Environmental Appeal Board

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DECISION NO. 2015-WIL-008(a)

In the matter of an appeal under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	Martin Scholz	**APPELLANT**
AND:	Regional Manager	**RESPONDENT**
AND:	Doig River First Nation	**PARTICIPANT**
BEFORE:	A Panel of the Environmental Appeal Board: Cindy Derkaz, Panel Chair	
DATE:	Conducted by way of written submissions concluding on February 19, 2016	
APPEARING:	For the Appellant:	Martin Scholz
	For the Respondent:	Anthony H. Dalmyn, Counsel
	For the Participant:	Alison Leong, Counsel

APPEAL

[1] This is an appeal by Martin Scholz of a decision issued September 23, 2015 by Chris Addison, Director of Resource Management, Northeast Resource Management and Major Projects, Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"). Mr. Addison made the decision in his capacity as the designated Regional Manager of the Recreational Fisheries and Wildlife Programs (the "Regional Manager") under the *Wildlife Act*.

[2] The Regional Manager denied the Appellant's application for a permit to trap fur bearing animals on vacant trapline #TR0720T012 (the "Trapline"), located in the vicinity of the settlement of Tomslake, south of the City of Fort St. John, in northeastern British Columbia. The Appellant appealed the decision to the Board by a Notice of Appeal dated October 20, 2015.

[3] In a December 4, 2015 letter to the Board, counsel for the Regional Manager identified the Doig River First Nation (the "DRFN") as having a possible interest in the subject matter of the appeal. The DRFN was granted participant status in the appeal by the Board on January 13, 2016.

[4] The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*. Section 101.1(5) of the *Wildlife Act* provides that the Board may:

a) send the matter back to the person who made the decision being appealed, with directions,

b) confirm, reverse or vary the decision being appealed, or

c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

[5] The Appellant asks the Board to grant his application for a permit to trap on the Trapline for the remainder of the 2015-2016 season, and to issue a permit for the 2016-2017 season.

[6] The Regional Manager and the DRFN ask the Board to dismiss the appeal.

[7] The appeal was conducted by way of written submissions.

BACKGROUND

[8] The Trapline was established sometime in the first half of the 20th century and has been vacant[1] since approximately 1985. It is located to the south of Tomslake on Highway 2 and is bounded on the east by the Alberta border. From the map filed in the appeal, the Trapline appears to be roughly rectangular, and approximately 10 kilometres east-west and less than 20 kilometres north-south. Within that area there are a number of private agricultural properties, roads (including a section of Highway 2), a railway track and Swan Lake Provincial Park. The Trapline area is the Crown land contained within the boundaries shown on the map: private property is excluded.

[9] The Appellant, a resident of Tomslake, has held trapping permits for the Trapline on and off since 1996. His most recent permit (#FJ11-73161) was issued on September 13, 2011 pursuant to section 19 of the *Wildlife Act* and section 2(c)(iii) of the *Permit Regulation*, B.C. Reg. 253/2000 (the "*Permit Regulation*"). That permit was granted by:

Nick Baccante, Fish & Wildlife Section Head
A person authorized by the Regional Manager
Recreational Fisheries & Wildlife Programs
Peace Region

[1] The term "vacant trapline" is not defined in either the *Wildlife Act* or the regulations. The Board considered the ownership of a trapline in *Galbraith v. Deputy Regional Manager*, (Decision No. 2014-WIL-027(a), June 3, 2015) at paragraph 55, stating: "The existence of an 'owner', that is a person who is registered on a trapline, makes a transfer of rights possible from that "owner". In the absence of an 'owner', the trapline is vacant."

[10] Permit FJ11-73161, which expired on May 30, 2012, authorized the Appellant to:

> Set traps for and trap fur bearing animals on the area of crown land outlined on the attached map … formerly identified as TRAPLINE TR0720T012, as the regional manager considers it necessary for the proper management of the wildlife resource.

