informed the Superintendent's deliberations, including the *National Parks of Canada Businesses Regulations*, and I have decided that the decision of the Superintendent to deny the business licence application was correct. […]
>
> I made my decision with a good deal of thought and consideration. I note that the previous owners of Trophy Lodge operated under a business licence for many years, and I have no reason to doubt the intent, experience and goodwill of you and your partners with respect to the planned operation of Trophy Lodge and the potential economic, cultural, and environmental benefits you outline. However, these are not the only factors that I must consider.
>
> Parks Canada's relationship with Indigenous partners is based on principles of mutual trust-building and reconciliation after decades of exclusion and separation from the land of Indigenous Peoples in previous national park establishment processes. Those principles must supersede all others.
>
> In your letter, you reference several factors related to Thaidene Nëné xá dá yáłtı (TDNXDY)'s decision and advice that you feel were applied by them in error and, further, that you feel the Superintendent improperly replied on. It is my role at his stage to assess the factors that informed the Superintendent's decision, rather than the factors that contributed to TDNXDY's advice.
>
> The Superintendent's reasons for not demonstrate a wholesale adoption of TDNXDY's reasoning for their opposition to the licence. The Superintendent did not reply on TDNXDY's comments about (in their view) Trophy Lodge's lack of experience, nor did he rely on speculation that Trophy Lodge "may not have the interest or the capacity to uphold the vision of the parties" with respect to the Kaché area. The ownership structure of Trophy Lodge was not a central factor in the Superintendent's decision. Rather, the decision was grounded in two key factors: principles of reconciliation, and a desire to respect joint

> management planning and policy development, which have yet to occur, both of which strongly implicate section 5(1)(d) of the *National Parks of Canada Businesses Regulations* with respect to the participation of the Indigenous partners in "the preservation, control and management of the park." […]
>
> I am confident that the Superintendent and staff for Parks Canada's Southwest Northwest Territories Field Unit acted diligently and in good faith in providing advice to guide your application at its various stages. I am also confident that the Superintendent situated the advice of TDNXDY correctly, and appropriately based his decision on sections 5(1)(a) and 5(1)(d) of the *National Parks of Canada Businesses Regulations*.
>
> In doing so, Parks Canada is honouring the spirit and intent of Thaidene Nëné agreements with respect to shared management and its commitment to advancing reconciliation with Indigenous Peoples.
>
> (Certified Tribunal Record, Applicant's Record, at pp 2231–2232)

III. Issues and standard of review

[41] The Applicant raises two issues for judicial review:

1. Whether the PCEO's Decision breached procedural fairness;
2. Whether the PCEO's Decision is unreasonable.

[42] On the procedural fairness issue, as held in *Caron v Canada (Attorney General)*, 2022 FCA 196 at paragraph 5, allegations of breaches of procedural fairness are reviewed according to a standard equivalent to correctness: "When engaging in a procedural fairness analysis, [the] Court must assess the procedures and safeguards required, and, if they have not been met, the Court must intervene" (see also *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 33–34 [*Canadian*

Pacific]; *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57).

[43] As reiterated in *Canadian Pacific* at paragraph 54, the role of the reviewing court on procedural fairness issues is simply to determine whether the procedure that was followed was fair, having regard to the particular circumstances of the case: "The ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (at para 56).

[44] The standard of review applicable to the merits of the PCEO's decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 7, 39–44 [*Mason*]).

[45] Following this standard, *Mason*, relying on *Vavilov*, teaches that the reviewing court must first look to the reasons of the administrative decision maker in order to assess the justification for the decision. Moreover, the Supreme Court of Canada [SCC] reiterates the need to "develop and strengthen a culture of justification" (*Mason* at paras 8, 58–60, 63; *Vavilov* at paras 14, 81, 84, 86).

[46] In *Mason*, the SCC explains how a reviewing court must conduct a judicial review of a decision. A decision may be unreasonable if the reviewing court identifies a fundamental flaw,

either because of a lack of internal logic in the reasoning or because of a lack of justification given the factual and legal constraints affecting the decision (*Mason* at para 64).

[47] The SCC identifies a series of factual and legal constraints that the decision maker must examine and justify, depending on the applicable context, in order for the decision to be sufficiently justified within the meaning of *Vavilov*. The burden of justification varies, but the decision maker must be "aware" of the essential elements, "sensitive to the issue before [it]" and "meaningfully grapple with key issues or central arguments raised by the parties" (*Mason* at paras 69, 74; *Vavilov* at paras 120, 128). The decision maker must consider the main arguments and evidence of the parties and give reasons as to why particular arguments were accepted or dismissed, and the evidence that was accepted or rejected in the decision-making process (*Mason* at paras 73–74*; Vavilov* at paras 126–128).

[48] In particular, the decision maker must ensure that they consider the principles of statutory interpretation, the applicable statutory, common law or international law rules, the evidence and main arguments of the parties, the practices and previous decisions of the administrative tribunal, and the potential and possibly severe consequences of the decision on the party concerned or on a broad class of persons, as well as the overall issues. Failure to give proper consideration to any of these factors, or to provide adequate reasons for the decision, may constitute a serious deficiency that causes a reviewing court to "lose confidence" in the decision maker's decision (*Mason* at paras 64, 66–76).

[49] When the decision maker sets out its reasons, it is not enough for the decision to be justifiable; it must be justified by reasons that establish the transparency and intelligibility of the decision-making process (*Mason* at paras 59–60; *Vavilov* at paras 81, 84, 86). The Court must determine whether, by examining the reasoning followed and the result obtained, the decision is based on an internally coherent and rational chain of analysis that can be justified in light of the legal and factual constraints to which the decision maker is subject (*Mason* at paras 8, 58–61; *Vavilov* at paras 12, 15, 24, 85–86). The decision will be unreasonable if it lacks internal logic or if the reviewing court is unable to follow the decision maker's reasoning without "encountering any fatal flaws in its overarching logic" (*Mason* at para 65, citing *Vavilov* at paras 102–103).

[50] On the other hand, the reviewing court must not create its own yardstick and then use it to measure what the administrator did (*Mason* at para 62; *Vavilov* at para 83). Nevertheless, reasonableness review is not a "rubber-stamping" process, it is a robust form of review (*Mason* at paras 8, 63; *Vavilov* at paras 12–13).

[51] Accordingly, on judicial review under the standard of reasonableness, the reviewing court must assess the reasons for the decision "holistically and contextually" in light of the history and context of the proceedings, the evidence adduced and the main arguments of the parties (*Mason* at para 61; *Vavilov* at paras 91, 94, 97). The Court's role is not to reweigh the evidence presented to the decision maker, to question its exercise of discretion, or to make its own interpretation of the law. It is up to the decision maker to fulfil these roles. As long as the decision maker's interpretation of the law is reasonable and the reasons for its decision are justifiable, coherent and intelligible, the court must show deference (*Vavilov* at paras 75, 83, 85–86, 115–124).

[52] Regardless of the approach taken by the decision maker, the task of the reviewing court is to ensure that the statutory provision is interpreted in accordance with the "modern principle" of statutory interpretation, which focuses on the overall context of the statute, following the ordinary and grammatical meaning of the words chosen by Parliament, and harmonizing with the spirit of the statute, its purpose, the context, and Parliament's intention (*Mason* at paras 67, 69–70, 83; *Vavilov* at paras 110, 115–124; *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 at para 42; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 20, 36 [*Alexion*]; *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 16; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 1998 CanLII 837 (SCC); *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26; Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87). An interpretation that involves a "results-oriented analysis" and is done in an expeditious manner is unreasonable (*Alexion* at para 37, citing *Vavilov* at paras 120–121; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 42).

[53] In this case, it is up to the PCEO, not the Federal Court, to interpret the scope of the exercise of the discretion conferred on the Superintendent by subsection 5(1) of the *Regulations* (*Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 37). The PCEO is not required to follow the manner with which courts proceed to statutory interpretation – the standard of perfection does not apply. Nor is the PCEO required to give reasons on every argument, legislative provision, or detail raised by the parties (*Mason* at paras 61, 69–70; *Vavilov* at paras 119–120). Nor is the length of the reasons themselves a decisive indicator of the

reasonableness of the decision (*Vavilov* at paras 92, 292–293; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 16–19; *Groupe Maison Candiac Inc c Canada (Procureur général)*, 2023 CF 1720 at para 63).

[54] On the other hand, the more serious the impact of the decision on the rights and interests of a party, the more the reasons must reflect these issues, be sufficient for the parties, and the decision maker must explain "why his or her decision best reflects the legislature's intention" (*Mason* at para 76; *Vavilov* at paras 133–134; *Alexion* at para 21). Consequently, a decision may be unreasonable simply because the decision maker does not consider or address, in its reasons, the particularly harsh consequences for the affected individuals (*Mason* at paras 69, 76; *Vavilov* at paras 134–135).

