Environmental Appeal Board

Citation:	*James (Jim) Munroe v. Deputy Regional Manager, Recreational Fisheries & Wildlife Programs,* 2024 BCEAB 24
Decision No.:	EAB-WIL-21-A012(d)
Decision Date:	2024-07-25
Method of Hearing:	Conducted by way of oral hearing concluding on November 14, 2023, and written submissions concluding on December 22, 2023
Decision Type:	Final Decision
Panel:	Linda Michaluk, Panel Chair
Appealed Under:	*Wildlife Act*, RSBC 1996, c. 488

Between:

James (Jim) Munroe

Appellant

And:

Deputy Regional Manager, Recreational Fisheries & Wildlife Programs, Omineca Region, Ministry of Forests

Respondent

And:

Petra A'Huille

Third Party

And:

Richard Prince

Participant

And:

BC Trappers Association

Participant

Appearing on Behalf of the Parties:

For the Appellant and Third Party:	Courtney Jacklin, Counsel[1] Christopher Devlin, Counsel Lorenzo Rose, Counsel
For the Respondent:	Sonja Sun, Counsel Glen R. Thompson, Counsel
For the Participant, Richard Prince:	Self-Represented
For the Participant, BC Trappers Association:	Daniel Bertrand, Counsel[2] Tim Killey

[1] Courtney Jacklin was removed as co-counsel on January 4, 2024.
[2] Daniel Bertrand was removed as counsel on November 8, 2023.

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FINAL DECISION

INTRODUCTION

[1] This is an appeal brought by Mr. James Munroe (the "Appellant") against the November 2, 2021, decision (the "Decision") of Leslie McKinley, Deputy Regional Manager, Recreational Fisheries & Wildlife Programs, Omineca Region (the "Respondent"). The Respondent worked in the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), as it was known at the time the Decision was made. The Decision denied the transfer of trapline TR725-T008 (the "Trapline") from Sally Sam A'Huille ("Ms. S. A'Huille") to Petra A'Huille ("Ms. P. A'Huille"), who was granted Third Party status in this appeal. Mr. Richard Prince, as co-holder of the Trapline, and the BC Trappers Association (the "BCTA") were granted Participant status in this appeal.

[2] The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 101.1 of the *Wildlife Act*, RSBC 1996, c. 488 (the "*Act*"). Section 101.1(5) of the *Act* provides as follows:

> On an appeal, the appeal board may
>
> (a) send the matter back to the regional manager or director, 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.

BACKGROUND

[3] Trapping fur bearing animals is one of the oldest industries in BC. Traplines were largely unregulated until 1926 when the BC government introduced the registered trapline system which divided Crown lands into registered traplines. It is estimated that there are in the order of 2,900 registered traplines in BC. Under the *Act*, the requirement to hold a trapping licence to trap fur bearing animals does not apply to "an Indian residing in British Columbia."[3] However, persons with Indian status are required to be registered on a trapline in order to sell furs commercially and to have a trapline cabin.

[4] The Trapline is located roughly 40 km east of Fort St. James and covers roughly 212 square kilometers. There is a cabin on the Trapline. The boundaries of the Trapline

[3] Under the *Wildlife Act,* "Indian" means a person defined as an Indian by the *Indian Act* (Canada).

roughly correspond with the ancestral lands (the "Keyoh") of the A'Huille extended family—the snadnake. The Trapline has historically been passed down along family lines.

[5] The Appellant, Ms. P. A'Huille, and Mr. Richard Prince have Indian status. Ms. P. A'Huille and Mr. Prince are members of the Dakelh First Nation (the "Nak'azdli Band") and Mr. Munroe is a member of the Sumas First Nation. The Appellant and Ms. P. A'Huille are husband and wife; Mr. Prince and Ms. P. A'Huille are first cousins.

[6] The provincial records show that the family has been associated with the Trapline since 1936 when Michel Benoit L'Huille[4] applied for, and received, the registration. In 1947 the Trapline was transferred to his son, Mr. Pius A'Huille who, in 1969, applied to have his daughter, Ms. S. A'Huille, and grandson, Mr. Prince (whom he had fostered), added to the Trapline registration. Mr. P. A'Huille remained as a registrant until his death in 1973, and Ms. S. A'Huille and Mr. Prince became sole registrants under the name of Richard Prince and Co. in 1974[5]. At some point after this, the Appellant was registered as an assistant trapper on the Trapline.

[7] Ms. S. A'Huille died in 2020. According to the terms of her will, the Appellant (Ms. S. A'Huille's son-in-law) was named executor of her estate, and Ms. P. A'Huille (Ms. S. A'Huille's daughter) was bequeathed (among other things) Ms. S. A'Huille's interest in the Trapline.

[8] On September 23, 2020, the Appellant was acting in his role as executor to Ms. S. A'Huille's estate and contacted Ms. Dawn Dreher (Fish and Wildlife Permit Coordinator, Front Counter BC, Omineca Region) about transferring Ms. S. A'Huille's interest in the Trapline to Ms. P. A'Huille. Ms. Dreher, by email, advised him that although she understood he would rather not involve Mr. Prince, that Mr. Prince, as a registrant, would have to agree to and sign the transfer form (the "Application"). She also advised the Appellant that he would need Mr. Prince's agreement to continue to be registered as an assistant trapper on the Trapline.

[9] On September 24, 2020, Mr. Matthew Scheideman, RPBio, the Omineca Region Wildlife Biologist who would be responsible for processing the Application once it was received, emailed the Appellant advising that he had received a copy of Ms. S. A'Huille's death certificate and will, dated February 17, 2017. Mr. Scheideman asked that a more recent copy of the will be provided, if one existed. He also advised that he would review the Application once it had been completed through Front Counter BC, and that the Application would need to be signed by: Mr. Prince as the existing registrant; the Appellant as executor; and Ms. P. A'Huille as the new registrant. He also advised that the

[4] The various spellings associated with this name results from anglicizing Indigenous words, and include L'Huille, A'Huille and Hahul. It is the name given to the head of the family and in this decision is spelled according to the evidence.

[5] For the purposes of this decision, a "registrant" is a person to whom a trapline is registered.

Appellant would require Mr. Prince's permission as the sole existing Trapline registrant in order to be recognized as an assistant trapper.

[10] On February 10, 2021, the Appellant informed Mr. Scheideman that probate of the will had been granted,[6] and that Ms. P. A'Huille would be making an offer to Mr. Prince to purchase his share of the Trapline. Mr. Scheideman replied on March 8, 2021, advising that regardless of whether Mr. Prince sold his interest to Ms. P. A'Huille, the trapline transfer application would still need to be made and that Mr. Prince would be required to sign it.

[11] On April 15, 2021, the Appellant made a formal written offer to Mr. Prince to purchase his interest in the Trapline for $50,000.00. In a letter dated April 22, 2021, Mr. Prince refused, advising that: traplines are not inherited or transferred through wills; he had never agreed to have Ms. P. A'Huille added as a registrant; and, he wanted to keep "my trapline" in his family forever.

[12] On May 10, 2021, the Appellant requested that the Ministry proceed with the Application, advising that as Mr. Prince did not agree with Ms. S. A'Huille's will, he did not co-sign the Application. The Appellant also requested that he be listed as assistant trapper for Ms. P. A'Huille.

[13] Ms. Dreher advised the Appellant on May 11, 2021, of the steps to complete the Application and advised that in the absence of Mr. Prince's signature, she would have to work with Mr. Scheideman as policy required all registrants sign the Application.

[14] On May 14, 2021, the Appellant informed Mr. Scheideman that Mr. Prince had advised he would not sign the Application. The Appellant asked that the Application, as well as his request to be added as assistant trapper, be processed. He further advised on May 17, 2021, that an error had been made and they were requesting a 2/3 share as opposed to a 50% share of the Trapline.

[15] On May 27, 2021, Mr. Scheideman emailed the Appellant advising that the Application was under review, but that he had spoken with Mr. Prince who indicated that he had not received a request from the Appellant to sign the Application. Mr. Scheideman requested a copy of the correspondence between the Appellant and Mr. Prince related to the request for and refusal by Mr. Prince to co-sign the Application. The Appellant replied later that same day advising that the response from Mr. Prince was as set out in the April 21, 2021, letter refusing the offer to purchase, but that given the Trapline was a "tenancy in common," according to the Ministry definition, transfer of an inheritance did not depend on the other registrants. The Appellant requested confirmation of the transfer of the 2/3 share.

[16] On July 19, 2021, Mr. Scheideman advised the Appellant that although section 42(3) of the *Act* sets out traplines are considered tenancy in common, section 64 indicates

[6] The granting of probate means that a will has been validated by a court.

traplines are not transferrable by will. Mr. Scheideman further advised that while the Ministry had in certain cases historically transferred registrations in accordance with wills, the Respondent had discretion in these matters. Mr. Scheideman explained the Respondent would have concerns about proper fur bearer management practices where there was disagreement between the parties as to trapline registration, as well as concerns over future conflicts between the registered holders. Mr. Scheideman encouraged the Appellant to establish an open line of communication with Mr. Prince to reach a mutually agreeable solution. Later that day, the Appellant requested that the Application be processed without further delay.

[17] On July 20, 2021, Mr. Scheideman emailed the Respondent. The Respondent understood this to be Mr. Scheideman's initial recommendation to her on the Application. The Respondent reviewed the material and returned it to Mr. Scheideman, requesting additional information and a final recommendation on the disposition of the Application.

[18] On August 5, 2021, Mr. Scheideman sent a recommendation via email (the "Recommendation") that the Respondent deny the Application.

[19] On November 2, 2021, the Respondent issued the Decision. She set out that she was not bound to follow Ministry of Environment Procedure 4-7-03.01.1,[7] "Granting Trapping Privileges", dated November 19, 1985 (the "Procedure"). She also set out that Mr. Prince did not agree to the transfer and that the Appellant had not tried to communicate or work with Mr. Prince to resolve the situation. The Respondent noted that as fur bearer populations and species-at-risk management were of concern in the Omineca Region, the absence of collaborative management between individuals who were, or could be, registered on the Trapline was concerning. The Respondent stated that because the Appellant had not "come to an agreement with the remaining living registered trapline holder to transfer part of the trapline, it would not be appropriate for me to approve this application without that additional consent."

[20] The Respondent also noted that the Application additionally asked for the transfer of Ms. S. A'Huille's trapline cabin. The Respondent advised that as trapline cabins were administered under the *Land Act,* RSBC 1996, c. 245, this request was outside of her authority under the *Act*. She also advised that the Lands Department within the Provincial government would require an approved trapline transfer application before the application to transfer the "Notation of Interest" for the trapline cabin could be reviewed.

[21] The Appellant appealed the Decision on November 30, 2021, on the following grounds:

[7] The Procedure, which sets out a standard approach to be followed for trapline succession, sale or transfer is specifically addressed later in my decision.

1. the Respondent fettered her discretion by treating a Ministry procedure that requires all registered holders of a trapline to agree to a transfer as a mandatory requirement;
2. the Decision is unreasonable as regards: sustainable management, the Appellant's role as Executor, and tenancy in common; and,
3. the Decision is inconsistent with the principles of natural justice and procedural fairness.

[22] The Appellant and Ms. P. A'Huille seek to have the Decision overturned and Ms. S. A'Huille's interest in the Trapline transferred to Ms. P. A'Huille. The Appellant also seeks costs.

[23] The Respondent asks that the Board dismiss the appeal without costs. In the alternative, should the appeal not be dismissed, the Respondent requests that the matter be sent back to the Respondent for reconsideration, without costs.

[24] Mr. Prince, who elected to provide a statement in writing to the Panel, submits that the Decision should be upheld and the appeal dismissed.