[11] Also on September 13, 2011, the Appellant was issued Trapping Licence #FJ11-74010, by:

> Chris Addison, Regional Manager
> Recreational Fisheries & Wildlife Programs
> a person authorized by the Director of Wildlife

[12] The licence authorized the Appellant to:

> … trap furbearing animals in accordance with the Wildlife Act and the regulations there under during the open season and at the following locations:
>
> British Columbia – Private Property Trapper #TR0720P101
> (Vacant Trapline #TR0720T012 [the Trapline] As Per Permit FJ11-73161).

[13] The licence was valid to June 30, 2012.

[14] The Appellant states that he has trapped marten, fisher, mink, lynx, coyote, wolf, weasel, squirrel, beaver, muskrat and otter on the Trapline. Over the years, he has sustained an annual catch of 25 marten, and has helped in the management of wolves and coyotes in areas experiencing cattle/predator conflict. He has also trapped "problem" beavers for landowners. He finds trapping both economically and mentally rewarding, and notes that the income he earns goes back to the local economy to pay for his snowmobiles, chainsaws, fuel and other trapping supplies.

[15] Sometime in 2015, the Appellant applied to the Regional Manager for a permit to trap on the Trapline for the 2015-16 season. A copy of the application was not provided to the Board.

[16] By letter dated September 23, 2015, the Regional Manager denied the Appellant's application, stating:

> Re: Vacant Trapline Permit Application – Trapline# TR0720T012 (tracking 82007)
>
> Thank you for your application requesting a permit to trap on vacant traplines. I have reviewed and considered all of the information you have provided in your application and have decided that I cannot grant your request for the reasons described below.
>
> The province does not recognize that trapping may take place on vacant traplines. The trapline that you have requested access to trap is currently vacant. For this reason your application is being denied.
>
> You have the right to appeal this decision to the Environmental Appeal Board within 30 days. …

The Appeal

[17] The Appellant appealed the Regional Manager's decision to the Board on the grounds that:

- The decision conflicts with the Regional Manager's past practice of issuing permits for the Trapline, including permits to the Appellant as recently as 2011;
- The Trapline has been both financially and mentally rewarding;
- Trapping on this Trapline has assisted with wildlife management in areas of cattle/predator conflict; and
- The revenue from trapping supports the local economy.

[18] The Appellant submits that the Regional Manager's decision was not founded in science and that his permit application was denied "for reasons that are unjust and not fair". He asks that the decision be reversed and for the Board to issue a permit to him for the remainder of the 2015-16 season. In his submissions on the appeal, he also asked the Board to issue a permit for the 2016-17 season because the appeal process "has taken far longer than originally scheduled".[2]

The Respondent's position

[19] The Regional Manager submits that:

- he observed the requirements of procedural fairness; and
- the Appellant did not have any right to be granted a new permit.

[20] The Regional Manager submits that he reached a fair, principled and reasonable conclusion, and that there is no compelling reason to issue a permit. The Regional Manager asks that the appeal be dismissed.

The Participant's position

[21] As noted above, the DRFN became a participant in the appeal on January 13, 2016. The DRFN submits that the Regional Manager's decision was appropriately made and also asks the Board to dismiss the appeal.

ISSUES

[22] The issue to be determined in this case is whether the Regional Manager's decision is reasonable and fair in the circumstances.

[2] The written hearing schedule was extended into February 2016 to accommodate the late identification of the DRFN as a having an interest in the vacant trapline under appeal. The written hearing schedule was originally scheduled to conclude on December 11, 2015.

RELEVANT LEGISLATION

[23] There is no dispute that neither the *Wildlife Act*, nor the regulations under that *Act*, specifically address vacant traplines. The authority for the Regional Manager's decision in this case is found in the general permitting provisions in the *Wildlife Act*, and in the specific provisions relating to permits for trapping in the *Permit Regulation*.

[24] The relevant provisions in the *Wildlife Act* are as follows:

Definitions and interpretation

1 (1) In this Act:

...

"trapline" means an area for which registration is granted to one or more licensed trappers for the trapping of fur bearing animals;

...