[55] When the reviewing court examines the "entire record" to determine whether the decision maker was aware of the key issues and made a decision on them, that record includes all the documents, evidence and arguments that were presented to the decision maker (*Zeifmans LLP v Canada*, 2022 FCA 160 at para 10; *Vavilov* at para 94). In this case, among these documents, Parks Canada sent the TDNXDY a briefing note including an evaluation criteria, which the TDNXDY relied upon in its consideration and recommendation. Although the TDNXDY's recommendation itself is not subject to judicial review, as it has no legal or practical effect, the PCEO had to consider it and examine any shortcomings as presented and argued by the Applicant. Indeed, *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*] at paragraph 201 and *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 [*Taseko Mines*] at paragraph 45 indicate that significant deficiencies in a report on which the

decision is based may lead to its annulment. Although the reports in those decisions were required by the applicable statute whereas no recommendation by the TDNXDY is required in the context of subsection 5(1) of the *Regulations*, I see no reason why the teachings of the Federal Court of Appeal in *Tsleil-Waututh* and *Taseko Mines* should not be applied in this case. The Federal Court of Appeal's teachings are applicable in this case insofar as the PCEO indicates in its reasons that its decision is based in part on the TDNXDY recommendation, and that that recommendation contains significant flaws and deficiencies that have been brought to its attention. The deficiencies identified and argued by the Applicant in relation to the TDNXDY recommendation, and their consideration by the PCEO, may have a real impact on the reasonableness of the PCEO's decision.

[56] However, while the reviewing court may examine the "entire record," in the absence of specific reasons on an important issue, it can only "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (*Vavilov* at para 97). The reviewing court cannot in the abstract deduce from the record or from the decision maker's reasons a rationale that the decision maker did not itself give (*Mason* at paras 96–97, 101).

[57] Finally, the reviewing court must analyze the reasonableness of the decision based on the evidence and on the representations made by the parties to the decision maker. In this case, the Applicant argued in oral argument that the PCEO did not consider nor provide any reasons in relation to many of the arguments raised in its request for the review of the Superintendent's decision. The Applicant alleges that their arguments were neither considered nor weighed.

[58] Although the reviewing court may hear new arguments that were not submitted to the decision maker, it must be careful in doing so (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26). The following reasons will therefore focus primarily on the arguments presented by the Applicant to the PCEO, in order to determine whether the PCEO's Decision is reasonable in light of the evidence and arguments presented before it.

IV. Analysis

A. *The Canada National Parks Act and the Parks Canada Agency Act*

[59] Parks Canada is established by the *PCA Act*, as an agent of His Majesty the King in right of Canada [Canada], and is responsible for the administration and enforcement of the *Parks Act* and the *Regulations*.

[60] The *PCA Act* provides that the PCEO, under the direction of the Minister of the Environment, is appointed and has the control and management of Parks Canada, and all matters connected with it (*PCA Act*, subsections 10(1), 12(1)).

[61] The *PCA Act* also provides in its preamble that it is in Canada's interests, *inter alia*, "to protect the nationally significant examples of Canada's natural and cultural heritage in national parks, national historic sites, national marine conservation areas and related heritage areas in view of their special role in the lives of Canadians and the fabric of the nation" and "to

commemorate places, people and events of national historic significance, including Canada's rich and ongoing aboriginal traditions."

[62] Of particular importance in this case, section 8 of the *PCA Act* provides that Parks Canada may "enter into […] agreements […] with any person or organization in the name of Her Majesty in right of Canada or in its own name."

[63] Parks Canada is therefore responsible to administer and enforce the *Parks Act* and its regulations. The *Parks Act* recognizes Indigenous rights and provides that "nothing in this 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 section 35 of the *Constitution Act*, 1982" (*Parks Act*, subsection 2(2)).

[64] The purpose of the *Parks Act* is found at section 4, which provides at subsection 4(1) that "[t]he national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations" (*Parks Act*, subsection 4(1)).

[65] Recognizing that an area or a portion of an area within its jurisdiction may be the subject of a land claim by an Indigenous nation, subsection 4(2) of the *Parks Act* provides for the creation of "Park reserves" : "Park reserves are established in accordance with this Act for the purpose referred to in subsection (1) where an area or a portion of an area proposed for a park is

subject to a claim in respect of aboriginal rights that has been accepted for negotiation by the Government of Canada." Pursuant to subsection 6(2), once a land claim is settled, the Park reserve may be amended by removing the part of the land from the Park reserve that was subject to a settlement, recognizing title belonging to the Indigenous nation under the settlement agreement and section 35 of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*].

[66] The *Parks Act* also provides that the Minister is responsible for "the administration, management and control of Parks" (*Parks Act*, subsection 8(1)). Pursuant to section 10 of the *Parks Act*, "[t]he Minister may enter into agreements with […] local and aboriginal governments, bodies established under land claims agreements and other persons and organizations for carrying out the purposes of this Act."

[67] The Establishment Agreement is therefore an example of an agreement under section 10 of the *Parks Act*, concluded in this case between LKDFN and the Minister to establish a Park reserve under subsection 4(2) over the Thaidene Nëné Park, which is an area that is subject to unresolved claims of Aboriginal rights and title by the Akaitcho Dene First Nations, who are advancing reconciliation by negotiating a modern treaty agreement with Canada and the GNWT.

[68] The *Parks Act* also grants the Governor in Council the power to make regulations respecting, *inter alia*, "the preservation, control and management of parks," "the protection of […] cultural, historical and archaeological resources," "the issuance, amendment and termination of leases," and "the control of businesses" (*Parks Act*, paragraphs 16(1)(a), (b), (g) and (n)).

[69] Subsection 16(3) of the *Parks Act* then provides that the regulations adopted may authorize the superintendent of the park, *inter alia*, “to issue, amend, suspend and revoke permits, licences and other authorizations in relation to any matter that is the subject of regulations and to set their terms and conditions.” The superintendent of a park is appointed pursuant to the *PCA Act* and holds powers that are largely prescribed by regulation (the *Parks Act*, subsections 2(1), 16(3)).

[70] The *Regulations* govern the licensing of businesses in national parks, including park reserves. Licences are issued for a one-year period from April 1 to March 31 and expire at the end of the term, if revoked or if the business is sold. Business licences must therefore be obtained annually (*Regulations*, ss 1, 4, 10).

[71] Business licence applications are granted by the superintendent of a national park or national park preserve. In determining whether a business licence should be granted or not, the superintendent must consider subsection 5(1) of the *Regulations*, which provides as follows:

Licences	**Permis**
5 (1) In determining whether to issue a licence and under what terms and conditions, if any, the superintendent shall consider the effect of the business on	**5 (1)** Le directeur doit, pour décider s’il y a lieu de délivrer un permis et, le cas échéant, en déterminer les conditions, prendre en considération les conséquences de l’exploitation du commerce sur les éléments suivants :
(a) the natural and cultural resources of the park;	**a)** les ressources naturelles et culturelles du parc;
(b) the safety, health and enjoyment of persons visiting or residing in the park;	**b)** la sécurité, la santé et l’agrément des visiteurs et des résidents du parc;

(c) the safety and health of persons availing themselves of the goods or services offered by the business; and	**c)** la sécurité et la santé des personnes qui se prévalent des biens ou services offerts par le commerce;
(d) the preservation, control and management of the park.	**d)** la préservation, la surveillance et l’administration du parc.

[72] Pursuant to section 10.1 of the *Regulations*, a person denied a business licence may request a review of the superintendent’s decision by the PCEO of Parks Canada. If the PCEO finds that the superintendent’s decision incorrectly considered the factors set out in subsection 5(1) of the *Regulations*, the PCEO shall require that the superintendent issue the licence.

[73] However, the *Regulations* do not prescribe how the superintendent, or the PCEO in a review, must exercise their discretion, and what weight must be given to different factors set out in section 5(1) of the *Regulations* in different circumstances.

[74] In *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273 at paragraphs 27, 31–34, leave to appeal to SCC refused, 32327 (February 21, 2008) [*Moresby FCA 2007*] and *Moresby Explorers Ltd v Canada (Attorney General)*, 2006 FCA 144 at paragraphs 31, 33 [*Moresby FCA 2006*], the Federal Court of Appeal held that the licensing power under subsection 5(1) of the *Regulations* provided a broad discretion that extended to the control of businesses, including to impose conditions of licences based on racial or ethnic origin, or distinguish between different types of businesses.

[75] In this case, the Respondents argue that in deciding whether the Applicant should be issued a business licence, the Superintendent and the PCEO (on review) could rely on the

Establishment Agreement and its objective of reconciliation, under paragraph 5(1)(d) of the *Regulations*, providing that "the superintendent shall consider the effect of the business on […] (d) the preservation, control and management of the park."

[76] I agree.

[77] Reconciliation with Indigenous peoples is a fundamental constitutional principle, a process flowing from rights guaranteed by subsection 35(1) of the *Constitution Act, 1982* (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida Nation*]; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 1, 24) and is in the public interest (*Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2014 FC 197). Reconciliation has been encouraged outside of the courtrooms (*Reference Re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at paras 77, 90; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 1997 CanLII 302 (SCC); *Shot Both Sides v Canada*, 2024 SCC 12 at para 71) and includes, for example, the negotiation and settlement of claims through comprehensive land claims and self-government agreements. The establishment of Thaidene Nëné Park is a step towards reconciliation between Canada and the Akaitcho Dene First Nations.

[78] As stated above, the *PCA Act* and the *Parks Act* provide a means for reconciliation through the recognition of Aboriginal traditions as a national interest, the Minister's power to enter into agreements with Aboriginal governments and bodies established under land claims

agreements, and the creation of national park reserves for the purpose of maintaining lands subject to land claims negotiations.