[25] The BCTA represents the interests of trappers in the province. The BCTA's participation was limited to making an oral statement at the hearing and to providing a written submission and documentary evidence related to trapline transfers and/or holding traplines in common, including its statutory interpretation of the *Act* as it relates to these issues. The BCTA submits that the Appellant's appeal should be granted and the Decision overturned.

[26] At the beginning of the hearing, the Appellant and Ms. P. A'Huille advised that they would be combining the presentation of their cases. As a result, for the purposes of this decision the submissions and arguments of the Appellant and Ms. P. A'Huille will be combined and referenced as the Appellant.

[27] While Mr. Prince elected to participate in the appeal by providing a written submission, he was called as a witness by the Respondent. Therefore, any testimony provided by Mr. Prince will be reflected in the sections setting out the Respondent's submissions.

ISSUES

[28] I have grouped the issues which were advanced by the Appellant and are to be addressed in this decision as follows:

1. Does the Decision meet the requirements of natural justice and administrative fairness?
2. If not, what is the appropriate remedy?

3. Should there be an order for costs?

ISSUE ONE

Does the Decision meet the requirements of natural justice and administrative fairness?

Appellant's Submissions

[29] The Appellant submits that the Decision is inconsistent with the principles of natural justice and procedural fairness in that:

- the Respondent fettered her discretion;
- the Appellant did not know the case that had to be met;
- the Appellant was not provided with a meaningful opportunity to be heard; and,
- the Respondent engaged in conduct giving rise to a reasonable apprehension of bias.

[30] As a result, the Appellant argues, the Decision should be overturned and the Panel should exercise its discretion to confirm the transfer.

The Respondent fettered her discretion

[31] The Appellant submits that the Respondent fettered her discretion by treating an unwritten policy/best management practice (the "BMP") requiring the consent of all registrants of a trapline before that trapline registration can be transferred as binding rather than putting her mind to the specific circumstances of this situation. This is distinct from the written Procedure.

[32] The Appellant submits that section 42 of the *Act* authorizes the Respondent to exercise discretion in deciding to grant a trapline registration. To assist in the exercise of this discretion, provincial ministries establish policies and procedures which are not law, but which guide decision-making. The Procedure, which was referenced by Ministry staff in correspondence with the Appellant, provides (in part):

1. In the event of a registered trapper's death, the executor (executrix) of the estate of the deceased trapper will be given one year to find a qualified trapper who wishes to purchase the assets of the trapline and have the trapline registered to the qualified trapper. After one year following the trappers [*sic*] death the trapline becomes vacant if the trapline cannot be registered to a qualified trapper found by the executor (executrix). Immediate family members (if no family member(s) is specified in the deceased trappers will) of the deceased trapper may also be given one year in which to apply for registration to that trapline. A family member who applies will not be registered to the

> trapline unless they have held a previous licence or have been authorized to trap or until they have successfully completed the BC Trapper Education Course. A family member must qualify to trap by the end of the next complete trapping season following the death of the registered trapper or the trapline becomes vacant.

[33] The Appellant submits that the Respondent was correct that she was not bound to follow the Procedure, and that had the Respondent treated the Procedure as binding to the exclusion of other relevant considerations, she would have fettered her discretion.

[34] In her Rationale for Decision dated November 2, 2021 (the "Rationale"), a document that was not included with the Decision and was only made available to the Appellant after this appeal was filed, the Respondent set out that one of the factors she considered in making the Decision was the BMP. Since 2019, the Ministry, Omineca Region, has adopted the BMP to ensure there is agreement amongst registrants for trapline transfers adding people as registrants, and when assigning assistant trappers. This statement referencing the 2019 BMP did not appear in the Decision.

[35] The Appellant submits that Respondent testified that she reviewed and approved Mr. Scheideman's July 19, 2021, email to Mr. Munroe which referenced the need for all trapline registrants to sign the Application, as required by the BMP. As such, she was aware that Ministry staff had informed the Appellant that Mr. Prince's consent was required to approve the Application.

[36] The Appellant submits that in both the Rationale and the Decision the Respondent concludes that it would not be appropriate for her to approve the Application without Mr. Prince agreeing to Ms. P. A'Huille being added as a registrant. The Respondent thus considered the lack of Mr. Prince's consent to be determinative of the Application and therefore fettered her discretion. The Respondent's subsequent justifications for this decision relating to fur bearer management requiring communication between trapline registrants cannot change the clear meaning of the statement in the Decision.

[37] The Appellant submits that there is no explicit evidence that the Respondent considered that she was not required to follow the BMP in exercising her statutory discretion. The Respondent's focus on the unwritten BMP fettered her ability to consider the particular circumstances of the Application.

[38] The Appellant says he was correct in assuming Mr. Prince would never agree to adding Ms. P. A'Huille as a registrant to the Trapline because, in the oral hearing, Mr. Prince testified that he would never consider adding Ms. P. A'Huille or other members of her family to the Trapline (contrary to what was set out in the Recommendation).

[39] The Appellant argues that the Respondent failed to properly consider the evidence available to her and this is further demonstration she fettered her discretion. In the Rationale, the Respondent set out the factors she considered in making the Decision. These factors (as summarized) included:

- traplines cannot be distributed as an asset of an estate;
- she was not bound to follow the Procedure;
- the BMP had been in place since at least 2019, and assists registered holders working together regarding what is happening commercially on a trapline;
- Mr. Prince expressed willingness to add Ms. S. A'Huille's kin as registrants if the Appellant was willing to meet with him and others, but the Appellant was not willing to do so;
- the Appellant made no attempt to contact Mr. Prince in spite of being advised by Ministry staff to do so, which showed a lack of willingness to work in good faith and caused concern that the registrants would not work collaboratively to make the best decisions for wildlife management on the Trapline;
- the Appellant was "demanding" a 2/3 share of the trapline which would only be applicable for buying and selling the trapline and not appliable to a percent permission to trap fur bearing animals, and opens up concerns for overharvest due to a perceived majority stake in the trapline; and,
- Indians, as defined under the *Wildlife Act*, do not require a licence to trap, and conditions cannot be placed on the trapping licenses of Indians.

[40] The Appellant submits none of the factors considered discuss Ms. S. A'Huille's wishes as set out in her will, the importance of the Application to Ms. P. A'Huille, the Keyoh system within Aboriginal practice, or any other factor in favour of granting the Application. Several of the points are general statements that show no consideration of the specific circumstances of this Application, while others are a direct copy and paste from Mr. Scheideman's Recommendation, including the reference to the 2/3 share of the Trapline which the Respondent testified formed no part of her decision making. Further, the Respondent's reference to Ms. P. A'Huille and Mr. Prince having Indian status indicates no consideration of the special circumstances of the Application beyond the Ms. P. A'Huille's and Mr. Prince's Indian status.

[41] The Appellant submits that the Respondent's testimony that she did not consider any other options or alternatives to Mr. Scheideman's Recommendation further supports that she fettered her discretion.

Knowing the case to be met

[42] A fundamental principle of administrative law is that a person must know the case they have to meet and have an opportunity to be heard and to respond before a decision

is made. When a decision breaches this principle, the rules of natural justice and procedural fairness are also breached.[8]

[43] The Appellant submits that the Respondent relied on the Recommendation in making the Decision, but the Recommendation contains information that was never discussed with or disclosed to the Appellant. In the Recommendation, Mr. Scheideman referenced a May 27, 2021, phone conversation he had with Robin Young of the Nak'azdli Natural Resource office during which Ms. Young commented, in relation to the Appellant and Ms. P. A'Huille, that there was a history of creating problems for their community. Ms. Young reportedly recommended against adding Ms. P. A'Huille as a registrant for the Trapline. The Recommendation also referenced: "in conversations held between the Province and Nak'azdli Natural Resource office that Nak'azdli staff indicated to Heather Carson (Ministry staff, First Nations Relations Advisor) that Richard Prince was the only recognized Keyoh Holder for this area …".

[44] The Appellant submits that Mr. Fred Sam, who was called as a Respondent witness and who is a former Chief, and present Councillor, of the Nak'azdli Band, testified that he was not aware of any problems the Appellant or Ms. P. A'Huille had created for the area. Further Mr. Sam testified that to his knowledge, there is no single leader for a Keyoh. When asked whether the Nak'azdli Band would normally be involved in considering this type of Application, Mr. Sam advised that to his knowledge they would not be involved. Mr. Sam also clarified that he was testifying on his own behalf and was not representing the Nak'azdli Band in any capacity.

[45] The Appellant further submits that the Recommendation and subsequent Decision are based on a policy preference that was never disclosed to the Appellant: that the unwritten BMP would be preferred over the widely known Procedure.

Opportunity to be heard

[46] The Appellant submits that the Decision effectively stripped Ms. S. A'Huille's estate, and Ms. P. A'Huille as beneficiary, of the Trapline and effectively granted sole registration to Mr. Prince. As such, the Appellant should have been granted an opportunity to present his case to the Respondent prior to the Decision being made.

[47] The Appellant submits that he was misled to believe that the only factor the Respondent would consider was whether Mr. Prince had signed the Application and consequently did not have an opportunity to respond to the two primary considerations underlying the BMP: fur bearer management and species-at-risk management. In fact, the Appellant was never informed at any time that species-at-risk management would be considered in the Decision.

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[8] *Champ's Fresh Farms Inc. v British Columbia (Employment Standards Tribunal),* 2023 BCSC 1075 (CanLII), at para. 37, citing *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation of British Columbia*, 2022 BCCA 247 (CanLII), at para. 74.

Bias

[48] The Appellant submits that the Supreme Court of Canada[9] has held that officials who play a significant role in decision-making must not give rise to a reasonable apprehension of bias, regardless of whether they are "subordinate reviewing officers, or those who make the final decision."

[49] The Appellant submits that Mr. Scheideman's conduct in handling the Application gives rise to a reasonable apprehension of bias because the Recommendation was based on an irrelevant factor: his belief that trapline transfers should never be approved without the consent of all registrants. The Appellant says this is evidenced by Mr. Scheideman:

- repeatedly telling the Appellant that the Trapline transfer would need Mr. Prince's signature and testifying that he never advised the Appellant that Mr. Prince's signature was not required to approve the Application;
- encouraging the Respondent to follow the BMP developed by a former Regional Manager who was "adamant on all our trapline transfers that **All** Registered Holders have to sign off on Trapline Transfers" (emphasis in original – July 20, 2021, initial recommendation email);
- testifying that he was trained to follow the BMP and has never processed a trapline transfer application without the signatures of all registered holders; and,
- being unduly concerned with an incorrect assumption concerning precedent—that approving this Application would require that similar future applications would also need to be approved.

[50] Mr. Scheideman expressed a concern in the Recommendation that approving this Application would result in Ms. P. A'Huille adding all of her extended family to the Trapline, which would result in Mr. Prince doing the same, rendering "Trapline management unmanageable." The Appellant argues there was no evidence to support this concern.

[51] The Appellant submits that Mr. Scheideman's testimony reinforced the reasonable apprehension of bias in that:

- during examination in-chief and cross-examination, he stated the former Regional Manager would have refused to look at a trapline application that did not have the signatures of all registrants; and,
- he referred to trapline applications that did not have the signatures of all registrants as "incomplete" and advised he would return such applications with instructions that signatures of all registrants were required.

[9] *Baker v. Canada (Minister of Citizenship & Immigration),* 1999 CanLII 699 (SCC) (*Baker*), at para. 45.

[52] The Appellant submits that as the Decision is based nearly entirely on Mr. Scheideman's Recommendation, Mr. Scheideman's bias in processing the Application results, in this case, in a reasonable apprehension of bias regarding the Decision itself.