Property in wildlife

2 (1) Ownership in all wildlife in British Columbia is vested in the government.

(2) A person does not acquire a right of property in any wildlife except in accordance with a permit or licence issued under this Act ….

...

Permits

19(1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, or

(b) to omit to do anything that the person is required to do by this Act or the regulations,

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

(2) The form and conditions of the permit may be specified by the director.

...

Prohibition within a trapline

41 A person commits an offence if the person sets a trap for, hunts, kills, takes or captures a fur bearing animal in an area of British Columbia unless the person

...

(e) holds a permit to trap that is required by regulation.

Reasons for and notice of decisions

101(1) The regional manager or the director, as applicable, must give written reasons for a decision that affects

(a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or

(b) an application by a person for anything referred to in paragraph (a).

...

(2) Notice of a decision referred to in subsection (1) or (1.1) must be given to the affected person.

...

[25] The relevant provisions in the *Permit Regulation* are as follows:

Authorization by permit

2 A regional manager may issue a permit in accordance with this regulation on the terms and for the period he or she specifies

...

(c) authorizing a person to hunt, trap or kill wildlife during the open or closed season for the following purposes:

...

(iii) if the regional manager considers it necessary for the proper management of the wildlife resource;

...

...

Restrictions on issuing permits generally

5(1) Before issuing a permit under section 2, 3 or 4 the regional manager or the director, as applicable, must be satisfied

(a) that the applicant meets the specific requirements, if any, for the permit as set out in this regulation, and

(b) that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia.

...

DISCUSSION AND ANALYSIS

Is the Regional Manager's decision reasonable and fair in the circumstances?

The Appellant's submissions

[26] The Appellant states that his objective is to ensure that all properly trained and educated trappers have fair and equal opportunity to harvest fur on all traplines; that vacant traplines are being trapped and managed in a professional manner; and that the Province realizes fur royalties from these traplines.

[27] In addition to the grounds for appeal set out in the Background, the Appellant makes the following points:

- Vacant traplines should be available for trappers who do not have registered traplines, and to provide an opportunity for new trappers;
- Vacant traplines are usually in areas with more private land where there are more human/wildlife conflicts and predator problems. Trapping in these areas is necessary for wildlife management;
- Trapping decreases the risk to human health from diseases such as Giardia, Mange, Distemper and Lyme disease;
- Trapping provides "free" wildlife management for the government; and
- The government is missing revenue from traplines that are not being used.

[28] The Appellant submits that the Regional Manager's 2015 decision conflicts with a November 1, 2010 letter he received from Maurice Lirette, then regional manager, Northern Region, which states:

> The purpose of this letter is to provide you with information on the Ministry of Environment's policies[3] related to trapping on and disposal of vacant traplines.
>
> A regional manager has the authority to permit a licence (sic) trapper to trap furbearing animals on land with no registered trapline owner (AKA 'a vacant trapline'). These permits are typically issued for a period of one year, grant a trapper the same trapping privileges and hold the trapper accountable for the same responsibilities as someone who is a registered trapline owner.

[29] In contrast, the Regional Manager's September 23, 2015 decision states:

> The province does not recognize that trapping may take place on vacant traplines. The trapline that you have requested access to trap is currently vacant. For this reason your application is being denied.

[3] Wildlife resource stewardship is now the responsibility of the Ministry of Forests, Lands and Natural Resource Operations.

[30] In his Final Reply Comments dated February 19, 2016, the Appellant states, for the first time, that the term "vacant trapline", used in the Regional Manager's decision, and throughout this appeal, is incorrect. The Appellant states that over 20 years ago the government turned the Trapline into a "permit line" because it is over 60% private land. The government also decided that Permit Lines would be permitted on an annual basis to qualified trappers. The Appellant did not refer the Panel to any section of the *Wildlife Act*, regulations, policy, Ministry directives or other evidence to support this submission.