[79] Paragraph 5(1)(d) of the *Regulations* enables the superintendent to consider the impact of a business licence on the "preservation, control and management of the park," that must be consistent with the agreements ratified by the Minister with an Aboriginal government and its objective of reconciliation. The Establishment Agreement is a type of agreement contemplated under section 10 of the *Parks Act*, that aims at "carrying the purposes of this Act" including to protect existing Aboriginal or treaty rights as recognized and affirmed in section 35 of the *Constitution Act, 1982* (*Parks Act*, subsection 2(2); *Moresby FCA 2006* at para 3).

[80] Indeed, as provided under subsection 4(2), a national park reserve is established in an area that is subject to unresolved claims of Aboriginal rights and title that Canada has accepted for negotiation (*Parks Act*, subsection 4(2)). Section 35 of the *Constitution Act, 1982* provides a framework that is intended to facilitate agreements like the Establishment Agreement (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 118; *Haida Nation* at para 14).

[81] Consequently, the Superintendent and the PCEO (on review) are empowered to consider the issue of reconciliation in deciding whether to issue a business licence and to do so, the Establishment Agreement is a factor to be considered under paragraph 5(1)(d) "preservation, control and management of the park" under the *Regulations*.

[82] An interpretation suggesting that the consideration of the Establishment Agreement is valid under paragraph 5(1)(d) of the *Regulations* is consistent with the FCA's decision in *Moresby FCA 2007* at paragraphs 10–11, 27, 36 (see also *Moresby FCA 2006* at paras 3, 31, 33; *Moresby Explorers Ltd v Canada (Attorney General)*, 2005 FC 592 at para 20), where the Court held that paragraph 5(1)(d) of the *Regulations* was sufficiently broad to authorize a distinction between classes of business, including one drawn on the basis of the racial or ethnic origin of the business owners. That interpretation is also supported by this Court's decision in *Peter G White Management Ltd v Canada (Minister of Canadian Heritage)*, 132 FTR 89 at paragraphs 4, 11, 16, 37, 39–41, 1997 CanLII 22722 (FC) [*Peter G White*], where the Court held that a superintendent could deny the issuance of a licence where an increase in activity could have a detrimental environmental impact and would be contrary to a long-term environmental policy plan adopted for the area.

[83] However, while reconciliation is a relevant ground under paragraph 5(1)(d) of the *Regulations*, a finding that reconciliation requires the denial of a business licence must rest on an appropriate consideration of the evidence and the submissions of the parties, including the applicant's business licence application package and the First Nation's opinion regarding the objective of reconciliation. Parks Canada's reasons must demonstrate, on the basis of evidence, why such refusal is necessary to achieve that purpose.

B. *The process followed by Parks Canada was in breach of procedural fairness*

[84] Minimal procedural fairness is owed when an applicant applies for a business licence under the *Parks Act* (*Peter G White* at para 40). At minimum, an applicant has the right to be

provided with the criteria that will be applied to the decision, and be able to adequately make its case (*Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653, 1990 CanLII 138 (SCC); *Confederation Broadcasting (Ottawa) Ltd v Canadian Radio-Television Commission*, [1971] 1 SCR 906 at 925, 1971 CanLII 141 (SCC); *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 181–182, 1994 CanLII 113 (SCC); *Lill v Canada (Attorney General)*, 2020 FC 551 at para 72).

[85] In this case, the process followed by Parks Canada breached the Applicant's right to procedural fairness.

[86] First, the PCEO's duty, under subsection 10(2) of the *Regulations*, is to determine if the Superintendent's decision to deny the Applicant's proposed business licence was "incorrect." In doing so, the PCEO had to be in possession of the materials on which the Superintendent based its earlier decision. Otherwise, the PCEO is incapable of assessing and holistically determine the basis of the Superintendent's decision, and its "correctness." In the PCEO's reasons, it is noted that it reviewed the Applicant's submissions carefully, "as well as all the supporting documentation that informed the Superintendent's deliberations." At the hearing, Parks Canada conceded that this statement was an error.

[87] Indeed, it appears that the PCEO was not in possession of the Applicant's business licence application package, which had been revised following Parks Canada's review, and included proposed terms and conditions that were supported by LKDFN and in their view

"compatible with the [Park] [A]greements and regulations." Therefore, the Applicant was never able to make its case to the PCEO.

[88] The Certified Tribunal Record demonstrates that while the Applicant did enclose its business licence application package along with its arguments to the PCEO, the business licence application package did not make its way to the PCEO along with the other material sent by Parks Canada to the PCEO for analysis.

[89] At the hearing, there was a debate as to whether the business licence application package was included as an enclosure in the Applicant's letter to the PCEO seeking a review of the Superintendent's decision. While it is possible that the Applicant inadvertently omitted to include its business licence application package as an enclosure in its letter (even if the application package is noted as an enclosure in the Applicant's letter to the PCEO), Parks Canada ought to have sent the business licence application package along with the other materials that were reviewed by the Superintendent to the PCEO for review.

[90] It is important to note that there is no guideline provided by Parks Canada to explain the PCEO review process under section 10 of the *Regulations*. The Applicant asked questions to Parks Canada as to how the review process functioned, and what to include in its request. Parks Canada did not provide any substantive information as to how to proceed (Uunila Affidavit at Exhibit Y, Applicant's Record, at p 1787). To be clear, the lack of information provided by Parks Canada on the review process is not in itself problematic.

[91] However, in applying subsection 5(1) of the *Regulations* and ruling that the proposed business license ought not to be granted, including because of the objective of reconciliation, the Superintendent made its decision on the basis of specific information that included the Applicant's business licence application package and the TDNXDY reasons for the recommendation. Regardless of the Applicant's arguments for review to the PCEO, and whether the Applicant enclosed its business licence application package in the letter or not, it was incumbent on Parks Canada to provide the PCEO with all the material or information on which the Superintendent relied upon to make its decision. That package ought to have included, at the very least, the Applicant's arguments, the business licence application package, the TDNXDY recommendation, and the briefing note that was sent by Parks Canada to the TDNXDY for review and recommendation (Uunila Affidavit at Exhibit V, Applicant's Record, at p 1740).

[92] While it is possible that the briefing note and the criteria that had to be applied by the TDNXDY was not sent to the Superintendent for consideration, the briefing note is an important element in Parks Canada's process. The Superintendent ought to have been in possession of the briefing note, in order to be able to properly evaluate the TDNXDY's recommendation, and what weight it could apply to that recommendation. As discussed below, the TDNXDY made factual errors in its consideration, and based its recommendation on factors that were not included in the briefing note. The Superintendent and the PCEO therefore ought to have been in possession of that briefing note in its evaluation process.

[93] The fact that the PCEO was not in the possession of the Applicant's business licence application package precluded the PCEO from being in the position to properly assess the

proposed business licence and to determine if the Superintendent's decision to deny the business licence was "incorrect," as required under section 10 of the *Regulations*.

[94] For this reason alone, the PCEO's Decision must be set aside.

[95] Second, the Applicant argues that because it did not have the Establishment Agreement, it could not tailor its business licence application package to be responsive to the Establishment Agreement and its criteria, resulting in a breach of procedural fairness. Parks Canada responded in oral argument that the failure to disclose the Establishment Agreement did not result in any consequence for the Applicant because the business licence application form included, through its questions for the purposes of the evaluation, the same criteria found in the Establishment Agreement.

[96] I agree with Parks Canada.

[97] In my view, the business application form did include specific questions regarding the Applicant's project, including to "describe what economic benefits (employment, procurement, etc.) […] your operations may offer to local Indigenous communities" and that these questions were responsive to the Establishment Agreement; and the Applicant properly answered them.

[98] Indeed, the Superintendent and the PCEO accepted the Applicant's submissions that it had the necessary experience, interest and capacity to uphold the vision of the parties for the Kaché area (including the proposed economic benefits to the Akaitcho Dene First Nations). The

Superintendent and PCEO's decisions do not rest on any issue related to the Establishment Agreement. There is therefore no breach of procedural fairness.

[99] As discussed below, the TDNXDY recommended that the business licence not be issued because the Applicant, *inter alia*, did not meet the Establishment Agreement's objective (presumably under clause 3.7.1) to facilitate the building of an Indigenous-led conservation economy that can promote and support Indigenous-owned tourism businesses. That recommendation was based on an unreasonable assessment of the facts as presented by the Applicant in the business application package, and on the basis of irrelevant factors. The TDNXDY's misunderstanding of the evaluation criteria and unreasonable assessments of the facts do not give rise to a breach of procedural fairness; they make the TDNXDY's recommendation potentially unreliable.

[100] The application form contained sufficient details to allow the Applicant to meet its case, and there was no breach of procedural fairness from Parks Canada's failure to disclose the Establishment Agreement. While the TDNXDY disagreed with the Applicant, that assessment was not accepted by the Superintendent and the PCEO, who both determined that the business licence should not be granted, but for reasons that were not related to the content of the Establishment Agreement.

[101] In light of my determination that the Applicant's right to procedural fairness was breached because the PCEO was not in the possession of the Applicant's business licence application package, it is not necessary to address the other issues raised in relation to procedural

fairness, such as whether Parks Canada raised a legitimate expectation that it would trigger the Issue Resolution Process under the Establishment Agreement. Whether a legitimate expectation arose in this case is now irrelevant, and may not occur when Parks Canada analyzes the next request for a business licence from the Applicant.

[102] The following comments address some of the parties' arguments and may be relevant in any future determination on a new application for a business licence.