BCTA's Submissions

[53] The BCTA did not make any submission on this issue.

Mr. Prince's Submissions

[54] Mr. Prince did not make any submissions on this issue.

Respondent's Submissions

[55] The Respondent submits that the Supreme Court of Canada[10] set out that administrative decisions affecting the "rights, privileges or interests of an individual" trigger the application of the duty of fairness, with the precise content of the duty being a flexible variable. The Supreme Court elaborated on this point in stating "[a]ll of the circumstances must be considered in order to determine the content of the duty of procedural fairness." The guiding principle resultant from this decision is that an applicant must have an appropriate chance to fully and fairly present their case to the decision maker through an open procedure.

[56] The Respondent submits that as the Application is a type of permission that is not granted as a matter of right and the decision-making process is not adversarial and does not resemble judicial decision making, these factors mitigate against requiring a degree of procedural fairness as rigorous as, or resembling, an adversarial, judicial, or quasi-judicial process.

Respondent's Discretion Not Fettered

[57] The Respondent submits that the law on fettering discretion is well established. A statutory decision maker fetters their discretion by treating policies or guidelines as binding to the exclusion of other valid or relevant reasons for the exercise of discretion, but that discretion is not fettered by adopting general policy guidelines.[11]

[58] The Respondent submits that the Rationale sets out the factors the Respondent considered in coming to her Decision, and this shows that the Application was not rejected outright and that she did not treat the BMP as a mandatory requirement. The Respondent argues she considered many relevant facts in arriving at the Decision, not simply that Mr. Prince did not sign the Application. The Respondent asserts her testimony was straightforward and showed that her Decision was based on, amongst other things, a lack

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[10] *Baker,* paragraphs 20, 21 and 22.

[11] Canadian Encyclopedic Digest, Administrative Law, §41 The Abuse of Fettering of Discretion.

of communication between the parties which caused concern for fur bearer management: the type of concern the BMP is meant to address.

Knowing the case to be met

[59] The Respondent submits that the references to the Appellant and Ms. P. A'Huille creating problems in the community were not Mr. Scheideman's views, but instead were comments made by Nak'azdli Natural Resources staff and reported by Mr. Scheideman. In any case, the Respondent submits her testimony was that she did not place substantial weight on this factor in making her Decision and that it did not materially affect the outcome.

Opportunity to be Heard

[60] The Respondent submits that the Appellant had notice and opportunity to make submissions and provide relevant information before she made the Decision. The Respondent submits that the nature of the process did not require the Recommendation to be provided to the Appellant or that they be given an opportunity to respond to it. As well, it did not require the Appellant be provided with notice of the Ministry discussions with the Nak'azdli Band or an opportunity to participate in any such meetings.

[61] The Respondent submits that the record shows that while Ministry staff did not speak directly with the Appellant, there was extensive and lengthy email communication over a long period of time.

[62] In response to the Appellant's assertion that he was misled to believe the Respondent would consider only whether Mr. Prince had signed the Application, the Respondent argues her testimony showed she considered many more factors. The correspondence and evidence show, according to the Respondent, the Appellant was made aware of the importance of communicating with Mr. Prince and was asked very early on in the process to do so.

Bias

[63] The Respondent submits the Appellant did not raise "bias" as a ground of appeal when the appeal was filed and therefore should be precluded from arguing the issue.

[64] The Respondent submits that, in any event, bias is a serious issue that must be supported by actual evidence.[12] The BC Supreme Court has held that the test is whether "an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through" would conclude, "more likely than not" that the decision maker "would not decide fairly."[13]

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[12] *Sacky v. British Columbia (Workers' Compensation Appeal Tribunal),* 2017 BCSC 1541 (CanLII), para. 22.

[13] *Attorney General of B.C. v. Lindsay,* 2009 BCCA 159, paragraphs. 7-8; and *Brar v. College of Veterinarians of British Columbia,* 2011 BCSC 486 (CanLII), paras. 60-62.

[65] The Respondent submits that there is no evidence of actual bias or a reasonable apprehension or perception of bias on her part or on the part of Mr. Scheideman. The Respondent argues there is nothing inappropriate about the Respondent considering the relevant opinions of herself and of other professionals.

[66] In discussing the Procedure, the Respondent submits that it was created almost 30 years ago when the *Act* and relevant provisions were different. For example, at that time, traplines could only have been held by one registrant. While the Procedure has not been formally repealed, it is no longer provided to the public and decision-makers must give it appropriate weight when making decisions on trapline registrations, as the Respondent did in this case.

[67] The Respondent submits that Mr. Scheideman placing great importance on the BMP does not mean that the Decision was predetermined. Mr. Scheideman testified that he knew the BMP was not mandatory, and that it was a working policy to promote collaboration and good management of traplines in the Omineca Region. His use of the word "incomplete" and his asking applicants to submit applications with the signatures of all registrants was his attempt to encourage collaboration and adherence to the BMP as much as possible while being aware that decision makers could deviate from that policy.

[68] The Respondent argues that Mr. Scheideman's comment concerning Ms. P. A'Huille adding extended family members does not demonstrate implicit bias and that the comment was part of the process of considering different potential scenarios and issues from the perspective of fur bearer management. In any event, the evidence shows that this was not a material factor in the Decision.

Analysis and Findings

[69] In the Decision, the Respondent sets out to the Appellant:

> … In making the decision on this transfer application I considered the following:
>
> - Once a holder of a trapline registration dies, the registration ends. A trapline registration is not property that survives death and does not form part of the estate of the deceased holder. While the Regional Manager has discretion to consider the intentions of the deceased trapline holder as evidenced by a will, it is the Regional Manager's decision pursuant to s 42(1) of the *Wildlife Act*, whether or not to grant a registration on that trapline to a new applicant.
> - There is [the Procedure] that speaks to transfers of traplines in the event of a registered trapline holder's death; however, the Regional Manager is not bound to follow that procedure.
> - Richard Prince is the remaining living registered trapline holder on [the Trapline].

- Richard Prince is not agreeable to the transfer and has not co-signed the transfer application.
- Through correspondence between Omineca Wildlife Biologists and yourself, [the Ministry] has required a collaborative approach to management of traplines. Specifically, we had asked multiple times for you to communicate directly with Richard Prince to discuss adding Petra Munroe [A'Huille] to the trapline. We do not see any attempts from you to resolve this or work in good faith with the current trapline holder, and correspondence indicates you are unwilling to follow this recommendation.
- Management of furbearer [*sic*] populations is of importance, and without a level of collaboration with Richard Prince there is little confidence in multiple trapline holders addressing sustainable furbearer harvest, or establishing an effective furbearer [*sic*] management plan.
- [The Ministry] Omineca Region is concerned about furbearer populations and species at risk management, so the importance of collaborative management is of high importance.

Because you have not come to an agreement with the remaining living registered trapline holder to transfer part of the trapline, it would not be appropriate for me to approve this application without that additional consent. Without agreement with the current registered holder, the issue of proper furbearer management on this trapline with multiple parties would be of concern. It is for a combination of these reasons that I as Deputy Regional Manager deny the transfer application.

....

[70] I note that the list of considerations set out by the Respondent in the Decision differs somewhat from the list of factors set out in the Rationale. The Decision does not reference that Mr. Prince was willing to add Ms. P. A'Huille and her kin to the trapline if the Appellant and Ms. P. A'Huille were willing to meet with him but that they refused to do so. Notably, however, the Rationale refers to this statement as a factor considered by the Respondent in making the Decision. This statement is taken directly from the Recommendation and would seem to reinforce the notion that the Appellant and Ms. P A'Huille were not willing to work collaboratively with Mr. Prince, whereas Mr. Prince was willing to work with them. Mr. Prince's testimony however, refuted this statement as he testified he would never consent to having Ms. P. A'Huille or her kin added as registrants. I find this contradiction problematic as the concept of collaboration was key to the Respondent's decision-making. I note that the Respondent did not hear directly from Mr. Prince when she considered the Application, instead relying completely on the file information put before her. Consequently, she was not aware of Mr. Prince's position as expressed at the hearing.

[71] In deciding whether to apply certain policies or guidelines, while the Rationale described why the Respondent should apply the BMP, it did not consider why she should not apply the Procedure. In the Decision, the Respondent set out that she was not bound to follow the older Procedure and, without referencing the BMP directly, stated that the lack of agreement with Mr. Prince meant it would be inappropriate for her to approve the Application as she had little confidence that effective fur bearer management would be attained on the Trapline. Essentially, in the Decision, the Respondent applied the BMP without first acknowledging that she was similarly not bound to follow it, nor setting out that her reasoning relied upon or adopted the BMP. Additionally, in neither the Rationale nor the Decision did the Respondent explain why she should not follow the Procedure in this particular case.

[72] As a result, there is insufficient evidence before me to show that the Respondent considered certain aspects of the specific circumstances of the Application, such as the length of time Ms. P. A'Huille's family had been involved with the Trapline, and whether any fur bearer management issues had resulted from past activity on the Trapline. On a plain reading of the Decision, the Respondent appears to have ceased her consideration of the file once she determined the terms of the BMP had not been met. The Respondent also appears to have considered that current Trapline registrants agreeing to add new Trapline registrants would contribute to sound fur bearer management. It is not clear to me however, what evidence, save her opinion, that the Respondent considered in coming to this conclusion for this particular case. This raises the question of whether the Respondent fettered her discretion in relying on the BMP or its underlying assumptions, and in doing so failed to consider the specific circumstances of the Application. The Board has considered the rule against fettering before. As noted in *Earl Pfeifer v. Director of Wildlife*, 2019 BCEAB 4 (CanLII) ("*Pfeifer")*:

> [102] The rule against fettering was described by the Board in *Emilly Toews and Elisabeth Stannus v. Director, Environmental Management Act*, (Decision Nos. 2013-EMA-007(g) and 2013-EMA-010(g), December 23, 2015); [2015] BCEAB No. 25 (QL)[14] as follows:
>
> > 133. The BC Supreme Court has held that an administrative decision-maker who blindly follows a policy, or closes his or her mind to the evidence, will have fettered their discretion…the BC Court of Appeal discussed the concept of fettering in *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 (CanLII), at para 62:
> >
> > > The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v.* [*Government of*] *Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2 which holds that decision makers cannot limit the exercise

[14] Publicly viewable as *Emilly Toews v. Director, Environmental Management Act*, 2015 BCEAB 23 on CanLii.org

> of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant…Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy…
>
> (Emphasis in original)

[73] The parties did not address whether the unwritten BMP was an official Ministry approved guideline or policy (that is, created with proper authority) or whether it was a practice that was followed in the Omineca Region. The Respondent testified she had confidence in the BMP as it reflected regional corporate history and was a step forward in terms of mitigating against risk to fur bearers. As regards the Procedure, the Respondent's position was that it had never been cancelled or replaced so remained an official policy that warranted consideration, even though it was dated and written at a time when things "were different." There was, however, no persuasive evidence to show that the Respondent considered whether the Procedure should be applied in the circumstances of this case.

[74] I find the Respondent relied on the BMP in making the Decision because she determined that if Mr. Prince agreed to adding Ms. P. A'Huille as a registrant they would likely communicate on matters concerning fur bearer management on the Trapline. It is unclear to me, however, what evidence was before the Respondent to suggest that this would in fact have occurred.