[31] The Panel finds that the terms "vacant trapline" or "permit line" are not determinative of the issue in this appeal. For the purpose of this appeal, the Trapline will be considered to be a "vacant trapline" within the meaning set out in the Board's decision in *Galbraith*, cited in footnote 1 above.

The Respondent's submissions

[32] The Respondent states that before 2011, permits had been issued to the Appellant, and others, pursuant to section 2(l) of the *Permit Regulation*[4]. However, in 2010 there was a re-evaluation of the authority to issue permits for vacant traplines. In 2011, the Appellant's permit was issued pursuant section 2(c)(iii) of the *Permit Regulation* which provides that a permit may be issued "if the regional manager considers it necessary for the proper management of the wildlife resource".

[33] The Respondent submits that the *Permit Regulation* does not contain conditions for permits on vacant traplines, nor does it compel the issuance of permits. The Respondent submits that a regional manager has the discretion to issue permits. In doing so, a regional manager can, and should, use his or her knowledge and judgment to decide what is necessary for the proper management of the wildlife resource. While the previous regional manager issued a permit to the Appellant in 2011 under section 2(c)(iii), the Regional Manager in 2015 did not make the same decision.

[34] The Panel notes that the Appellant's 2011 permit was issued by Mr. Baccante, Section Head, but that the Appellant's trapping licence, which refers to the permit, was issued on the same day by the Regional Manager.

[35] In regard to the 2015 decision, the Respondent submits that the Regional Manager was not satisfied that commercial trapping was necessary for the proper management of the wildlife resource within the Trapline, and that the Appellant has not demonstrated that the Regional Manager was wrong. He states that there is no "right" to a permit, the Regional Manager does not have to authorize recreational or commercial trapping on demand (e.g., to create opportunities for trapping), that the application was considered on a "principled and timely basis", that the Regional Manager provided a "principled and comprehensible written decision", and that he reached a "fair, principled and reasonable conclusion".

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[4] Section 2(l) authorizing a licensed trapper or a person exempt from holding a trapping licence to set traps for and trap fur bearing animals on a trapline registered to another person.

[36] The Respondent also notes that permits have become the subject of consultation and possible contention and states that "[i]t was fair to avoid a contest between the Appellant and First Nations interests or other persons and to give the Appellant a chance to explore other opportunities including trapping on private land."

[37] In a supplemental submission filed after the DRFN became a participant, the Respondent submits that the Regional Manager consulted with the DRFN in respect to its claims within the boundaries of the Trapline, but that the duty to consult does not prevent the Regional Manager from exercising his discretion to issue permits. The Respondent also clarifies that, even if the DRFN had objected to a non-member trapping on its traditional lands, the duty to consult does not "forbid" the Regional Manager from issuing permits to trap and he did not, in fact, ask the DRFN for permission to issue a permit to the Appellant.

The DRFN's submissions

[38] In an affidavit sworn on January 29, 2016, Trevor Makadahay, Chief of the DRFN, outlined the basis for DRFN's participation in the appeal. In summary, Chief Makadahay's evidence is as follows:

- The DRFN's main reserve is Doig River Reserve (I.R. No. 206) located approximately 40 kilometres northeast of Fort St. John.[5]
- The DRFN's predecessor Indian Brand was the Fort St. John Band, which signed Treaty No. 8 with Canada in 1900.
- For centuries, the DRFN's ancestors used the land base now in northeastern British Columbia and northwestern Alberta as part of their seasonal round.[6] Their activities included hunting, trapping, fishing and gathering. The area within which the Trapline is situated has historically been part of the seasonal round.
- The introduction of the registered trapline system in British Columbia in 1925 resulted in loss of historic trapping areas when traplines were registered to other parties, the majority of whom were non-First Nations.
- The loss of historic trapping area is the subject of a "Specific Claim" currently being negotiated between the DRFN and the Federal Crown.
- Although the terms have not yet been defined, the Federal Crown has agreed to compensate the DRFN for the loss of historic trapping areas and the DRFN intends to use the funds to buy back any available or vacant traplines within its traditional trapping territory for use by its members.
- The Trapline has been identified by the DRFN, in consultation with the Regional Manager, as one of the traplines the DRFN is interested in acquiring.