[103] First, Parks Canada did not breach the Applicant's right to procedural fairness in failing to follow the "Review process for Thaidene [Nënë] National Park Reserve business licenses" (Moore Affidavit 2 at Exhibit O, Applicant's Record, at p 331, also referred to as being the "diagram"). In my view, because Parks Canada does not control the TDNXDY procedure, it could not provide the Applicant with an opportunity to be heard. As explained by Parks Canada at the hearing, the Review process demonstrates that Parks Canada undertakes to review the application package and make recommendations. As stated in the "diagram," if concerns are identified, the issues may be addressed by Parks Canada with the Applicant. In this case, Parks Canada reviewed the business licence application package and addressed concerns before the application was considered by the TDNXDY. Because the TDNXDY's concerns with the application as explained in its reasons could not be resolved in the circumstances, there was no additional duty on Parks Canada to communicate with the Applicant to "address significant concerns and finding solutions."

[104] Moreover, I agree with Parks Canada that it was unnecessary in the circumstances to refer the application to the MacKenzie Valley Land and Water Board. Section 124 of the *MacKenzie Valley Resource Management Act*, SC 1998, c 25 requires, as submitted by the Applicant, that a regulatory authority notify the board of an application, and that a preliminary screening be conducted. In my view, that notification is not required when the application is moot because the regulatory authority has exercised its discretion not to grant the application in any event. The *MacKenzie Valley Resource Management Act* certainly does not require an assessment by the board when the application will not go forward because no licence will be issued under the *Regulations*.

C. *The TDNXDY' recommendation is unreasonable*

[105] The TDNXDY's recommendation is not subject to this judicial review. However, it is an important part of the context of the impugned PCEO decision. The PCEO and the Superintendent justified their decisions on the basis of the TDNXDY's recommendation, in part, that the objective of reconciliation required that the business licence be denied. To the extent that the TDNXDY's recommendation was unreasonable, the reliance by the PCEO (and Superintendent) on the recommendation could result in the PCEO's decision also being unreasonable (*Tsleil-Waututh* at para 201; *Taseko Mines* at para 45).

[106] The TDNXDY recommendation was based on the Applicant's business licence application package submitted, as well as the briefing note prepared by Parks Canada, which included the criteria that the TDNXDY had to apply in making its recommendation (Uunila Affidavit at Exhibit V, Applicant's Record, at p 1740). The licensing process set out in the

Establishment Agreement requires the TDNXDY to consider and make a recommendation to Parks Canada. In doing so, the TDNXDY has to consider the business licence application package in good faith and analyze the proposed business licence in an objective, independent and individualized manner.

[107] As discussed above, Parks Canada provided the TDNXDY with a briefing note including criteria that the TDNXDY had to apply in its evaluation process. It explained that LKDFN and Parks Canada were proposing specific terms and conditions to the business licence and that those proposed terms and conditions were in their view "compatible with the [Park] [A]greements and regulations." In other words, both Canada and LKDFN <u>supported</u> the issuance of the licence.

[108] The briefing note then set out what the TDNXDY had to consider, including subsection 5(1) of the *Regulations* and "[f]actors from the [P]ark [A]greements to consider that correlate to section 5(1) of the regulations" including ecological integrity, cultural continuity, heritage resources and economic opportunities for Indigenous members (Uunila Affidavit at Exhibit V, Applicant's Record, at p 1741). The briefing note also included for reference at Appendix 2 specific clauses from the Establishment Agreement on which the TDNXDY could rely, most notably clause 3.7.1, setting out that "The Parties will develop and implement policies and procedures for procuring goods and services and allocating Business Licenses that maximize Łutsël K'é Denesǫłine participation in economic opportunities relating to Thaidene Nëné" (Uunila Affidavit at Exhibit V, Applicant's Record, at p 1770).

[109] I have no doubt that the TDNXDY acted in good faith.

[110] However, on a plain reading of the TDNXDY reasons, it is clear that the TDNXDY did not provide an individualized and objective assessment of the Applicant's business licence application package, which the Applicant was entitled to. The TDNXDY's recommendation is therefore unreasonable for three main reasons: (a) the reasons contain numerous factual errors; (b) the TDNXDY considered irrelevant factors; and (c) the TDNXDY does not recommend the closure of Trophy Lodge because of its historical RCMP presence.

(1) The reasons contain numerous factual errors

[111] The TDNXDY opined that the Applicant "may not have the interest or the capacity to uphold the vision [of] the parties" and that the issuance of a business licence would not meet the objectives towards "facilitating the building of an Indigenous-led conservation economy that can promote and support Indigenous-owned tourism businesses and other ancillary economic development opportunities for the Indigenous people of the area" (Certified Tribunal Record, Applicant's Record, at pp2233–2234).

[112] These factual findings are not consistent with the proposed business licence application package submitted by the Applicant. In other words, the TDNXDY's reasons demonstrate a lack of internal logic in the reasoning process, because the justification given does not comply with the factual and legal constraints affecting the decision. The TDNXDY did not demonstrate being "aware" of the essential factual elements, "sensitive to the issue before [it]" and did not "meaningfully address the key issues or main arguments put forward by the [Applicant]" (*Mason* at paras 64, 69, 74; *Vavilov* at paras 120, 128).

[113] In its application package, and as stated above, the Applicant clearly noted that :

a) the owners had extensive business experience, including in the sport fishing industry;

b) the owners "will work with local Indigenous communities across the NWT and allow their art, crafts and jewelry to be sold the way that most benefits to them";

c) the owners "are aware that the people of the Łutsël K'é Dene First Nation still hunt, fish and regularly conduct important cultural activities in the area of our operation. We are aware that there are very sensitive areas that are very close to Trophy Lodge. During the first 2 weeks of August, we will not go to the area of Tsakui Theda (Parry Falls) at any time as it is a sacred area for the people of Łutsël K'é. […] We have been in contact with Łutsël K'é about the lodge and will continue to regularly be in contact and work with their people to make sure we are not interfering with their way of life in the area of the lodge";

d) one of the owners as well as an employee are Indigenous persons;

e) there would be important economic benefits for the Akaitcho Dene First Nations because they will have priority in employment, procurement, contracts, including for potential cultural tours that would be offered through LKDFN cultural tourism operators; and

f) important environmental improvements intended to be made at the lodge, notably solar power and phasing out of diesel fuel.

[114] The TDNXDY did not engage with any of those submissions that appear to contradict its findings of fact. As the SCC held in *Vavilov* at paragraphs 94, 96, 99, 106 and 125–128, a decision may be unreasonable where the decision maker fails to consider, or fails to explain why it dismissed the evidence and the submissions of the parties. Such shortcomings reveal fundamental gaps that demonstrate an unreasonable chain of analysis, that the recommendation does not bear the hallmarks of reasonableness (justification, transparency and intelligibility), and that the recommendation is not justified in relation to the relevant factual and legal constraints that bear on the decision.

[115] Specifically, the TDNXDY's conclusion that the Applicants did not "have the interest of the capacity to uphold the vision" nor facilitate "the building of an Indigenous-led conservation economy" is contradicted by the Applicant's proposal that it will (a) make substantive investments that would benefit the environment; (b) prioritize employees, procurement and contracts for the Akaitcho Dene First Nations; (c) close the area of Tsakui Theda (Parry Falls) during the first two weeks of August for sacred use of the people of Łutsël K'é; and (d) propose cultural tours offered through local tourism operators. The TDNXDY's reasons do not engage with any of this evidence and do not explain why the information provided by the Applicant cannot satisfy it that the business licence should be issued. The Court is left to wonder about what else the TDNXDY could have requested for it to recommend that the proposed business licence be granted. The TDNXDY certainly did not explain why the proposed terms and conditions, endorsed by both Parks Canada and LKDFN, were insufficient, and undermined reconciliation. The TDNXDY's recommendation is therefore unreasonable.

[116] While the Superintendent and PCEO did not rely on those specific conclusions concerning the Applicant's alleged lack of "interest" or "capacity," and in fact overturned them, those considerations remained the opinion of the TDNXDY and supported its conclusion, which was ultimately accepted by the Superintendent and the PCEO, that the proposed business licence had to be denied to support the objective of reconciliation. However, had the TDNXDY properly considered the Applicant's proposed business licence application package, and properly considered its submissions on its "interest," "capacity" and the proposed economic benefits, the TDNXDY could have changed its opinion regarding the objective of reconciliation.