[75] The evidence does not appear to support the conclusion that there have been any Trapline-related fur bearer management issues in the past. The Respondent based her Decision on the information presented to her and she did not request additional information on this subject. She did not enquire as to how long Ms. P. A'Huille's family and Mr. Prince had been involved with the Trapline, nor as to the co-management of the trapline prior to the passing of Ms. S. A'Huille. She did not test the notion that Mr. Prince would have agreed to add Ms. S. A'Huille's kin had the Appellant met with him. I find this to be an indication that the Respondent chose to not look behind the BMP and instead chose to simply apply it without considering if it was appropriate to do so. In doing so, the Respondent failed to put her mind to the relevant specific circumstances of the Application, contrary to the test for fettering of discretion as described in *Pfeifer.*

[76] There are other procedural fairness concerns. In considering the requirement that an individual know the case to be met, the evidence shows that the Recommendation contained personal information about the Appellant and Ms. P. A'Huille, for example, the comment about the Appellant and Ms. P. A'Huille causing problems in the community. This allegation appears in the Rationale, but direct evidence was not presented on these

problems, either to the Respondent when she made the Decision or to the Panel on hearing this appeal. It stands as an unsubstantiated hearsay allegation alleging negative conduct by the Appellant and Ms. P. A'Huille which was not shared with the Appellant and which he did not have an opportunity to address before the Decision was made. Accordingly, the Appellant and Ms. P. A'Huille were denied the opportunity to know the case they had to meet and the opportunity to do so.

[77] The Rationale refers to this allegation as "noted" but not given "substantial weight" by the Respondent. I interpret this to mean that the information as included in the Rationale was considered by the Director. The only direct evidence presented on the question of these problems came from Mr. Sam, a member of the Nak'azdli Band who had held the positions of Chief and Band Councillor for many years and appeared on his own behalf as a Respondent witness. Mr. Sam testified that he was not aware of any problems in the community caused by the Appellant or Ms. P. A'Huille. Based on the evidence provided to the Panel, I find the allegations that the Appellant and Ms. P. A'Huille caused "problems" within the community to be bald assertions that are nothing more than unsubstantiated hearsay. No direct evidence has been presented to corroborate these allegations, and the Respondent's reliance on these assertions to any extent, even to a minor degree, was in error.

[78] While there exists a body of email correspondence between Mr. Scheideman and the Appellant, the Appellant asserts that there was no opportunity to communicate directly with the Respondent and that he was unaware of the Respondent's concern regarding fur bearer management. The Appellant says Mr. Scheideman never advised that the Respondent would be considering fur bearer or species-at-risk management when making her decision. I note that Mr. Scheideman's July 19, 2021, email to the Appellant sets out: "As this transfer application currently sits, the Regional Manager will have concerns about proper furbearer management practices on trapline TRO725T008 and future conflicts between the registered holders." This is the first time in what has been described by the Respondent as "extensive and lengthy email communication over a long period of time" that the link between the need for Mr. Prince's signature on the Application and fur bearer management was stated. This linkage to the unwritten BMP may have been known to Mr. Scheideman, but it was not until the July 21, 2021, email that this was communicated to the Appellant. There was no suggestion or request from Mr. Scheideman that, in the absence of Mr. Prince's signature, the Appellant provide any information on what fur bearer or species-at-risk management practices would be undertaken on the Trapline or to otherwise address the assumptions underlying the BMP. In this way as well, I find the Appellant was denied his right to know the case he had to meet and to make submissions and submit evidence to do so.

[79] Mr. Scheideman had conduct of the file up to the time it was before the Respondent, and his Recommendation was relied on by the Respondent in making the Decision. In fact, of the ten bullet points set out in the Rationale, five bullets are related to legislative requirements or Ministry process, four bullets are taken directly from the

Recommendation, and one is slightly modified from the Recommendation. It is clear to me that as Mr. Scheideman had a significant role in the processing of the Application, in accordance with the decision of the Supreme Court of Canada in *Baker,* the conduct of both Mr. Scheideman and the Respondent must be examined in a determination of bias.

[80] The final bullet in Mr. Scheideman's Recommendation is as follows:

- Concern that Petra [A'Huille] will then add all her extended family under this "TIC"[15] definition if you approve this transfer, which will result in Richard adding all of his extended family making Trapline management unmanageable. This will also set a precedent in the Omineca where Jeff Brown's (former Manager of NR) policy was to ensure that all RHs agreed for any trapline transfers, additions, and when assigning assistant trappers. This is the policy I have been working under since I started my role in 2019, and ensures all RH are working together in good faith and with a clear understanding of what activities and who is trapping commercially on their trapline.

[81] Although the Respondent did not include this bullet point in the information she stated she considered in making the Decision, Mr. Scheideman's significant role in the processing of the Application means that it is of importance to my consideration of whether he engaged in conduct leading to a reasonable apprehension of bias.

[82] The evidence shows that Mr. Scheideman concluded that the best way to ensure appropriate fur bearer management on traplines in general was to require that the terms of the BMP be met. In his July 19, 2021, email, Mr. Scheideman sets out that the "Regional Manager will have concerns" regarding fur bearer management—he does not say the Regional Manager may have concerns. He did not consider or raise with the Appellant whether there were any other ways to address fur bearer management on the Trapline, even considering that he, as the Wildlife Biologist in the area, testified that he did not have concerns about fur bearer management resulting from trapping in this area. In short, he considered that, in accordance with the BMP, the only way to ensure effective fur bearer management was to require Mr. Prince to agree to Ms. P. A'Huille being added as a registrant. Mr. Scheideman assumed that without Mr. Prince agreeing to Ms. P. A'Huille being added as a registrant, that there would be no collaboration on fur bearer management or sustainable harvest on the Trapline. In that regard, Mr. Scheideman treated the BMP, consciously or not, as a requirement of the Application.

[83] The Respondent relied upon the Recommendation without ensuring it was disclosed to the Appellant or making the factors on which she would make her determination known to the Appellant. This denied the Appellant a transparent process. The Recommendation did not contain any reference regarding whether there were any actual options for fur bearer management on the Trapline, save the assumption that Mr.

[15] Tenancy in Common. This concept will be discussed later in these reasons.

Prince's agreement to add Ms. P. A'Huille as a registrant would signal a collaborative approach. In that regard, the Recommendation did not provide sufficient information for the Respondent to conclude how or if the Application would impact fur bearer or species-at-risk management.

[84] For the reasons provided above, I find that the Respondent fettered her discretion by blindly following the BMP and the Recommendation for the reasons provided above. I also find that the process denied the Appellant sufficient information to know the case he had to meet and, consequently, a reasonable opportunity to make submissions and present evidence to make his case.

[85] I therefore find that the Decision must be set aside as it does not meet the requirements of natural justice and administrative fairness. As Board hearings are *de novo* proceedings and there is information before me that was not before the Respondent, I will now consider the status of the Application using the authority provided under section 101.1(5) of the *Act*.

If the Decision Does not Meet the Requirements of Natural Justice and Administrative Fairness, What is the Appropriate Remedy?

Appellant's Submissions

[86] The Appellant submits that rather than sending the Application back to the Respondent, I should grant a final resolution. The Appellant asserts that I have all the information required to make a decision on the Application, having heard 6 days of evidence which included testimony from the Appellant Ms. P. A'Huille, Mr. Prince, Mr. Sam, Mr. Scheideman, and the Respondent. The Appellant argues Ms. P. A'Huille deserves a final resolution of this issue and should not be required to wait for the Respondent to review and consider the same evidence that has been put before the Panel. The Appellant submits that the Nak'azdli Band need not be consulted prior to a decision being made on the Application as there is no evidence that the Province engages in formal consultation with First Nations on trapline registration decisions. Further, and as argued by the Respondent, the registration of a trapline does not affect Aboriginal title or rights as set out under section 35 of the *Constitution Act, 1982 (*the *"Constitution Act")*.

BCTA's Submissions

[87] The BCTA did not make any submission on this issue.

Mr. Prince's Submissions

[88] Mr. Prince did not make any submissions on this issue.

Respondent's Submissions

[89] The Respondent submits that making a new order without the participation of the Nak'azdli would be inappropriate. The Trapline is located within the asserted traditional

territory of the Nak'azdli Band, which claims Aboriginal title and rights over all the lands within its boundaries. The Nak'azdli were not a party or participant to the hearing and consequently it would be inappropriate to make a decision affecting the Nak'azdli without their presence and participation.

Analysis and Findings

[90] The Supreme Court of Canada has held that the Crown's duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) there is contemplated Crown conduct; and (3) there is the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[16]

[91] As noted at the beginning of this decision, the Province established traplines in 1926, and this particular trapline has been in the A'Huille family since at least 1936. Mr. Prince and Ms. S. A'Huille have been registrants on the Trapline since 1974. The appeal concerns transferring Ms. S. A'Huille's interest in the Trapline to her daughter, Ms. P. A'Huille. Mr. Prince remained as a registrant on the Trapline after Ms. S. A'Huille's death. It does not concern broadening the rights associated with trapline registration to anyone outside of a family that has long held an interest in the ancestral area in which the Trapline is located.

[92] The Rationale stated:

> …Knowing that there may be dissatisfaction from the Nak'azdli's Natural Resource office if an approval was pending, is not completely relevant to this particular decision and [the Ministry]'s larger goal of [First Nations] reconciliation. I noted this information as a consideration only, being somewhat relevant but not a point of considerable weight in exercising my discretion…

[93] I note that the Respondent did not include any reference to this point in the Decision. Based on the evidence before me, the Ministry reached out to the Nak'azdli's Natural Resource office, though formal consultation on the Application with the Nak'azdli Band was not undertaken. Neither the Appellant nor the Respondent made submissions or argued that the Respondent erred in taking this approach.

[94] The Appellant submitted that there is no evidence that the Province engages in formal consultation with First Nations on trapline registration decisions and the Respondent did not provide any indication to the contrary. Neither the Respondent nor the Appellant presented any case law that suggests that the circumstances of this particular case would trigger a requirement for consultation with the Nak'azdli Band, nor am I aware of any. As stated, the nature of the rights associated with the trapline would not change on the transfer of the Trapline interest from one family member, Ms. S. A'Huille, to another family member, Ms. P. A'Huille; it is more administrative in nature. The

[16] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 (CanLII), at para 31.

Trapline does not give the registrants any proprietary interests in wildlife, nor does it give exclusive rights to trap in the area. Fur bearers can only be harvested with a licence or under the *Act's* exemption for Indians. In the circumstances of this particular matter under appeal, the Trapline registration would persist regardless of whether Ms. S. A'Huille's registration is transferred to Ms. P. A'Huille. Therefore, it is difficult to see how the transfer of Ms. S. A'Huille's interest in the Trapline to Ms. P. A'Huille would amount to conduct that may adversely affect an Aboriginal right.

[95] The evidence before me consists of the information that was considered by the Respondent, including the information from the Recommendation and Rationale regarding comments of the Nak'azdli Natural Resource office, as well as evidence and testimony that was not before her. While the Respondent asserts that I must not make a decision without the participation of the Nak'azdli Band in this appeal process, they have not supported this position with any case law. Even if consultation were required in this instance, it is not clear to me that the participation of the Nak'azdli Band in this appeal would fulfil that obligation. I do not see a compelling reason why I could not make a decision in this instance without the participation of the Nak'azdli Band in this appeal.

[96] I am not required to make determination of the nature of Aboriginal and treaty rights under section 35 of the *Constitution Act* as it pertains to this appeal. However, for the purpose of determining whether I have sufficient information to proceed with making a decision on this Application under the authority provided in section 101.1(5)(c) of the Act, I find that the Nak'azdli Band need not be consulted.

What is the legal nature of a trapline under the *Act*?