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[5] Fort St. John is approximately 104 km, by road, northwest of Tomslake.

[6] Chief Makadahay describes the seasonal round at paragraph 6 of his affidavit as "as a pattern of land use used by their people to sustain themselves by moving across the land, depending on the season, to different areas for the purpose of resource gathering."

[39] The DRFN submits that the Regional Manager's decision was appropriately made because the Regional Manager was aware of the DRFN's Specific Claim about the loss of historic trapping area, and its plan to purchase available traplines, including the Trapline, with compensation from the Federal Crown. It submits that, where the Crown has been advised of Treaty or Aboriginal interests, including that the DRFN is seeking to acquire traplines, those interests must be considered by the Crown when making decisions on whether to approve permits to trap on vacant traplines. It states that the Provincial Crown has a duty to consult with the DRFN before issuing a permit to trap on the Trapline, and the DRFN should be given a right of first refusal with respect to the disposition of vacant traplines.

The Panel's findings

[40] Under section 2(1) of the *Wildlife Act*, ownership of all wildlife in British Columbia is vested in the government. Section 41 makes it an offence to trap or capture a fur bearing animal unless the person has authority to do so under the *Act*, such as by obtaining a permit (see section 41(e)).

[41] The *Wildlife Act* and the *Permit Regulation* use permissive rather than mandatory language with respect to a regional manager's authority to issue permits: i.e., a regional manager "may", not "must", issue a permit, even when an applicant meets all the requirements. For instance, section 19(1) of the *Wildlife Act* provides that a regional manager may issue a permit to do anything which is prohibited under the *Act* or regulations. Of particular relevance to this case, section 2(c)(iii) of the *Permit Regulation* provides that a regional manager may issue a permit to trap wildlife if the regional manager considers it "necessary for the proper management of the wildlife resource" Considering the wildlife resource is also a requirement of section 5(1)(b) of the *Permit Regulation*, which states that, before issuing a permit under section 2, a regional manager "must be satisfied" that the applicant meets the specific requirements set out in the *Permit Regulation* and that "issuing the permit is not contrary to the proper management of wildlife resources in British Columbia."

[42] The Panel finds that the language in the *Act* and *Regulation* gives a regional manager broad discretion to make decisions for the proper management of wildlife resources in British Columbia. This broad discretionary power applies to decisions in respect to permit applications. However, that broad discretionary power must be exercised in accordance with any legislated requirements, within the bounds of the jurisdiction conferred by the statute, and in accordance with the rules of natural justice.

[43] The Appellant has been granted annual permits on this same Trapline on and off in the past, including in 2011. The Panel finds that the Appellant knew that he could not expect a permit to be issued for 2015-16 simply because he had held a permit in previous years. This was clearly stated to the Appellant by the former regional manager, Mr. Lirette, in his 2010 letter to the Appellant:

> It is important for the permit holder to know that these permits are not a substitute for becoming a registered trapline owner. Because permits are issued on a yearly basis, there should be no expectation

> on the part of the permit holder that they will receive a permit this year because one was issued in past years. There are several circumstances where a regional manager may grant a permit to trap one year while denying it the next. Trappers who rely on yearly permits to trap a vacant trapline must be aware that any resources they commit to a trapline may be lost if their permit is denied in a following year. [Emphasis added]

[44] While the Appellant cannot expect a permit to be issued just because he received one in the past, it is reasonable for him to expect, and the law requires, that his application be given fair consideration and that it be decided in accordance with the law.