(2) The TDNXDY considered irrelevant factors

[117] The TDNXDY opined that the business licence should be denied because :

a) "the long-term impact that the indeterminate nature of Trophy lease (and by extension the right to apply for a license to carry out business activities) will have in undermining the Agreement objectives in the Kaché area";

b) "Parks Canada should have acquired the lease and assets of Trophy Lodge during the establishment process and worked with the other parties to the Agreements to establish joint control and management of this strategic and important ecological and cultural area within Thaidene Nëné, such that the vision for the Kaché area can be realized";

c) "There is also a very serious problem with the leasehold interest associated with Trophy Lodge that has a history of colonial occupation associated with it, and that may continue to place barriers in front of the parties with respect to the vision for the Kaché area. The TDNXDY has written to the parties negotiating modern treaties and self-government agreements in the region about the way in which this Territorial lease, and other leases, were transferred to the PCA by the Government of the Northwest Territories (GNWT)"; and

d) "When Thaidene Nëné was established in 2019, a land transfer agreement between the GNWT and PCA was signed. Within that agreement there were provisions to ensure that the existing GNWT leases would transfer to the PCA, however, this commercial lease was transferred in a form that granted the lessee with an indeterminate right of land occupancy. LKDFN was not notified of these changes. In the opinion of the TDNXDY, the GNWT's actions to change the term of this commercial lease before its transfer to Parks Canada is a continuation of bad faith actions on behalf of the Crown in the Kaché area.";

(Certified Tribunal Record, Applicant's Record, at p 2234)

[118] These factors were not included in the briefing note and criteria provided by Parks Canada to the TDNXDY for its evaluation. The consideration of irrelevant factors such as these can result in an administrative decision being set aside (*Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at para 41 [Yatar]). While implicitly cloaked in terms of "control and management of the park," seemingly consistent with subsection 5(1) of the *Regulations*, the reasons of the TDNXDY rather demonstrate that it recommended the refusal of the Applicant's business

licence because of its grievances with Canada and the GNWT. These grievances have nothing to do with the Applicant. The TDNXDY's consideration of the proposed business licence application was tainted by concerns with the GNWT's transfer of the Lease over Trophy Lodge to Parks Canada and the leaseholder's indeterminate right of land occupancy, as expressed throughout its reasons for the decision. The TDNXDY also opines that Parks Canada should have acquired Trophy Lodge's assets and "establish joint control and management of this strategic and important ecological and cultural area within Thaidene Nëné" (Certified Tribunal Record, Applicant's Record, at p 2234).

[119] Not only were those factors neither relevant nor indicated in the briefing note and criteria for the evaluation of a business licence, but these grievances are not the subject of any obligation in the Establishment Agreement. Moreover, under subsections 41.5(7) to (9) of the *Parks Act*, existing leases in Thaidene Nëné Park were continued in accordance with the GNWT-Canada Land Transfer Agreement and those leases could be renewed in accordance with their terms and conditions. As argued by Parks Canada in oral argument, the Lease over Trophy Lodge was a proprietary asset, and the assignment of the Lease to the Applicant was not a "decision" over which Parks Canada had any discretion to refuse.

[120] Reconciliation is a relevant factor to be analyzed, and may be relied upon under subsection 5(1) of the *Regulations*. However, the conclusion that reconciliation requires a specific action such as the denial of a licence must be justified by, and be consistent with, the factual and legal constraints of the situation. In this case, the TDNXDY's reasons recommending the denial of the business licence was not responsive to the legal issues and evidence presented.

[121] The TDNXDY justified its recommendation by raising grievances with Parks Canada that could not be addressed within the regulatory framework within which the business licence was requested. In these circumstances, the TDNXDY's reasons for recommendation to "acquire the lease and assets" do not neatly fit within paragraph 5(1)(d) of the *Regulations* for "control and management of the park" because it requires an intervention by Parks Canada that is not contemplated by the *Parks Act*, the *Regulations*, or the Establishment Agreement.

[122] If the TDNXDY had opined that Trophy Lodge had to be closed, or additional terms and conditions had to be imposed, to preserve the Thaidene Nëné Park and particularly the sacred sites close to Trophy Lodge, from an environmental or cultural perspective, these factors might have been valid under subsection 5(1). The reasons offered by the TDNXDY as to why "control and management of the park" (under subsection 5(1) of the *Regulations*) required the denial of the business licence because Parks Canada should have "acquired the lease and assets" are inconsistent with other requirements under the *Parks Act* as noted above in subsections 41.5(7) to (9), as well as the object of the *Parks Act* found at subsection 4(1) that "[t]he national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, […] and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations."

[123] Consequently, while the TDNXDY's opinion and grievances are relevant to the objective of reconciliation as a whole, the grievances identified by the TDNXDY were not relevant in this specific process. Rather, as noted in the TDNXDY's reasons for recommendation, these

particular grievances may be addressed in another forum – the negotiation of modern treaties and self-government agreements.

[124] If TDNXDY had not evaluated the proposed business licence through the lens of its grievances with Parks Canada and the GNWT, perhaps it would have agreed with Parks Canada and LKDFN that the proposed terms and conditions of the business licence were "compatible with the [Park] [A]greements and the regulations" and therefore recommendable.

[125] As the TDNXDY failed to analyze the proposed business licence in an objective and individualized manner, and considered factors that it ought not to have considered, its recommendation to the Superintendent was unreasonable (*Yatar* at para 41).

(3) The TDNXDY does not recommend the closure of Trophy Lodge because of its historical RCMP presence

[126] The TDNXDY reasons state that Trophy Lodge is a former RCMP ground and has a history of colonial occupation associated with it, which was the source of almost a century of bad faith actions between Canada and the Indigenous people in the surrounding area. The TDNXDY opined that the presence of the RCMP at the site was the beginning of the dispossession of the Łutsël K'é Denesǫłine members allowing Canada to assimilate them by criminalizing the practice of traditional subsistence activities (Certified Tribunal Record, Applicant's Record, at p 2234).

[127] This element of the TDNXDY's recommendation is relevant. As stated above, the objective of reconciliation is relevant and found both in the Establishment Agreement and in the *Parks Act* and *Regulations*.

[128] However, the TDNXDY's reasons to recommend the refusal of the proposed business licence is not related to the RCMP's former presence. If the TDNXDY had opined that the closure of Trophy Lodge was required for reconciliation purposes because of the historical events that occurred at the site, the TDNXDY's recommendation might have been valid on this ground, subject to the evidence adduced and relied upon to make that conclusion. However, the TDNXDY opined to the contrary. In its view, Trophy Lodge should remain open because it is a strategic area for tourists who will either stay at Trophy Lodge, or at another lodge "to enjoy land-based and cultural activities showcasing the Denesǫłine Way of Life." TDNXDY does not identify any issue with the proposed business licence and its terms and conditions regarding any potential adverse impact on the Thaidene Nëné Park and its sacred sites, from an environmental or cultural perspective, or because it is a former site of an RCMP detachment.

[129] Instead, the TDNXDY recommends the refusal of the business licence on the factors noted above, notably that Parks Canada should have "acquired the lease and assets" and worked with the Akaitcho Dene First Nations to establish joint control and management of Trophy Lodge, in order to "facilitate[e] the building of an Indigenous-led conservation economy that can promote and support Indigenous-owned tourism businesses and other ancillary economic development opportunities for the Indigenous people of the area" (Certified Tribunal Record, Applicant's Record, at pp 2233–2234).

[130] Unfortunately, as stated above, this grievance against Parks Canada was outside of Parks Canada's powers in this context, and irrelevant to the TDNXDY's consideration in the licensing recommendation process.

[131] More specifically, the reasons of the TDNXDY do not indicate that the resentment felt by the local Indigenous nations in relation to Trophy Lodge being a former RCMP site required its closure, since the LKDFN supported the issuance of the business licence. Indeed, the TDNXDY did not explain why the opinion of its members on the objective of reconciliation should prevail over those articulated by LKDFN, and its elected leaders, in this process.

(4) Conclusion

[132] To be clear, reconciliation is a relevant factor to be considered in the licensing process. However, the TDNXDY's recommendation that the issuance of a business licence would have an impact on reconciliation must be based on relevant criteria and evidence. If, for the purposes of reconciliation, the TDNXDY had suggested that the Trophy Lodge site should no longer operate, as it brings sentiments of resentment to the Akaitcho Dene First Nations, that reasoning could have been sustained, if the evidence demonstrated it. Likewise, if the granting of a business licence had resulted in a negative impact to the Thaidene Nëné Park and its sacred site, from an environmental or cultural perspective, those factors could also have been justified under subsection 5(1) of the *Regulations* and the Establishment Agreement.

[133] However, the TDNXDY does not rely on these relevant factors. Instead, it confirms that Trophy Lodge is a strategic area that should continue to operate and does not identify any issue

with the Applicant's proposed business licence and terms and conditions – except that it is not Indigenous-led or Indigenous-owned. The TDNXDY does not consider that the business licence application will bring economic benefits to the Akaitcho Dene First Nations, and that significant investments are proposed to protect the environment.

[134] The TDNXDY's opinion that the Applicant is not Indigenous-owned is also contrary to the evidence. Moreover, clause 3.7.1 of the Establishment Agreement, on which the TDNXDY's opinion appears to rest, does not require that licences be limited to Indigenous-owned groups, nor does it require a percentage of Indigenous ownership. Rather, it aims at "maximiz[ing] Łutsël K'é Denesǫłine participation in economic opportunities relating to Thaidene Nëné."

[135] In this regard, the Applicant's proposed business license provides that employment, procurement and contracting will be offered to the Akaitcho Dene First Nations in priority. The proposed business licence application package also indicates that it is partly Indigenous-owned. Had it properly considered the evidence, the TDNXDY could have concluded that indeed, Trophy Lodge was partly owned by an Indigenous person, and that the proposed business licence did bring economic benefits to the Akaitcho Dene First Nations. The TDNXDY's reasons provide no consideration of these facts nor why they had no impact on its recommendation. The TDNXDY also does not explain why reconciliation could not be fostered even if the business licence was granted to the Applicant, perhaps through additional terms and conditions. The TDNXDY failed to rely on any of the evidence and failed to mention and explain why the proposed business licence application was insufficient to meet its objectives.

[136] Consequently, the TDNXDY's reasons for recommendation do not demonstrate that it meaningfully grappled with the key issues, evidence and central arguments of the Applicant (and LKDFN's support for the business licence) (*Vavilov* at para 128). Rather, it applied its own factors and opinions that were outside the criteria provided by Parks Canada in the TDNXDY's licence review process, and outside the factors found in the Establishment Agreement, the *Parks Act* and the *Regulations*.