Relevant Legislation

[97] The legislation relevant to this decision is excepted below:

> ***Constitution Act, 1982***
>
> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.
>
> **Wildlife Act**
>
> **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

(a) is a registered holder of the trapline for that area,

(b) has written permission of a registered holder of the trapline for that area,

(c) is the owner or occupier of the land,

(d) has written permission from the owner or occupier of the land, or

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

Registration of traplines

42 (1) A regional manager, or a person authorized by the regional manager, may grant registration of a trapline on Crown land to a person who is, or to a group of persons each of whom is,

(a) 19 years of age or older, and

(b) a citizen of Canada or a permanent resident of Canada.

(2) A person or group of persons must not be granted registration of more than one trapline unless

(a) the traplines are contiguous,

(b) the person or group of persons has submitted to the regional manager a fur management plan, and

(c) the regional manager has approved the fur management plan.

(3) Registration of a trapline or traplines in the name of more than one person creates a tenancy in common.

Certificate or licence is part of estate

64 (1) An interest in a guiding territory certificate is part of the estate of the holder of that interest and, subject to section 62 (2), the heirs or administrators of a deceased holder may transfer, within 2 years of the holder's death, the holder's interest in the guiding territory certificate to a person who qualifies under section 59 (1).

(1.1) If an interest in a guiding territory certificate is not transferred in accordance with subsection (1) after the death of a holder, the deceased holder's interest in the guiding territory certificate is forfeited to the government.

(2) An angling guide licence, including any angler day quota attached to it, is part of the estate of the angling guide and, subject to the regulations,

the heirs or administrators of a deceased angling guide may transfer, within 2 years after the angling guide's death, the privileges conferred by the angling guide licence and any angler day quota attached to it.

(3) If an annual fee for an angling guide licence becomes due in the interval between the death of the licence holder and the date of a transfer under this section, no annual fee is payable.

(4) If privileges conferred by an angling guide licence are not transferred in accordance with this section, the heirs or administrators must surrender the angling guide licence to the regional manager.

Commercial Activities Regulation

Abandonment of trapline

3.14 (1) No person shall continue to hold a registered trapline unless the person

(a) renews the person's licence,

(b) carries on active trapping on the person's registered trapline to the satisfaction of the regional manager,

(c) obtains permission from the regional manager to temporarily discontinue the use of the person's registered trapline for a period not exceeding 2 years, or

(d) uses or causes the use of the person's trapline by a licensed trapper or a person exempted from holding a licence.

(2) Where a person fails to comply with subsection (1), the regional manager shall cancel the registration of the person's trapline.

Appellant's Submissions

[98] The Appellant submits that the *Act* sets requirements for trapping in BC. Section 11(8) provides that trappers are required to obtain a trapping licence prior to trapping fur bearing animals, while section 11(9) confirms that people with Indian status are exempt from this requirement. Section 41 provides that fur bearing animals may only be trapped: on a trapline by the registered holder of the trapline or someone with their permission; on private land they own or occupy or if they have permission from the owner/occupier; or as permitted by a trapping permit.

[99] The Appellant submits that the primary defining feature of traplines is that they grant the exclusive right to trap certain animal species in a specified area to registered trapline holders. Although persons with Indian status are exempted from the hunting related offences established in section 41 of the *Act*, there is no legislated exemption in relation to trapping. Section 3.14 of the *Wildlife Act Commercial Activities Regulation,* B.C. Reg. 338/82, (the "*Regulation*"), which sets out the minimum requirements for registered

holders of traplines, does not include a requirement that a trapline be operated, often referred to as "trapped," by the registered holder. Consequently, traplines can have silent registered holders who do not trap but who grant permission for others to trap.

[100] The Appellant submits the Respondent was incorrect in stating, in the Decision, that: registration ends once a holder of a registered trapline dies; trapline registration is not a property that survives death; and, trapline registration does not form part of the estate of the deceased holder.

[101] The Appellant submits that traplines are a form of property[17] - a *profit à prendre* - which is "undeniably a property right"[18] that may be assigned and dealt with as a valuable interest[19] which survives the death of the holder and is capable of being inherited.[20]

[102] The Appellant submits that the Ministry treats traplines as property. Mr. Scheideman's testimony was that traplines are regularly bought and sold. Further, section 1 of the Procedure sets out that traplines can be sold, including following a registered holder's death, and that the estate executor will have one year to find a trapper to be registered to the trapline.

[103] The Appellant submits that there is no provision in the *Act* which states that traplines do not form part of a deceased registrant's estate. Instead, the Respondent relies on the "implied exclusion rule" to argue that, as the *Act* does not set out that traplines can form part of an estate, the legislature must have not intended for traplines to be able to form part of an estate. The Appellant argues that this principle does not apply in this case because it ignores the BC Court of Appeal's 1985 finding in *Bolton*[21] that traplines are a proprietary interest that survive the death of the registered holder. Trapline registration does not create an interest in land, but traplines are a form of property. Angling guide licenses and guide outfitter certificates, in contrast, are not property interests and therefore, without section 64 of the *Act*, would not survive the licensee's death. By not stating that traplines cannot form part of an estate during subsequent revisions to the *Act* after *Bolton*, the Legislature appears to have expressly decided not to abrogate the law set out in *Bolton*. Additionally, section 42(3) of the *Act* expressly setting out that registration in a trapline in the name of more than one person creates a tenancy in common indicates that the Legislature did intend traplines to survive the death of the registrant, given a primary distinguishing feature of tenancy in common is that property interests held by a tenant in common survive the holder's death.

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[17] *Bolton v. Forest Pest Management Institute*, 1985 CanLII 579 (BC CA) ("*Bolton*"), at para. 17.
[18] *Saulnier v. Royal Bank of Canada*, 2008 SCC 58 (CanLII) ("*Saulnier*"), at para. 28.
[19] *ibid.*
[20] *Montreal Trust Company's Application (Cleveland Estate) (Re), 1962 CanLII 301 (SK KB),* at para. 15.
[21] *ibid.*

[104] The Appellant argues that while traplines do not create a proprietary interest in land[22], a trapline, as a *profit à prendre,* is a right to use the land which, according to *Bolton,* can be inherited. The Appellant argues that a *profit à prendre* is a property right, but it is not a proprietary interest in land. An essential characteristic is that the proprietary right to land is held by someone other than the *profit à prendre* right holder.

[105] The Appellant submits that the Board's decision in *Capot-Blanc*[23] does not stand as an authority for the proposition that interests in a trapline are automatically lost when a registrant dies. In addressing the Board's reference in that decision that an interest in a trapline could be lost through death, the Appellant argues that the issue of an interest in a trapline surviving the death of a registrant was not before the Board and that there was no authority cited for the statement.

[106] The Appellant submits trapline registrants do not have a right of survivorship to each other's interest in the trapline because their interests are held as tenancy in common as opposed to joint tenancy. Indeed, a survivorship interest is the primary practical difference between a joint tenancy and a tenancy in common. While the Respondent relies on *Haddelsey*[24] in support of the proposition that a tenancy in common may or may not include a right of survivorship, the Appellant argues that that case is distinguishable from this appeal. The Appellant submits that *Haddelsey* is a wills interpretation case decided on the basis of the "express and distinct" words of the testator. Further, the Appellant submits that while that case addressed the interpretation of a will which granted a tenancy in common with a benefit of survivorship, section 42(3) of the *Act* does not include such an express modification to the structure of a tenancy in common. Further, *Haddelsey* is a 167 year old English case which has not been followed by a Canadian court or tribunal, whereas the Board, in *Capot-Blanc,*[25] has previously applied the Procedure to the issue of succession of family members to a trapline registration. The Appellant argues that, consequently, the reasoning of the Board in *Capot-Blanc* should be preferred to that in *Haddelsey.*

[107] The Appellant submits that, in making a decision regarding the transfer of a trapline, the Respondent cannot apply policy or procedure in a way that ignores the plain meaning of "tenancy in common" as provided in section 42(3) of the *Act*. The Appellant submits that requiring the surviving holder to agree to the transfer of the deceased holder's interest in the trapline effectively converts a tenancy in common (with no right of survivorship) into a joint tenancy (with a right of survivorship). When there is conflict or disagreement between or amongst trapline registrants and/or their family members, the BMP, rather than encouraging good faith and collaboration, has the opposite effect of

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[22] *Chingee v. British Columbia*, 2017 BCCA 250 (CanLII) ("*Chingee*"), at paras. 14 and 15.
[23] *Virginia Capot-Blanc v. Regional Manager*, 2010 BCEAB 4 (CanLII) ("*Capot-Blanc")*, at para 52.
[24] *Haddelsey v. Adams* (1856), 22 Beav. 266, 52 E.R. 1110 ("*Haddelsey*").
[25] *ibid.*

incentivizing the surviving registrant to refuse to sign the Application. This is so as, by refusing to sign, the surviving registrant acquires the entire interest in the trapline.

BCTA's Submissions

[108] The BCTA submits that the interpretation of the *Act*'s provisions respecting traplines must be interpreted contextually within the history of the trapping industry, Indigenous law, and the common law.

[109] The BCTA asserts that the evidence shows that traplines have value, they can be a sizeable financial investment, and they provide a livelihood to some trappers. As a result, in order to keep the trapping industry viable, trappers require assurance and certainty of their legal interests in traplines, and a high degree of fairness from the Respondent in regulating traplines. Trapping is often a family tradition, and the ability to pass traplines through estates has great cultural and personal value to both Indigenous and non-Indigenous persons. The ability to pass a trapline through an estate serves the purpose of the *Act* to ensure sustainable wildlife management, as estate beneficiaries are more likely to be familiar with locations of wildlife, habitat, trails, and other features essential for proper habitat and wildlife management than is a third party.

[110] The BCTA submits that, as set out in *Bolton*, traplines are a *profit à prendre.* While this status does not give the holder any proprietary rights in wildlife or to the land itself, the *Land Act* and its associated regulation explicitly list trapline registrations as a form of tenure which comes with interest and rights or estate in land[26]. Further, as concluded by the BCSC[27], the *profit à prendre* is a right that may be dealt with as part of an estate. Additionally, the 1958 Game Management Manual of the BC Game Commission sets out, at page 5, "when the holder of a registered trap-line dies, his trap-line is part of his estate, and it cannot be transferred or otherwise negotiated without the signature of the person authorized to do so."

[111] The BCTA submits that in accordance with *Berkheiser,*[28] the *profit à prendre* can either have a set term or can last in perpetuity. As a default position, where a lease or grant does not stipulate a term it is deemed to be indefinite.[29] In fact, the Board previously held that a trapline is granted in perpetuity and does not have a time limit,[30] with the only reason for cancellation of a trapline registration being failure to fully utilize the resource.

[112] The BCTA submits that as trapline registrations are *profit à prendres* granted by the Ministry without expiry dates, they can pass through an estate. There is no law or policy

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[26] *Land Act*, RSBC 1996, c. 245, sections. 1, 7.1, 7.2; *Integrated Land and Resource Registry Regulation* B.C. Reg. 180/2007, Section 3 and Schedule 1.
[27] *Canadian Forest Products Inc. v. Sam*, 2011 BCSC 676, at paras. 79 and 97.
[28] *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, 1957 CanLII 56 (SCC) ("*Berkheiser*"), at page 6.
[29] *Stony Mountain Enterprises Ltd. v. Genstar Corp*., [1986] 5 WWR 763, 1986 CanLII 5088 (MB KB).
[30] *Phillip Leroy v. Deputy Director of Wildlife*, 1997 BCEAB 37 (CanLII), at page 6.

that sets out that a trapline registration ceases on the death of a registrant. If a trapline tenant in common dies, the BCTA argues, the registration remains in the name of the deceased trapper indefinitely and is not removed until it is either cancelled by the Minister following a hearing pursuant to Section 61 of the *Act*, or upon the granting of an application under section 42 of the Act to transfer the trapline registration to another person. The BCTA submits that many of the approximately 2,900 traplines in BC are registered in the name of deceased persons awaiting action by estate administrators or by Ministerial staff to cancel the registration due to a failure to harvest pelts. These traplines, however, can still continue to be trapped, keeping the registration maintained in good standing, if it is actively trapped by someone who has the written permission of either the deceased trapper from when they were alive or of the deceased trapper's estate. So long as one of the conditions listed in section 3.14(1) of the *Regulation* is met, a person may be a registrant even if they don't hold a trapping licence: section 3.14(1)(d) explicitly allows the use of a trapline by a person other than the registrant.