[45] A regional manager is required by statute, and at common law, to provide reasons for his or her decision, and those reasons must be adequate. Under section 101 of the *Wildlife Act*, a regional manager must provide written reasons for a decision that affects a permit application. Section 101(1) states:

> **101**(1) The regional manager or the director, as applicable, must give written reasons for a decision that affects
>
> (a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or
>
> (b) an application by a person for anything referred to in paragraph (a).
>
> …
>
> (2) Notice of a decision referred to in subsection (1) or (1.1) must be given to the affected person.
>
> [Emphasis added]

[46] The Panel has considered the Regional Manager's decision of September 23, 2015 and finds that the only "reasons" given to the Appellant were:

> The province does not recognize that trapping may take place on vacant traplines. The trapline that you have requested access to trap is currently vacant. For this reason your application is being denied.

[47] The Regional Manager did not provide any legislative authority or Ministry policy in support of the proposition that "the province does not recognize that trapping may take place on vacant traplines" in his September 23, 2015 decision, nor in his submissions on the appeal. If the proposition is correct, as noted by the Appellant, it represents a significant change in the administration of vacant traplines in the Province – a change that has been made without any explanation or notice to applicants before they file a permit application and provide the required filing fee.

[48] In paragraph 53 of his written submissions, the Respondent states:

> 53. The first point of the 2015 decision letter was that a permit would not be issued under s. 2(l). It is clear, further that the Regional

> Manager was not satisfied that trapping on this vacant trapline was necessary for the proper management of the wildlife resource.

[49] The Panel disagrees. The first and only point in the Regional Manager's September 23, 2015 decision letter is that the Province does not recognize that trapping may take place on vacant traplines. There is nothing in the decision that makes it "clear" that the Regional Manager even considered whether this application would impact the proper management of the wildlife resource. The *only* thing that is clear from the decision letter is that the Regional Manager was of the view that he could not issue a permit because trapping on vacant traplines is not "recognized" by the Province. What is meant by this has not been explained.

[50] Although the Regional Manager states in his letter that he "reviewed and considered all of the information provided in" the application, on its face, his "reason" for denying the application suggests otherwise. His statement that "the province does not recognize that trapping may take place on vacant traplines" suggests that he fettered his discretion by strictly applying a government policy against trapping on vacant traplines. Fettering occurs when a decision-maker "failed to genuinely exercise its discretionary powers in an individual case, but rather made its decision on the basis of a pre-existing policy": *Phillips v. British Columbia (Workers Compensation Appeal Tribunal)*, 2012 BCCA 304 (CanLII). In the present case, there is simply no indication from his decision that the Regional Manager considered the merits of the Appellant's application in terms of whether the application was "necessary for the proper management of the wildlife resource" under section 2(c)(iii) of the *Permit Regulation*.

[51] If a regional manager has not provided adequate reasons for decision, or if the wording of a decision suggests a fettering of discretion, the Board has previously found that the appeal process may "cure" these defects: *Wiens v. Regional Manager, Fish and Wildlife,* Decision Nos. 2005-WIL-020(b) and 2005-WIL-026(b), March 9, 2006, and *Luker v. Regional Wildlife Section Head*, Decision No. 2000-WIL-013, September 27, 2000. In the latter case, *Luker v. Regional Wildlife Section Head*, the panel found that the regional manager had not provided adequate reasons, explaining as follows at pages 4-5:

> The underlying rationale for requiring reasons to be supplied is to improve administrative accountability, and to enable a person affected by a decision to assess whether he or she has any grounds of appeal. Of course, there is an implied requirement that the reasons supplied must be adequate. "Adequate" reasons does not mean that every piece of evidence or finding of fact must be set out, but the reasons must reveal what matters have been taken into account when making the decision. This point is summarized in D.P. Jones & A.S. de Villars, *Principles of Administrative Law*, 3rd ed. (Toronto: Carswell, 1999) at p. 346:
>
> > In summary, it appears that the test for determining whether the reasons given by a delegate are adequate in law is whether why or how or on what evidence the delegate reached the conclusion. If so, then any statutory requirement to give reasons will be satisfied