[137] As a result, the PCEO (and the Superintendent) could not rely, nor adduce any probative weight, to the TDNXDY's recommendation in the circumstances.

[138] Finally, at the hearing, LKDFN invited the Court not to conclude from the TDNXDY reasons that for it to approve the issuance of a business licence to Trophy Lodge, the TDNXDY required an Indigenous-led proponent. The Court agrees. The TDNXDY did not specifically state that it required an Indigenous-owned proponent. As stated above, the Establishment Agreement does not require an Indigenous-led or an Indigenous-owned proponent. A decision of the TDNXDY relying solely on this ground, and acceptance by the Superintendent and PCEO, could be unreasonable. The evidence in this case also demonstrates that the TDNXDY has recommended the granting of other licences in the Thaidene Nënë Park. While there is no evidence that any of these licenses were granted to proponents that were not Indigenous-led or owned, there is certainly no evidence that the TDNXDY discriminates against non-Indigenous-led or owned proponents.

[139] The TDNXDY's reasons demonstrate that it failed to properly assess the evidence and consider the Applicant's proposed business licence application. The Applicant did state that one of the owners was Indigenous, and included a commitment to prioritize the Akaitcho Dene First Nations in employment, procurement and contracts, thereby maximizing their economic opportunities in Thaidene Nëné Park. The TDNXDY did not discuss this evidence, nor explain why in its view, those were insufficient to satisfy it that the proposed business licence met the requirement of subsection 5(1) of the *Regulations* and the Establishment Agreement. Indeed, the TDNXDY did not assess the proposed licence against the criteria proposed by Parks Canada in the briefing note. The TDNXDY made no comment on subsection 5(1) of the *Regulations* or why, from a technical standpoint, the proposed license did not comply with the Establishment Agreement.

[140] It is important at this point to note that the members of the TDNXDY are appointed by the parties, including the LKDFN and NWTMN. However, in exercising their duties, the members must maintain an independent and impartial perspective on all matters and <u>are not</u> representative of their respective Indigenous nations on the TDNXDY (Establishment Agreement, clause 4.3.8, Uunila Affidavit at Exhibit J, Applicant's Record, at p 1595; Catholique Affidavit at Exhibit A, Applicant's Record, at p 1358; Uunila Affidavit, Applicant's Record, at paras 31–37, at p 1431; Certified Tribunal Record, Applicant's Record, at p 2266, see also clause 4.3.8 at p 2285; Moore Affidavit 1 at Exhibit J, Applicant's Record, at p 318).

[141] The TDNXDY is therefore a body constituted of non-elected members, that do not speak on behalf of the Indigenous nations, but only "for Thaidene Nëné" – indeed, TDNXDY means

"the people that speak for Thaidene Nëné." Consequently, while the members of the TDNXDY may believe that the objective of reconciliation requires the denial of the business licence, that opinion cannot be attributed to the Akaitcho Dene First Nations. The TDNXDY may only speak on behalf of the Thaidene Nëné Park and its purposes are discussed at clause 4.3.9 of the Establishment Agreement. Those purposes include: (a) park protected area management; (b) Indigenous land use, knowledge and cultural interpretation; (c) sustainable tourism and visitor protection; (d) environmental planning and protection; (e) knowledge and experience of the Indigenous communities; and (f) knowledge of the area, lands and environment of Thaidene Nëné (Establishment Agreement, clauses 4.3.8 and 4.3.9, Uunila Affidavit at Exhibit J, Applicant's Record, at p 1595; Uunila Affidavit, Applicant's Record, at paras 31, 35, pp 1430–1435; Moore Affidavit 1 at Exhibit J, Applicant's Record, at p 318).

[142] Notably, the TDNXDY is not solely tasked with determining whether the issuance of a licence will have an impact on reconciliation, an issue that is shared with the First Nations as a whole, represented by elected officials. The TDNXDY's role is also different from the Regional Management Board, also established under the Park Agreements, but whose members <u>do represent their appointing party</u>, and whose purposes include providing recommendations on "research and monitoring, <u>business licensing</u>, including <u>tourism operator licensing</u> in [Thaidene Nëné]" (Establishment Agreement, Appendix M, clauses 2.2(f) and 3.1, Uunila Affidavit at Exhibit J, Applicant's Record, pp 1628–1629; Uunila Affidavit, Applicant's Record, at para 35, at p 1431).

[143] This being said, to the extent that the TDNXDY may opine on reconciliation (and it may do so in the context of its purposes discussed above), the TDNXDY did not explain why its view that reconciliation required the denial of the business licence was more accurate, and sufficient, to override the views of LKDFN whose elected Council supported the licence application (Transcript of Uunila Cross-Examination on Affidavit, at questions 48, 50, Applicant's Record, at pp 1894–1895). In other words, the TDNXDY did not provide any reasons on why it disagreed with the LKDFN's view that the proposed terms and conditions were "compatible with the [Park] [A]greements and regulations" (also supported by Parks Canada), and why these terms and conditions were insufficient to mitigate its concerns on the objective of reconciliation. Likewise, the TDNXDY did not explain why the objective of reconciliation could not be met with additional terms and conditions to meet its concerns, especially because in its view, Trophy Lodge is a strategic site that must remain open and that does not affect the environment or sacred sites. It was incumbent on the TDNXDY to provide reasons on these issues and the failure to do so renders that recommendation unreasonable.

D. *The Superintendent's decision*

[144] Under the *Regulations*, and notwithstanding the Establishment Agreement and the TDNXDY recommendation, the Superintendent has the power to grant a business licence. In doing so, the Superintendent has to consider the terms set out in subsection 5(1) of the *Regulations*, but can also rely on the TDNXDY's recommendation. As stated above, and as argued by the parties, the Superintendent is not bound by the TDNXDY's recommendation. If the Superintendent merely ratified the recommendation of the TDNXDY, without considering or drawing upon the other elements of section 5 of the *Regulations*, the Superintendent could be

fettering its discretion, even if it has a broad discretion (*Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 at para 93; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 28, 60).

[145] In this case, after reviewing the TDNXDY's recommendation, the Superintendent denied the Applicant's request for a business licence.

[146] The Superintendent reviewed the Applicant's business licence application package and noted, contrarily to the TDNXDY's reasons, that the proposed business licence would provide clients with an opportunity to connect with the natural environment, outlined a number of proposed improvements to infrastructure and operations for the safety of guests and environmental protection of the site, and supported the economy to local Indigenous communities (Certified Tribunal Record, Applicant's Record, at p 2237).

[147] However, the Superintendent denied the business licence for two key reasons :

> a) the Kaché area, where Trophy Lodge is located, is highly culturally sensitive. Management planning, zoning, and policy development for this area have yet to occur. Given the uncertainty of this area's future regarding visitor use, tourism and business operations, we are not able to issue a licence in good faith while undertaking a collaborative management planning process with Indigenous government partners (paragraphs 5(1)(a) and (d) [of the Regulations]).
>
> b) the spirit and intent of the Thaidene Nëné agreements is to support shared management of the park. The TDNXDY and two nations have indicated they do not support the issuance of the licence. Reconciliation and relationships with Indigenous partners are paramount (paragraph 5(1)(d) [of the Regulations])
>
> (Certified Tribunal Record, Applicant's Record, at pp 2237–2238).

[148] Notably, the Superintendent failed to analyze the validity of the TDNXDY's opposition to the issuance of the business licence, and determine whether or not it could rely on its opinion regarding the objective of reconciliation. As stated above, the TDNXDY's recommendation contained factual errors (that the Superintendent recognized and correctly refused to follow), but also rejected the business licence on the basis of factors that were not part of Parks Canada's criteria submitted to the TDNXDY in the briefing note.

[149] On the first reason, the Superintendent reasoned that Trophy Lodge was located in a highly culturally sensitive area. The Superintendent did not note why the proposed business licence, including its proposed terms and conditions that were supported by the LKDFN, would have a detrimental impact on the Thaidene Nëné Park and its sacred sites. Indeed, the TDNXDY does not oppose the operation of Trophy Lodge, and does not mention that any operation will have a detrimental impact in the Kaché area from an environmental or a cultural perspective.

[150] The Superintendent's conclusion that there is "uncertainty of this area's future regarding visitor use, tourism and business operations […]" is not supported by the TDNXDY's reasons which, to the contrary, state that the Kaché area is "a strategic area for tourists who will be visiting Thaidene Nëné, who […] will use the lodge as a staging area to access the barrens, or both. This location is critical and strategic for the long-term viability of a conservation economy in Thaidene Nëné" (Certified Tribunal Record, Applicant's Record, at p 2233). The Superintendent did not provide any reasons or any basis for its conclusion that there is "uncertainty" on visitor use in the Kaché area, thereby justifying the denial of the licence. Closure of the Kaché area, and especially Trophy Lodge, was never contemplated by the

TDNXDY in this case, nor by the LKDFN that supported the Applicant’s business licence application.