[113] The BCTA submits that the Respondent's interpretation of the tenancy in common created in section 42(3) of the *Act* is unduly narrow and is not supported by a contextual reading of the *Act* as a whole. If it was intended that the tenancy in common set out in section 42(3) of the *Act* was anything other than what is ordinarily meant, language would have been provided in this section or elsewhere in the *Act* to make this explicitly clear, as is the case for guide outfitter license tenancies in common. Section 59(4) of the *Act* creates tenancy in common if more than one person is granted a guiding territory certificate, and section 61(1) limits that tenancy in common to 2 years from the death of the certificate holder. The BCTA argues that the *Act* does not put a similar temporal limitation on a trapline registration tenancy in common.

Mr. Prince's Submissions

[114] Mr. Prince did not make any submissions on this issue.

Respondent's Submissions

[115] The Respondent submits that a trapline registration is a regulatory permission which gives the holder permission to do (and permit others to do) certain things which would otherwise be prohibited. The registration: does not survive death; ends once the holder dies; does not form part of the holder's estate upon their death; and, cannot be assigned after death. The Respondent submits that the understanding of the law, as stated in the Decision, is correct and reflects the legal position of the Province.

[116] The Respondent submits that the main purpose of the *Act*, as determined by the BC Courts, includes the preservation and conservation of wildlife habitat, the enhanced production of wildlife, and the regulation of the consumptive use of wildlife.[31] The *Act*

[31] *The Association for the Protection of Fur-Bearing Animals v. British Columbia (Minister of Environment and Climate Change Strategy),* 2017 BCSC 2296 (CanLII).

regulates trapping activity and makes it an offence for a person to trap fur bearing animals unless the person holds a trapping licence under section 11(8)—except for those with Indian status (section 11(9)). While there is no similar exemption for a trapline registration for Indigenous persons, there is no need to do so because of the constitutionally recognized and protected section 35 Aboriginal rights to trap for food, social, and ceremonial purposes.

[117] The Respondent submits that it is evident under section 61 of the *Act* that trapping is to be regulated as a commercial activity, and as such, holders of authorizations are afforded extra administrative fairness protections before rights granted under the *Act* can be curtailed or taken away. Regulations pertaining to trapping activities are set out in the *Regulation*, which clearly establishes that the intent of the *Act* is for traplines to be regularly and actively utilized. Although there is no provision in the *Act* which specifically authorizes the transfer of a trapline registration, the legal mechanism to transfer registration from one person to another is through the exercise of the regional manager's discretionary powers under sections 42(1) and 100(2)(a) of the *Act*.

[118] While the Respondent agrees with definition of *profit à prendre* as set out by the Appellant—a right to enter on the land of another person and take some profit of the soil—the Respondent submits there is no authoritative case where a court has found that a trapline registration under the *Act* is a *profit à prendre.* Authorities cited by the Appellant and the BCTA rely on *Bolton,* which was an application for an interim injunction to stop a herbicide spraying programme. The nature of an application for an interim injunction meant that the Court did not fully consider the issues raised and make a decision on the merits of the case. Consequently, the Respondent argues, the Court in *Bolton* did not specifically consider the legal nature of a trapline, and it does not authoritatively conclude that an interest in land is a *profit à prendre*. Additionally, the Respondent asserts the analysis applied by the Court was based on misunderstandings of the trapline registration statutory scheme, because trapline registration lacks two key elements necessary for an interest to be a *profit à prendre*: a trapline registration does not provide for access to land and does not in itself provide for the registrant to take animals from the soil.

[119] The Respondent submits that trapping is regulated separately from access to Crown lands. Sections 41 and 42(1) of the *Act* are the essence of the trapline scheme: being the registered holder of a trapline ensures the person can trap in an area of Crown land and not commit an offence by doing so. Registrations under the Act do not provide the right to enter onto Crown land as use of Crown land is governed by the *Land Act*. The right to access Crown land for trapping is provided by the "Permission Land Use Policy" (the "Permission") which provides permission (i.e. bare licence under section 6 of the *Land Act*) to enter, traverse or be present upon Crown land for a variety of activities, including for transitory activities such as hunting (section 8.1). The Permission also authorizes the use of Crown land for trapping.

[120] The Respondent submits that the trapline registration is only one of the many required elements that allows a person to take wildlife and does not confer property

rights to the wildlife itself, as is specifically stated in section 42(5)(a) of the *Act*: registration of a trapline does not give the holder any proprietary rights in wildlife. The BCCA in *Chingee* also found that a trapline does not create a proprietary interest in land. The Respondent says the Appellant's argument that a *profit à prendre* is a property right, but is not a proprietary interest in land is patently false as a *profit à prendre* is a type of right in property.

[121] The Respondent submits that the use of "tenancy in common" in section 42(3) of the *Act* does not automatically make the interest it is describing a property interest, as the term must be considered in the context of the entire scheme. Viewed in context, the phrase describes the nature of the relationship between a group of persons who hold an authorization under the *Act*. That is:

- they all own part of the same trapline;
- they can each sell their individual interest while others retain theirs;
- they can hold different percentages, i.e. the shares do not have to be equal; and,
- each registrant holds their share "in common" and so can trap anywhere within the trapline area.

[122] The Respondent submits that tenancy in common is also used in section 59(4) of the *Act* in relation to guiding territory certificates issued to more than one person. As the Appellant concedes that guiding territory certificates are not property interests and therefore would not survive the licensee's death if not for section 64 of the *Act*, it follows that traplines registrations, being tenancies in common, must be a property interest.

[123] The Respondent also submits that the implied exclusion rule is a standard common law principal of statutory interpretation: if the legislature left something out, it intended to do so since if it had wanted to include something it would have expressly done so. The Respondent submits that if the Legislature had intended that traplines form part of an estate, like guiding territory certificates or angling guide licences, trapline registrations would have been referenced in section 64 of the *Act*. The Respondent says that the Appellant is wrong, where he argues that the implied exclusion rule does not apply here because *Bolton* has established that traplines are a proprietary interest, fails because *Bolton* was not a definitive case on the nature of trapline interests. Further, the original form of the current *Act* provided for guide outfitter's certificates or licences to be part of the estate of the holder since it was enacted in 1982, predating the *Bolton* decision in 1985.

[124] The Respondent submits that the *Game Act*[32], the statute predating the *Act*, provided that trapline registrations do not amount to title in any land or property. That statute allowed a trapline to be passed down after the death of a registration holder by allowing the personal representatives of a deceased registered holder to nominate a licensed trapper to have prior and exclusive right to become the holder subject to the approval of the Game Commission. This suggests that traplines are not property interests. If the Legislature had wanted to continue to allow personal representatives of a deceased holder to nominate someone to have prior and exclusive right to become a holder, it would have.

[125] The Respondent submits that the Procedure was created at a time when only one individual could be the registrant for a trapline and that once that holder passed away, the trapline would be become vacant, revert back to the Crown, and subsequently be sold by auction. The intent of the Procedure was to set out a process that accomplished the objective of providing some relief to the estate and family of the deceased holder. There would not have been a need for the Procedure if traplines were a property interest that survived death. The Procedure also highlights that trapline registrations are, at their core, commercial in nature in that the process outlined in the Procedure gives the estate more protection if it wishes to sell the trapline's assets (i.e. have the trapline registered to a qualified trapper) as opposed to have family members take it over (i.e. they can apply for registration). In addition, for family members named in a will or immediate family members, the Procedure only provides them with limited time to allow the opportunity to apply for registration as opposed to having the trapline registered to the qualified purchaser.

[126] The Respondent submits that to consider a trapline as a *profit à prendre* runs contrary to trapline regime as set out in the *Act,* as it would remove the Respondent's discretion. Through property and estate law, if a trapline was a *profit à prendre,* the trapline registration, where there was a valid will, must pass with the estate. This implies that the statutory decision maker would have to grant the registration in accordance with the wishes of the estate or will, leaving the decision maker no choice in the matter. The Respondent argues that this implication runs contrary to the plain meaning of section 42(1) of the *Act*.

[127] Furthermore, the Respondent submits that if a trapline was a *profit à prendre,* the absence of a term does not automatically mean that a *profit à prendre* is granted in perpetuity: its term would be limited to that of the registrant's life.

[128] The Respondent submits, lastly, that it is ultimately unnecessary for me to decide the exact legal question of whether a trapline registration is a *profit à prendre.* The question in this appeal is whether to exercise the statutory discretion of the regional

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[32] *Game Act*, RSBC 1936, c 108, s 41(3)(a); *Game Act*, RSBC 1948, c 135, s 42(3)(a); and *Game Act*, RSBC 1960, c 160, s 42(3)(a).

manager under section 42(1) of the Act to grant the Application which can be done without deciding on the nature of the trapline interest.

Analysis and Findings

[129] The Parties agree that trapline registration is grounded in the *Act*. The Appellant and the BCTA argue that trapline registrations are a *profit à prendre,* and as such are considered property in terms of an individual's estate—that they are a property right and not a proprietary interest in the land. The Respondent argues that if the Legislature had intended traplines to form property for the purposes of an estate, express provision would have been made in the *Act* as is the case in the guide outfitter regime.

[130] Section 42(3) of the *Act* creates a tenancy in common when more than one individual is registered on a trapline. The Appellant argues that, upon the death of one of the registrants, their share of the trapline would be passed in accordance with their wishes, as expressed through their will, to someone other than the remaining registrants/tenants in common. If this were otherwise, the Appellant argues, the *Act* would establish a joint tenancy rather than a tenancy in common. The Respondent argues that a trapline registration does not survive the death of the registrant, and that the *Act*, in establishing a tenancy in common, applies only to the extent of permitting the co-registrants to share, in common, the resources of the trapline for their lives. If this were otherwise, the Respondent argues, the Respondent would not, in fact, have any discretion to exercise as they would be bound to register the trapline to the person named in the will.

[131] As regards the tenancy in common provision, the Respondent argues that while tenancy in common is a term used in property law context, its use in the *Act* is distinct. The Respondent asserts that the term tenancy in common in the *Act* does not mean that the *Act* describes or conveys a property interest; rather, the use of this term in the context of the *Act* describes only that registrants have the right to trap anywhere within the geographic area of the trapline, they can hold different shares in the trapline, and they can be registered at different times from each other.

[132] The Respondent raised the exclusionary principle of statutory interpretation: if something does not appear in statute, it was not intended to be there. The Respondent argues that this principle should be applied in the present dispute, as it provides insight into the proper interpretation of the *Act*. If, as argued by the Respondent, I apply the exclusionary principle to the wording of tenancy in common, I see that while its meaning is limited in the case of guiding territory certificates, it does not appear to be limited in the case of trapline registrations. Following this approach, it would seem to follow, therefore, that under the *Act*, tenancy in common as applied to trapline registrations would have a broader meaning than the limited meaning associated with the same phrase applied to guiding territory certificates. According to the Respondent's argument, each trapline registrant owns an equal share in the trapline. In that scenario, it would follow that if the registrant has no opportunity to nominate a successor by way of their will, and if the

registration terminated on the death of that particular registrant, that the interest would pass to the remaining registrant(s), ultimately leading to a "last man standing" outcome. This, in fact, describes a joint tenancy rather than a tenancy in common.