> … if not, that fact alone will constitute a fatal flaw in the exercise of the delegate's power.
>
> Had the Respondent relied solely on the content of his letter dated May 3, 2000 in his submissions, it's likely that the Board would have found a "fatal flaw" in the exercise of Mr. Forbes' powers under the *Act*. An appropriate remedy in such a case would be to declare the decision void, and send the matter back to the original decision-maker along with instructions to provide adequate reasons. However, such is not the case in this appeal.
>
> Although the Board recognizes that there has been a defect in failing to provide reasons, the Board finds that the Respondent has subsequently cured this defect in later correspondence. In letters dated July 5, 2000 and September 11, 2000, the Respondent provides reasons for refusal of the permit, the content of which will be discussed in greater detail in the following section. These reasons have been provided to the Appellant, and the Appellant has been given the opportunity to make submissions on these reasons before the Board. Given that the Environmental Appeal Board is a *de novo* tribunal, the Board finds that the original failure to provide reasons has subsequently been cured.

[52] In the present case, although the Respondent had an opportunity to explain the Regional Manager's thought process and describe how he evaluated the Appellant's application, he did not do so. Instead of actually providing "reasons" for the decision, or providing any relevant evidence in relation to the proper management of the wildlife resource in the area, the Respondent's submissions attempt to convince the Panel that the Regional Manager's decision meets all legal tests and should be upheld as it is. For example, the Respondent's states at paragraph 61: "The Regional Manager provided a principled and comprehensible written decision." He further states at paragraphs 62 and 63:

> 62. The Regional Manager was not satisfied that commercial trapping was necessary for the proper management of the wildlife resource at this place at this time. The Appellant has not demonstrated that the Manager was wrong.
>
> 63. … the Regional Manager reached a fair, principled and reasonable conclusion – indeed a correct conclusion. There is no other compelling reason to issue a permit.

[53] With respect, there is no objective basis for these assertions in either the decision or the written submissions on the appeal. There is no evidence before the Panel, nor any clear statements from the Regional Manager, that he considered anything other than the Province's apparent new policy or position regarding vacant traplines.

[54] Based upon the evidence and submissions of the DRFN, it may well be that the Province has decided not to issue new permits on vacant traplines until First Nations' claims have been resolved. If First Nation's claims are at the heart of a policy change by the Province with respect to vacant traplines and the Regional

Manager evaluated the Appellant's application in terms of any impact on those claims, and on wildlife management, this may well constitute a reasonable exercise of discretion. However, while the Respondent refers to the DRFN's asserted interests in the area and the duty to consult, and states that "permits have become the subject of consultation and possible contention", in his supplemental submissions he denies that the Regional Manager's decision was based upon an objection/claim by First Nations.

[55] In conclusion, the Panel finds that, even after the full appeal, the Respondent has not cured the flaws in the Regional Manager's decision. There is nothing in the decision letter, or the Respondent's submissions, describing why the Regional Manager determined that a one-year permit to trap on the Trapline was not necessary for proper management of the wildlife resource. There is no explanation for the Province's new policy or position on vacant traplines, and no indication that the Regional Manager actually considered anything other than this policy or position when he made his decision on the application. Ultimately, there is no evidence before the Panel upon which the Panel can find that the Regional Manager properly or fairly considered the merits of the Appellant's application in the context of section 2(c)(iii) of the *Permit Regulation*.

[56] In a previous decision by the Board in *Chanski v. Regional Manager*, (Decision No. 2007-WIL-009(a), March 7, 2008), the Board considered the requirement to give reasons in section 101 of the *Wildlife Act* and the exercise of discretion in that case. It found as follows at paragraphs 44-47:

> [44] To support his request for a replacement permit, Mr. Chanski provided copies of numerous Ministry permits allowing motor vehicle access within many of the same closed areas he applied for. The Panel finds that, at most, these permits indicate that the Regional Manager has access to information about those closed areas, the values motivating the closures, and how to assess the impacts of motor vehicle access to those areas – all of which may assist him in assessing Mr. Chanski's application. These permit examples do not enable the Panel to substitute its discretion for that of the Regional Manager and issue a replacement permit to Mr. Chanski. Every permit application must be assessed separately. Without more information about the specific circumstances of these other permit applications, the Panel is unable to determine how those applications differ from Mr. Chanski's situation. There is also no evidence before the Panel about the values that required protection in those areas or how the permit conditions addressed those values.
>
> [45] Finally, the Panel emphasizes that the exercise of permitting discretion is not just a matter of saying "yes" or "no". The Regional Manager must explain his reasons in writing; this is a well established principle of law (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817). It is also clearly stated in section 101(1) of the *Wildlife Act* and the Policy Manual - when denying an application, a regional manager must provide written explanations for

> his or her decision. In this case, the Regional Manager admits that he failed to provide any written explanations for his actions.
>
> ...
>
> [47] Therefore, Mr. Chanski's appeal is allowed on this issue. Although the Panel has the jurisdiction to make a new decision in relation to Mr. Chanski's permit, it is unable to grant this remedy because neither party provided sufficient information or evidence for the Panel to make a new decision on the thirty-two closed areas requested by Mr. Chanski. Thus, the matter will be sent back to the Regional Manager with directions. [Emphasis added]

[57] In the present case, the Panel finds itself in a similar position to the panel in *Chanski*. The Appellant did not provide an explanation or evidence in support of his assertions that a trapping permit on the Trapline is needed for proper management of the wildlife resource (e.g., he did not provide evidence in support of his assertion that there is a need for fur bearing animal management in the area or that there are human/problem wildlife issues). Similarly, the Regional Manager provided no evidence, or even clear statements, regarding the basis of his decision and his exercise of discretion. While the burden of proof in an appeal is on the Appellant, in this case the Appellant was clearly at a disadvantage when preparing his case given the lack of adequate reasons in the September 23, 2015 decision, and the lack of clarification and evidence in the Respondent's written submissions. The Panel finds that the Appellant could not know "the case to be met", contrary to the rules of natural justice.

[58] What is the appropriate remedy?

[59] Under section 101.1 of the *Act* the Board may:

a) send the matter back to the person who made the decision being appealed, with directions,

b) confirm, reverse or vary the decision being appealed, or

c) make any decision that the person whose decision is appealed could have made, and that the Board considers appropriate in the circumstances.

[60] The Panel has carefully reviewed the written submissions provided by all the parties. As stated above, the Panel finds that it does not have sufficient evidence before it to either vary the decision being appealed or to make a decision that the Regional Manager could have made and that would be appropriate in the circumstances.

[61] The Panel notes that the Appellant's 2011-12 permit expired on May 30, 2012. Although no party provided the Panel with a copy of the Appellant's application for the 2015-16 season, it is likely that the end date of the activity is May 30, 2016, less than two months from the date of this decision. In his written submissions, the Appellant requested a permit for the 2016-17 season. However,

in light of the submissions received by the Panel, the Panel does not have sufficient information to properly assess the application for the next season. This is properly the subject of a new application to the Regional Manager.

[62] In the circumstances the Panel has decided to refer this matter back to the Regional Manager with directions to provide the Appellant with written reasons for his 2015 decision. Those reasons must identify the factors and information that he considered when making his decision on the Appellant's application. If he is relying on a provincial policy of not recognizing trapping on vacant traplines, then he must address the issue of fettering by genuinely exercising his discretionary power and explaining why it was appropriate not to deviate from pre-existing policy in the circumstances of this case.

[63] The new reasons provided by the Regional Manager must be sufficient to provide the Appellant with guidance for any future applications for a trapping permit on the Trapline.

DECISION

[64] In making this decision, the Panel has carefully considered all of the evidence and submissions before it, whether or not specifically reiterated here.

[65] For the reasons provided above, the Panel refers the matter back to the Regional Manager with directions to provide the Appellant with appropriate written reasons for his decision, on or before June 30, 2016.

[66] The appeal is allowed.

"Cindy Derkaz"

Cindy Derkaz, Panel Chair
Environmental Appeal Board

April 12, 2016