[151] The TDNXDY also did not recommend the denial of the business licence on the basis that a management planning, zoning and policy development had not been completed. The TDNXDY did not provide any recommendation in this regard. In fact, the TDNXDY has recommended the issuance of other licences in the same time period, including a new guide-outfitter licence, despite the absence of a joint management plan, and the Superintendent approved the new licence with conditions (Uunila Affidavit at Exhibit Z, Applicant’s Record, at pp 1790–1796). The Superintendent’s reliance on the lack of collaborative management planning did not result in other applications also being denied. Rather, it appears that the TDNXDY’s view of “control and management of the park” (or management planning), in this case only (as opposed to other applications), means that Parks Canada ought to have acquired the lease and assets of Trophy Lodge and worked with the Akaitcho Dene First Nations to establish joint control and management of Trophy Lodge, which is not contemplated by the *Parks Act*. Unfortunately, the *Parks Act* required the continuation of the leases and Parks Canada did not unilaterally have the discretion to achieve the TDNXDY’s objectives.

[152] As for the second reason, the Superintendent denied the proposed business licence on the ground of reconciliation and relationship with Indigenous partners, stating that “two nations have indicated they do not <u>support the issuance of the licence</u>” [emphasis added] (Certified Tribunal Record, Applicant’s Record, at p 2238). On this issue, the Superintendent failed to distinguish

between the LKDFN's decision to "respect" the TDNXDY's recommendation and not trigger the Issue Resolution Process, with the LKDFN's support of the business licence application.

[153] Indeed, it is erroneous to suggest that two Nations did not support the issuance of the licence. The fact that Parks Canada, LKDFN and NWTMN "respected" the TDNXDY's recommendation and did not trigger the Issue Resolution Process does not mean that they endorsed its reasons. Indeed, the only evidence on record is that LKDFN and NWTMN would "respect" the TDNXDY decision (Uunila Affidavit, Applicant's Record, at paras 83–84, at p 1441). Neither LKDFN nor NWTMN indicated that they "agreed with" or even "supported" the TDNXDY's reasons. It is possible for LKDFN and Parks Canada to support the business licence application, while also "respect" the TDNXDY's recommendation, including the Establishment Agreement's Issue Resolution Process. However, the parties' decision not to trigger the Issue Resolution Process does not equate to an opposition to the issuance of the business licence, nor an endorsement of the TDNXDY's reasons, and there is no evidence on record as to why the parties elected not to proceed with dispute resolution.

[154] Like the TDNXDY, the Superintendent failed to adequately consider that the proposed business licence was supported by LKDFN and its elected Council. The LKDFN's support for the business licence was evidence that, contrary to the TDNXDY's view, the objective of reconciliation would not be undermined by the issuance of the business licence. The Superintendent provided no reasons as to why it preferred the opinion of the TDNXDY on the objective of reconciliation over the views of the LKDFN, which supported the issuance of the business licence.

[155] This being said, the reliance by the TDNXDY, the Superintendent (and the PCEO thereafter) on their own views, and reliance on the fact that the parties to the Establishment Agreement did not trigger the Issue Resolution Process, is not necessarily problematic or erroneous. However, all failed to explain why, on the basis of the evidence adduced and the business licence application package, the denial of a business licence was required to achieve the objective of reconciliation. That conclusion is particularly important because the elected officials from LKDFN, who spoke on behalf of the members of the most affected First Nation, believed otherwise and instead opined that the business licence was "compatible with the [Park] [A]greements and regulations" – in other words did not undermine the objective of reconciliation.

[156] Consequently, the Superintendent failed to explain why Trophy Lodge's business licence could not be approved, or why additional terms and conditions could not be imposed in order to mitigate any issues related to the objective of reconciliation. The Superintendent also failed to properly analyze the TDNXDY's recommendation and note that the TDNXDY did not identify any cultural or environmental reason to deny the licence, and relied on irrelevant grounds to justify its recommendation.

[157] The Superintendent's conclusions that "management planning, zoning and policy development […g]iven the uncertainty of this area's future regarding visitor use" and that "two nations indicated they do not support the issuance of the licence" are therefore unreasonable as they do not present an "intrinsically coherent and rational analysis [that] can be justified in the

light of the legal and factual constraints to which the decision maker is subject" (*Mason* at paras 8, 58–61; *Vavilov*, at paras 12, 15, 24, 85–86).

E. *The PCEO decision is unreasonable*

[158] The PCEO had to assess, under subsection 10.1(2) of the *Regulations*, whether the Superintendent's decision was "incorrect." For the reasons noted above, the Superintendent's decision contained significant errors; and the PCEO's reliance on the same grounds is, for the same reasons, unreasonable.

[159] Most importantly, unlike the Superintendent, the PCEO had the benefit of the Applicant's representations. The Applicant argued, *inter alia*, that the TDNXDY's reasons were based on its grievances against Parks Canada for failing to acquire the Lease and assets of Trophy Lodge, and work with the Akaitcho Dene First Nations to establish joint control and management of Trophy Lodge. The Applicant also argued that the long-term impact of the Lease followed a different authorization process. In the Applicant's view, these issues were inappropriate considerations in the review of a business licence application (Certified Tribunal Record, Applicant's Record, at p 2253). The PCEO provided no explanation in response to the Applicant's argument as to why those factors were relevant, despite not being a requirement in Parks Canada's criteria submitted to the TDNXDY in the briefing note, nor in Park Canada's discretionary powers under the *Parks Act* and *Regulations*, or under the Establishment Agreement. Indeed, as argued by the counsel for Parks Canada in oral argument, and as discussed above, the Lease is equivalent to a property right, and Parks Canada did not make any discretionary decision in transferring the Lease. It was a right belonging to the former and new owner. The PCEO therefore did not respond to the

Applicant's argument that the TDNXDY's reasons for denying the business licence and its justification that it undermined the objective of reconciliation, relied on inappropriate considerations.

[160] Like the Superintendent before it, the PCEO dismissed the TDNXDY's views that the Applicant did not have the necessary "interest" or "capacity" to uphold the vision of the parties. Rather, the PCEO held that he had "no reason to doubt the intent, experience and goodwill" of the Applicant including the potential economic, cultural, and environmental benefits of Trophy Lodge (Certified Tribunal Record, Applicant's Record, at p 2231).

[161] However, like the Superintendent, the PCEO denied the business licence on the following grounds: (a) on the principle of reconciliation; and (b) on a desire to respect joint management planning and policy development. Both of these grounds implicate subsection 5(1) of the *Regulations*. The PCEO also stated that Parks Canada's relationship with Indigenous partners on the principle of mutual trust-building and reconciliation superseded all other principles.

[162] In doing so, and as explained above, the PCEO did not review the Applicant's business licence application package. Therefore, the PCEO could not assess whether the Superintendent's decision to deny the licence was "incorrect," after a careful analysis of the proposed business licence application package, nor whether the Applicant's commitments in its proposal could be responsive to the TDNXDY's concerns regarding the objective of reconciliation, which were endorsed by the Superintendent. For that reason alone, the PCEO's decision must be set aside.

(1) The principle of reconciliation

[163] On the issue of reconciliation, and as discussed above, the objective of reconciliation is a relevant ground for the Superintendent and PCEO to consider, under subsection 5(1) of the *Regulations*, in the issuance of a business licence. The PCEO was entitled to approach the license request from the reconciliation perspective. As discussed above, paragraph 5(1)(d) may include reconciliation and the consideration of Indigenous economic development; and reconciliation is a major policy of Canada as a whole, and Parks Canada particularly.

[164] However, in determining that reconciliation required the denial of the business licence, the PCEO provided no reasons justifying its rationale. There is no discussion on what evidence was relied upon by the PCEO to make that finding. The PCEO's reasons discuss the recommendation of the TDNXDY, but (like the Superintendent before it) do not indicate that any weight was adduced to the fact that LKDFN supported the Applicant's proposed business licence and opined that the proposed business licence was "compatible with the [Park] [A]greements and regulations" – in other words did not have an adverse impact on reconciliation. The PCEO did not explain why the TDNXDY's opinion that the objective of reconciliation would be undermined by the issuance of the business licence should prevail over the views of the LKDFN (approved by Council, and who is the First Nation most affected by Trophy Lodge). The PCEO had to properly explain why the TDNXDY's view on reconciliation was valid, and "superseded" all other considerations, including the LKDFN's initial support.

[165] The PCEO also did not notice the Superintendent’s factual error on the support of the LKDFN for the licence and how this error could have impacted its decision that the objective of reconciliation required that the business licence be denied.

[166] The Respondents rely on *Moresby FCA 2007* and *Peter G White* for the proposition that the PCEO (and Superintendent) has broad discretion to refuse the issuance of a licence under subsection 5(1), including for reconciliation purposes. As stated above, I agree. However, the PCEO’s discretion is not unlimited. If a business licence must be denied because of the objective of reconciliation, Parks Canada must rely on evidence suggesting that the objective of reconciliation would be undermined if the business licence was awarded, and that no term or condition could mitigate the issues.

[167] In this case, and while Parks Canada’s discretion is broad as held in *Moresby FCA 2007* and *Peter G White*, the PCEO failed to consider that the TDNXDY’s recommendation in relation to the objective of reconciliation was based on considerations that were not related to the protection of the Thaidene Nëné Park from an ecological, cultural or economic perspective. For example, had the evidence demonstrated that the operation of Trophy Lodge, over past years, had an impact on the environment and sacred sites of the LKDFN, then the refusal of a licence could have been supported by the objective of reconciliation (as well as the preservation, control and management of the park under paragraph 5(1)(d) of the *Regulations*). Likewise, to the extent that Trophy Lodge raises sentiments of resentment because of its historical use as an RCMP detachment, reconciliation may require its closure under paragraph 5(1)(d) for “control […] of the park.” Also, the initial objection of the LKDFN (if that had been the case – and to be

distinguished with the LKDFN's "respect" of the TDNXDY's recommendation and its decision not to trigger the Issue Resolution Process), and demonstration that no additional term and condition may be imposed in order to mitigate any issue, could be relevant. As for the economic benefits, the PCEO agreed that this factor favoured the issuance of the business licence.