[133] Using the Respondent's approach of analysing the legislative provisions primarily through the lens of the exclusionary principle, if the legislature had intended for the outcome of such a scenario to be different from what was outlined, i.e. a traditional meaning of the term tenancy in common, it would have been provided for. The legislature could have, for example, provided for joint tenancy or used different wording to describe a similar outcome. Instead, in recognition of the historical Indigenous family related use of ancestral areas for traditional trapping practices, the legislature appears to have provided a way for Indigenous families to remain connected with their traditional territories in accordance with their rights under the *Constitution Act* within a voluntary provincial regulatory scheme.

[134] The legislature, in enacting the wording of section 64 of the *Act*, made express its intention that a guiding territory certificate is part of the estate of the holder of that interest. The legislature, in section 64, did this for both guiding territory certificates and angling guide licences. The Respondent argues that the legislature's inclusion of both of these forms of authorization in section 64 should be interpreted as forming a closed, or complete, list, and that no other manner of authorization may be interpreted as forming part of the estate of the authorization holder.

[135] In my view, this is incorrect.

[136] Firstly, the Respondent misapprehends the implied exclusion rule. This rule of statutory interpretation is one that is applied to legislation which lists items or factors that the legislation directly affects. This is not the structure of section 64 of the *Act*. The Respondent is correct in stating that section 64 discusses both guiding territory certificates and angling guide licences. However, these authorizations are not presented in a list form to which the implied exclusion rule applies. Rather, the *Act* sets out the treatment of these authorizations within the various subsections of section 64: guiding territory certificates are considered within subsections (1) and (1.1), and angling guide licences are considered in subsections (2) through (4).

[137] Finding that the implied exclusion rule of statutory interpretation applies not only to listed similar concepts or items but to separate sections of the legislation would, in my view, result in absurdity. This interpretation would not assist the reader in understanding the meaning of the legislation, but would rather serve to confound the statutory intent by allowing the application of the words of the statute to be understood only by a select few, those with specific training in statutory interpretation, rather than as a plain reading would intend for it to be read.

[138] In making this finding, I have explicitly considered whether not considering separate sections of the *Act* to consist of a list that would be caught by the implied exclusion rule would be a failure to follow a 'large and liberal' approach to applying this

rule. I find I must answer this question in the negative. The implied undertaking rule **must** be given a large and liberal approach when the words of an act are examined to determine their meaning. However, this rule of statutory interpretation **must not** be given so wide a scope of application so as to render meaningless or incomprehensible the plain wording of the statute. The legislature, in enacting the five subsections of section 64 of the *Act*, explicitly turned its mind to the two authorizations of guiding territory certificates and angling guide licences. That the legislature chose to place different effects and restrictions on these authorizations under section 64 is also of significance. While I will not enumerate all of these differences here, one significant difference between how the legislature intended these authorizations to be treated is that one of them, if the authorization is not transferred in accordance with the *Act*, is forfeited to the government by the operation of law, whereas the other is subject to surrender by the heirs or administrators of the authorization holder's estate. To consider that the implied exclusion rule would operate in this situation would not only be absurd: it would be impossible, as the purported list of similar authorizations are not uniformly treated by the *Act*.

[139] Secondly, the interpretation presented by the Respondent on the application of the "standard common law principle" of the implied exclusion rule fails to consider other rules of statutory interpretation. While the Respondent is correct in stating that the implied exclusion rule is a statutory interpretation tool that must be considered in understanding the words of an act, it must not be given so much deferential attention that it renders the other statutory tools impractical or of no effect. Specifically, the modern approach to statutory interpretation requires that the "words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament" (*Rizzo v. Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27).

[140] While I previously touched on the requirement to consider the plain words of the *Act*, their grammatical and ordinary sense, the entire context of the *Act* must also be considered. When seeking to establish the meaning of section 64 of the *Act*, the other sections of the *Act* inform and influence the plain language therein. Specifically, section 42 of the *Act* must be considered, dealing as it does with the survivorship rights of authorizations granted under the *Act*. As set out above, the survivorship rights of the two authorizations of guiding territory certificates and angling guide licences are established through section 64. Section 42 of the *Act* similarly addresses the survivorship rights of an authorization granted under the *Act*: trapline registrations. The Respondent has argued that, because section 64 does not contain reference to trapline registrations when discussing survivorship rights, the legislature intended that the *Act* would not convey survivorship rights on trapline registrants. To accede to this interpretation would require me to ignore the context of the *Act*, as well as the interpretation of section 42 which gives meaning and effect to the phrase "tenancy in common."

[141] For the reasons set out later in this decision, I do not need to make a finding on whether trapline registrations pass automatically to the beneficiary under a will or

testamentary document. However, it is clear to me that the interpretation of the Respondent cannot be supported on a reading of the *Act* through the lens of the modern approach to statutory interpretation.

[142] I find, for the reasons set out above, that given the circumstances of this appeal, that Ms. S. A'Huille had the opportunity to nominate a successor for her trapline registration within her will, and that these wishes needed to be explicitly considered in deciding the Application. In the circumstances of this appeal, while this finding may seem to have the same effect as if the Trapline was a *profit à prendre*, it does not determine whether trapline registrations in general are in fact a *profit à prendre*. In the circumstances of this appeal, it is not necessary for me to make a determination on that fact. The content of the legislation is sufficient in the circumstances of this case. For the reasons set out later in this decision, I do not need to determine if Ms. S. A'Huille passed her interest in the Trapline to Ms. P. A'Huille by way of a will. In the case before me, what is considered is an application to register Ms. P. A'Huille on the Trapline. If Ms. S. A'Huille's interest passed by operation of her will, there would be no need for an application, as the transfer would have been effected upon Ms. S. A'Huille's passing. As the issue before me, fully argued by the parties, is if the Respondent should have added Ms. P. A'Huille to the Trapline registration after consideration of the Application, I will constrain my findings to this factual situation.

Should the Application be granted?

Relevant Legislation

[143] ....

> **Wildlife Act**
>
> **Indigenous knowledge**
>
> 100.2 For certainty, in making a decision under this Act, the director, the assistant director and a regional manager must consider relevant Indigenous knowledge provided to the director, assistant director or regional manager, as applicable.

Appellant's Submissions

[144] The Appellant submits that the Application should be granted in accordance with the wishes of Ms. P. A'Huille's deceased mother. The Trapline is a Keyoh: an Indigenous family-held ancestral territory under Dakelh law. Ms. S. A'Huille, who was the Keyohwhudachun (i.e. Keyoh Holder, or hereditary chief), set out the following in her will:

> Pursuant to the indigenous legal order of the Stuart Lake Carrier, I declare that my daughter Petra Munroe is the next real and only Hahul,

> Keyohwhudachun of the Maiyoo Keyoh, and I transfer all my rights and obligations with respect to the Maiyoo Keyoh[33] to her.

[145] The Appellant argues that in deciding this Application, section 100(2) of the *Act* must be taken into consideration. The Appellant called two witnesses: Mr. Munroe, and Ms. P. A'Huille.

[146] The Appellant and Ms. P A'Huille testified that each Keyoh has a leader known as the Keyohwhudachun who, as the steward of the Keyoh, is responsible for managing its resources on behalf of the snadnake. The snadnake of this particular Keyoh consists of two branches of the A'Huille family: the A'Huilles and the Princes. Prior to his death, Pius A'Huille selected his daughter Sally to succeed him as Keyohwhudachun, and Sally then selected her daughter, Petra, to succeed her. The selection was based on suitability in accordance with the usual principles for appointing a Keyohwhudachun. The Appellant submits that the documentary evidence shows that Ms. S. A'Huille's position as Keyohwhudachun was undisputed during her lifetime.

[147] The Appellant testified that during her time as Keyohwhudachun, Ms. S. A'Huille, with the Appellant's assistance, worked to protect the resources of the Keyoh with respect to forestry activities in the area. According to the evidence, the Maiyoo Keyoh Society (the "MKS") was formed as a society under the *Societies Act*, SBC 2015, c. 18, as a formal entity was needed to deal with the provincial and federal governments. Since commercial logging began in the area in 1972, members of the Keyoh have noticed impacts on the wildlife and plant resources in the area. In 2015, the MKS participated with a group from the University of British Columbia ("UBC") who prepared a "Scenario Analysis for the Maiyoo Keyoh" which addressed sustainable forestry practices and described future impacts management practices may have on resources and wildlife over the next 100 years.

[148] The Appellant testified that he was Ms. S. A'Huille's assistant trapper and, in this role, he respected her wishes that trapping activity be restricted to rabbit and beaver until other furbearer populations increased. He trapped primarily in the north-western corner and along the western boundary of the Trapline mainly for martin and beaver until 2013 when Ms. S. A'Huille declared that trapping was to cease because of her concerns for local animal populations. In terms of trapping for martin, the Appellant advised that he used a trap that would not accidently trap fisher, although he had not seen any in the area. Both the Appellant and Ms. P. A'Huille testified that when they had trapped and had picked berries in the Keyoh they had never seen any evidence of Mr. Prince undertaking trapping activities.

[149] According to both the Appellant's and Ms. P A'Huille's testimony, relations with Mr. Prince had been strained for some time, but this strain did not result in fur bearer

[33] The Keyoh associated with the Trapline, as registered under the *Societies Act*, SBC 2015, c. 18.

management issues on the Trapline. Evidence was presented that Mr. Prince had had some concerns about the internal workings of the MKS, and that as early as March 2015, Ms. S. A'Huille was concerned that Mr. Prince was trying to have her name removed from the Trapline.

[150] The Appellant submits that he was always clear in his dealings with Ministry representatives from the outset that he, as estate executor, would rather not deal with Mr. Prince, and that he and Ms. P. A'Huille considered it unlikely that Mr. Prince would agree to the Application. As they had been told repeatedly that Mr. Prince's signature would be required in order for the Application to be processed, they made an offer to Mr. Prince to purchase his 50% share of the Trapline for $50,000.00. Mr. Prince was clear in his response that he would never sell "my trapline," and that he wanted to keep it in his family forever.

[151] In terms of percentage ownership of the Trapline, the Appellant testified that tenancy in common allows for different registrants to hold different share percentages of the Trapline. Certain government documents and family letters going back to the 1970's, entered as evidence in this hearing, showed that Mr. Prince should only be entitled to a 1/3 share of the Trapline. This would result in Ms. P. A'Huille's share as bequeathed by Ms. S. A'Huille being 2/3 of the Trapline. The probate documents were amended accordingly, and the correct fees were paid.

[152] Ms. P. A'Huille testified that she is a trapper, as was her mother, but that there are not a lot of animals left in the area, other than rabbits and beaver, owing to logging and fires throughout the area. She stated that even if she does not intend to personally trap the line, she wants to remain a registrant. She testified that she is concerned about fur bearer management and has assisted with replanting trees to help with habitat replacement. She testified she supports the sustainable management practices set out in the Scenario Analysis for the Maiyoo Keyoh prepared by UBC.

[153] Ms. P. A'Huille testified that she considered that as Keyohwhudachun, management of the Keyoh was her responsibility and she should be a Trapline registrant. The Trapline is important to her, as is the cabin, as it is used by her family for cultural activities. She confirmed that she did not try to contact Mr. Prince as she considered it unlikely that he would respond. She stated that she has three daughters and three sons. When she is ready to pass on the title of Keyohwhudachun, she will decide who is best suited for this responsibility as it will be her choice as to who the next Keyohwhudachun is. She testified that she was left the Trapline by her mother, and while she understands that Mr. Prince does not want to sell her his share, he has no business trying to take her mother's share. She stated that it is her Keyoh, and that she deserves to have the Trapline.