[168] Consequently, the PCEO's reasons do not explain why the TDNXDY opinion on reconciliation was valid in its view, and on what basis that opinion "superseded" all other considerations given that the PCEO agreed in its decision that "I have no reason to doubt the intent, experience and goodwill […] and the potential economic, cultural, and environmental benefits [the Applicant's] outline" (Certified Tribunal Record, Applicant's Record, at p 2231). There are no reasons indicating why the TDNXDY's opinion on reconciliation prevailed when balanced with the content of the Applicant's business licence application package (which the PCEO did not have), and the LKDFN's support of the proposed terms and conditions which, in its view, were "compatible with the [Park] [A]greements and regulations."

[169] The PCEO's failure to provide reasons on the Applicant's arguments relating to the relevance of the TDNXDY's considerations, and as to why the TDNXDY's opinions were wholeheartedly accepted on reconciliation and the contrary evidence dismissed, constitutes a fundamental flaw, a lack of internal logic in the reasoning, and a lack of justification given the factual and legal constraints affecting the decision (*Mason* at para 64).

(2) The absence of a joint management plan

[170] The PCEO (and Superintendent) also decided that the business licence should be denied because a joint management plan has not yet been adopted. In theory, the issue of joint management could be a valid factor consistent with *Moresby FCA 2007* and *Peter G White*: the TDNXDY and Parks Canada wish to complete the joint management plan before issuing licenses, in order for each licence to reflect the parties' intentions on the use and conservation of the Thaidene Nëné Park.

[171] However, that factor does not withstand scrutiny on the evidence on the record. First, the LKDFN and Parks Canada supported the issuance of the business licence despite the absence of a joint management plan. Second, the TDNXDY does not rely on this ground to recommend the refusal. Third, the evidence demonstrates that the TDNXDY presumably has recommended the issuance of other licences, including a new guide-outfitter licence, which was granted by the Superintendent (with conditions), notwithstanding the fact that no joint management plan existed (Uunila Affidavit at Exhibit Z, Applicant's Record, at pp 1790–1796).

[172] The only evidence of a licence being refused was that of the Applicant, which again appears to rely mainly on the fact that in the TDNXDY's opinion, Parks Canada should have acquired the Lease and assets and transferred them to an Indigenous-led business (Uunila Affidavit at Exhibit V, Applicant's Record, at pp 1740–1741).

[173] The PCEO (and the Superintendent before) had to justify, in its reasons, why in its view the absence of a joint management plan justified the denial of the business licence to support the objective for reconciliation, when neither the TDNXDY nor the LKDFN relied on this ground, and when other business licences, including a new one, were granted in the same period to other entities (presumably with the TDNXDY's support). In *Vavilov* at paragraph 112, the SCC indicated that reasons have to be given when the decision maker departs from precedents. In this case, the PCEO (and the Superintendent before) provided no explanation justifying why the absence of a joint management plan required the denial of a business licence in the Applicant's case, but other licences, including a new one, were granted in the same time period notwithstanding the absence of a joint management plan.

(3) Conclusion

[174] Consequently, as discussed above, while the PCEO does have the power to refuse the issuance of a licence, including on the ground of reconciliation or the lack of a joint management plan, the PCEO must ground its decision on the evidence and arguments presented by the parties, and provide reasons why, in its view, a refusal is necessary.

[175] The PCEO had to review the correctness of the Superintendent's decision, but also analyze the TDNXDY's recommendation on which the Superintendent's decision was based, and balance the TDNXDY recommendation and the objective of reconciliation, with other Parks Canada objectives. Those other objectives include the preservation of the Thaidene Nëné Park from an environment/ecological/cultural perspective, but also take into account the public's access and use of the Park. The PCEO's decision, especially because it was not in possession of

the Applicant's business licence application package, does not demonstrate a proper analysis of the reasons of the TDNXDY and the Superintendent for recommending the denial of the Applicant's business licence, nor undertake a review of the balancing exercise required under the *Parks Act* and *Regulations*.

[176] The failure by the PCEO to provide reasons on the Applicant's arguments on inappropriate considerations, to properly assess the Applicant's business licence application package, and to provide adequate reasons on reconciliation and the lack of a joint management plan, constitute serious deficiencies that causes the Court to "lose confidence" in the PCEO's process and decision (*Mason* at paras 64, 66–76).

V. Costs

[177] Pursuant to Rule 400 of the *Federal Court Rules*, SOR/98-106 [the *Rules*], the Court has discretion over the amount and allocation of costs. The Court may fix all or part of any costs by reference to Tariff B, or may award lump sum costs in lieu of any assessed costs. In this case, the Applicant and Parks Canada provided bills of costs on the basis of the starting point for assessment of costs as set out in Rule 407, which is Column III of Tariff B (see *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 25; *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at paras 4–5).

[178] Trophy Lodge is seeking costs in an amount of $18,207.00 for its costs on its application for judicial review, and $4,998.00 on its motion for injunctive relief that was filed by the Applicant, but never heard by the Court.

[179] Parks Canada seeks its costs at the high end of Column III, in an amount of $12,500.00 for the Applicant’s judicial review, and $3,000.00 for the Applicant’s motion for injunctive relief.

[180] LKDFN seeks lump sum costs equal to 50% of its actual costs, which amount to $83,264.25 ($154,956 in actual costs and $11,572.50 in disbursements) for the application for judicial review, and of $23,955 ($47,914 in actual costs) for the Applicant’s motion for injunctive relief.

(1) Costs for the Applicant’s motion for injunctive relief

[181] In relation to the Applicant’s motion for injunctive relief, the Applicant submits that the Court should exercise its discretion under Rule 400(6) and refuse to grant any costs, because of extenuating circumstances that are not the fault of any party and which included, in part, major wildfires in the Northwest Territories that impeded the availabilities of witnesses for cross-examinations on affidavits. The Applicant submits in the alternative that Parks Canada be awarded its costs on the motion for injunctive relief in the amount of $3,000.00 as set out in Parks Canada’s bill of costs.

[182] As for LKDFN, the Applicant submits that the proposed cost award of $23,955 is excessive and without merit. Alternatively, LKDFN should also be awarded costs equivalent to the costs sought by Parks Canada, in an amount of $3,000.00.

[183] In my view, Parks Canada and LKDFN are entitled to their costs for the motion for injunctive relief. While there may have been extenuating circumstances that resulted in the injunction not being heard, the motion had a low chance of success. Moreover, pursuant to Rule 402, parties against whom a motion has been abandoned or discontinued may be entitled to their costs. While the circumstances in this case do not comply strictly with Rule 402, the Applicant's adjournment of its motion for injunctive relief has the same effect.

[184] In the circumstances, Parks Canada is entitled to its costs in the proposed amount of $3,000.00.

[185] As for LKDFN, it has filed a memorandum to justify its costs. I have reviewed the memorandum and considered the factors set out in Rule 400(3) of the *Rules*. In my view, there are no reasons in this case to grant lump sum costs and depart from Column III of Tariff B for the purpose of the motion for injunctive relief. While some costs may have been "thrown-away" as LKDFN argues, if the motion had been heard and dismissed, LKDFN would in my view had been entitled to costs equivalent to the mid-point of Column III of Tariff B. I also disagree with LKDFN that the Applicant is the sole responsible for the delays leading to the cancellation of the hearing. Because LKDFN did not provide a bill of costs that would comply with Column III of Tariff B for the motion for injunctive relief, I agree with the proposal of the Applicant and set that amount at $3,000.00, which is the same amount claimed by and awarded to Parks Canada.

(2) Costs on the application for judicial review

[186] In normal circumstances, the rule is that costs follow the event of the cause (*MacFarlane v Day & Ross Inc*, 2014 FCA 199 at para 6). In my view, the principle should apply in this case and consequently, as the Applicant has succeeded in demonstrating that the PCEO's Decision was unreasonable, the Applicant has a right to its costs. There is no reason to deviate from this principle and grant costs to the Respondents for the application for judicial review in this case.

[187] After a review of the Applicant's bill of costs, and considering Rule 400(3), notably the importance and complexity of the case, I agree that the amount requested of $18,207.00 is reasonable in the circumstances.

[188] The Applicant is therefore entitled to its costs for the application for judicial review, in the amount of $18,207.00.

VI. Conclusion

[189] The PCEO's Decision is set aside.

[190] Because the Applicant's proposed business license has lapsed, no additional remedy is necessary.

[191] The Applicant has filed a new business licence application package, which should be reviewed and analyzed by the TDNXDY, and by the Superintendent thereafter, in accordance with these reasons.

[192] The Applicant is entitled to its costs for the application for judicial review in the amount of $18,207.00.

[193] Parks Canada and LKDFN are both entitled to their costs for the Applicant’s motion for injunctive relief, in the amount of $3,000.00 each.

JUDGMENT in T-1225-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the PCEO is set aside.
3. The Applicant is awarded $18,207.00 in costs for the application for judicial review, payable by Parks Canada.
4. Parks Canada is awarded $3,000.00 in costs for the Applicant's motion for injunctive relief.
5. LKDFN is awarded $3,000.00 in costs for the Applicant's motion for injunctive relief.

"Guy Régimbald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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