[154] The Appellant argues that as there is no cause for concern regarding sustainable fur bearer management or species-at-risk, the Application should be granted. There were two Trapline registrants prior to Ms. S. A'Huille's death: one each from the A'Huille and Prince families. If only Mr. Prince were to be registered, Ms. S. A'Huille's family would be effectively dispossessed of their interest in the Trapline and all associated improvements.

Additionally, this would result in a windfall to Mr. Prince, who would then be in a position to sell the Trapline without sharing any of proceeds with Ms. S. A'Huille's immediate family.

[155] The Appellant argues that this situation was caused by the BMP requiring all registrants to sign the Application. It was hardly surprising to the Appellant that Mr. Prince refused to sign, as this would have been directly opposed to his self interest. The Appellant argues that Ms. S. A'Huille and her descendants should not be dispossessed purely because Ms. S. A'Huille died before Mr. Prince. The Appellant submits the balance between the families would be returned with the registration of Ms. P. A'Huille to the Trapline.

[156] The Appellant argues that there was no evidence to show any substantiated reasons for concern that adding Ms. P. A'Huille as a registrant would negatively affect fur bearer, including species-at-risk, management. The Trapline has been largely deforested by industrial logging and forest fires, with the result that until fur bearer populations have recovered, the Appellant intends to continue to harvest beaver with firearms.

[157] The Appellant argues that refusing to grant Ms. P. A'Huille registration on the Trapline will interfere with the traditional Dakelh management of the Keyoh - which the Respondent is required to consider under section 100.2 of the *Act:* consideration of relevant Indigenous knowledge when exercising discretion. The Appellant submits that, in order to be consistent with article 27 of the *United Nations Declaration on the Rights of Indigenous Peoples*[34] ("UNDRIP"), the *Act* cannot be construed as granting Mr. Prince an effective veto of Ms. S. A'Huille's ability to pass her interest in the Trapline to her chosen successor in accordance with their Indigenous land use and resource management laws.

[158] The Appellant argues that in the event sustainable fur bearer management concerns do surface in the future, regional managers within the Ministry have the ability, under section 61(1) of the *Act*, to exercise broad discretion to conduct hearings and, if necessary, to suspend, cancel or amend a trapline registration to add conditions or restrictions.

Mr. Prince's Submissions

[159] In his written submission, Mr. Prince advised that he started trapping on the Trapline, with his grandfather, when he was 10 years old. Mr. Prince and his wife have visited the Keyoh many times, staying for a week or more. He has taught his sons traditional tools for survival, to hunt and trap on the Keyoh, and they have shot moose,

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[34] Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

elk, beaver, lynx, and martin. He states that he and his family have harvested medicinal plants and have made herbal tea from plants on the Keyoh. He first walked the area with his grandfather and still walks it. He submits that he is the true owner of the Trapline.

Respondent's Submissions

[160] The Respondent submits that fur bearer management relies heavily on the proper management of traplines by registrants. It is, therefore, very important where there is more than one registrant on a trapline that those individuals communicate with one another. Of particular concern to the Respondent in this Trapline was the management of fisher and lynx. Fisher is a red-listed species, meaning the population is at risk, while lynx is a species sensitive to harvest. In making the Decision, the Respondent asserts she accounted for the fact that Ms. S. A'Huille wished her daughter to be registered to the Trapline, knew that the Trapline had been held by members of the Keyoh, and considered there was a lack of communication between the Appellant and Mr. Prince. The lack of meaningful communication between the Appellant and Mr. Prince resulted in the Respondent taking a precautionary approach to managing for sustainable wildlife populations and she therefore chose to deny the Application. The Respondent submits that the Decision should be upheld. The Respondent called 4 witnesses: the Respondent, Mr. Scheideman, Mr. Fred Sam, and Mr. Prince.

[161] Mr. Scheideman testified he has been responsible for trapline files in the Omenica Region since 2019. In that role, he had been trained to implement the BMP, whereby all registrants were required to sign a trapline transfer application before the application would be granted. In terms of issues regarding this Application, Mr. Scheideman testified:

- he considered his role to be administrative in nature, to make sure the forms were filled in correctly and that the forms were complete;
- the Trapline is located at the northern extreme of the red-listed fisher population, and that the decreased number of fisher is due to loss of habitat and snowpack (industrial activities and climate change);
- in terms of the lynx population, population numbers are impacted more by food availability than by trapping, but that when populations are low, trappers must be aware and plan accordingly so communication between trappers is very important;
- martin populations are resilient to harvest but as they like older spruce and pine forests, their habitat has been impacted due to habitat loss and fires;
- while fur bearer populations had been impacted by fires and logging in this area, he has not had concerns in the past regarding fur bearer population management arising from trapline use;
- he was not aware of any trapline related fur bearer management issues that had arisen between Mr. Prince and Ms. S. A'Huille over the years that they were registrants;

- he was not aware that Ms. S. A'Huille had sent a letter to the Ministry in 2016 expressing concern that Mr. Prince was trying to have her removed from the Trapline registration;
- he did not keep any notes (if any notes had been taken) concerning the May 26, 2021, meeting with Mr. Prince and others referenced in the Recommendation. Mr. Scheideman recalled Mr. Prince being worried during that meeting that if he passed away his children may not be able to be registered on the Trapline, but Mr. Scheideman did not communicate this information to the Appellant;
- he was not aware of the nature of the problems that were noted during the May 27, 2021, phone conversation with Ms. Young as referenced in the Recommendation, and he did not relay these comments to the Appellant as he considered them as First Nations comments;
- he believed the Procedure applied when a trapline could only be held by a single individual, and the Procedure was not updated when the *Act* was changed to allow groups of people to be registered;
- although the BMP calls for all registrants to sign when a registrant wishes to add an assistant trapper, there actually is no such position noted in the *Act*. All that is truly needed for someone to be an assistant trapper is the written permission of a registrant;
- the first time he knew that the Trapline had passed through at least 2 generations of the A'Huille family was on May 17, 2021, when the Appellant advised he was asking that Ms. P A'Huille be granted a 2/3 share as opposed to 50% share of the Trapline;
- his concerns regarding the possibility that Mr. Prince and Ms. P. A'Huille would add all of their extended family to the Trapline registration arose from his experience with other trapline files, but was not grounded in any specifics on the Trapline; and,
- in at least one other file, where both registrants were brothers and both were deceased, each family sent in an application with multiple registrants. Mr. Scheideman suggested to the family that considering there were two previous registrants, it could be appropriate again and that the family should discuss that approach, which is what they ultimately settled for. When he was asked why he did not suggest the same approach in this situation, he stated that he considered that he had done so when he kept advising the Appellant to have a discussion with Mr. Prince so as to arrive at a mutual agreement on how to resolve their disagreement about the Trapline, but that did not happen.

[162] The Respondent clarified, in response to a question, that although the *Act* only allowed for a single registrant prior to 1989, in 1974 Ms. S. A'Huille and Mr. Prince were

both registered under the single entity of Richard Prince and Co., which is how the ministry accommodated multiple registrant scenarios at that time.

[163] The Respondent testified that in making her Decision, she did not consider the BMP as binding: she reviewed and considered the Application in its whole. The Respondent testified that she considered that Traplines were not a property that survived the death of a registrant because, if that were the case, the resulting transfer would be automatic and would not require a decision to be made. In terms of whether registrants can hold unequal shares in a trapline, the Respondent testified that this is not a matter the Ministry gets involved in and she assumes equal shares to be held by the registrants.

[164] The Respondent testified[35] she took Mr. Scheideman's Recommendation at face value and did not request additional information on the points set out in the document as he was the specialist in this area. Consequently, she felt it was not appropriate for her to do "leg work" on the file as she is not the specialist. She did not make judgments on the substance of the disagreements between the Appellant and Mr. Prince, nor did she take sides. As regards the bullet point in the Recommendation setting out that Mr. Prince was willing to add "Sally Sam's kin if they were willing to meet with him…", the Respondent advised that she considered this to mean that Mr. Prince was willing to meet with Ms. P. A'Huille but she was not willing to do so. The Respondent testified that it appeared to her that the situation had evolved somewhat over the course of the Application: at first it appeared that Mr. Prince refused to sign, then it came out that he had not been approached to have the discussion, and this showed there had been no effort to establish good communication and collaboration. The Respondent stated that the lack of communication at this point between the Appellant and Mr. Prince did not leave her with a sense that they would work collaboratively on Trapline management issues going forward. She advised that the Ministry is not in the business of mediating disagreements between registrants and that they need to communicate amongst themselves to address any problems. The Respondent testified that she put "quite a bit of weight" on the lack of communication factor, and that she did consider that there was the "provincial standard or policy" set that the Ministry wants to have agreement from the registrants of the trapline.

[165] The Respondent testified that in her Rationale, she set out how she used the information provided in Mr. Scheideman's Recommendation. During her testimony she stated that although she had listed that the information concerning the Appellant's "demand" for a 2/3 share of the Trapline as a factor considered in her Decision, she had not phrased it well in the Rationale and that she should have simply set out that the Ministry does not track share interest in traplines.

[166] The Respondent testified that she did not consider the conflicting opinions as to whether Mr. Prince or Ms. P. A'Huille was Keyohwhudachun, as she considered this to be

[35] The Respondent's testimony is summarized later in this decision.

an issue for the First Nation to resolve. She also did not consider the transfer of the Notation of Interest for the Trapline cabin as trapping cabins are administered under the *Land Act*, and therefore was outside of her authority under the *Act*.

[167] Although Mr. Prince elected to participate in the hearing as a Participant and to provide a written statement, he also appeared as a witness for the Respondent. Mr. Prince is the grandson of Pius A'Huille, who fostered him from a very young age. He consequently is referred to in the evidence as either a "son" or "grandson" of Pius A'Huille and the "brother" or "cousin" of Ms. S. A'Huille.

[168] Mr. Prince testified:

- the boundaries of the Trapline are approximately the same as the Keyoh, and the Trapline is part of the Keyoh;
- the Trapline is for fur bearing animals, whereas the Keyoh is about survival as a source of medicinal plants, berries, and larger game animals, among other things;
- he has been actively trapping on the Trapline for most of his life, and he has taught his sons how to trap as well;
- there is not much trapping done now, and he and his sons generally shoot beaver;
- when he was trapping, it was primarily for mink and martin, and that he does not take any steps to avoid fisher bycatch as he only ever saw one fisher that his "father" caught;
- he made less than $1000 per year from trapping;
- he had no knowledge of much of the documentary evidence going back 45-50 years that bore his signature, and suggested that his signature may have been counterfeited on letters regarding the Trapline transfer at the time of Mr. Pius A'Huille's death;
- he thought there may have been different versions of Ms. S. A'Huille's will and of Pius A'Huille's will that would have been in his favour;
- Pius A'Huille was the leader of the Keyoh during his lifetime and that after his death, Mr. Prince became the leader, that it would not have been Ms. S. A'Huille because you "can't put women on a Trapline because of conflict;"
- Mr. Prince believes he is the present leader as well because he is the one who understands what's going on within the Trapline;
- he feels he was "tricked" into adding Ms. S. A'Huille to the Trapline under the name "Richard Prince and Co.;"
- he denied ever having tried to have Ms. S. A'Huille removed from the Trapline registration and that there was "nothing going on between them;"

- he denied ever having stated, as set out in the Recommendation, that he would agree to having Ms. S. A'Huille's kin added to the Trapline;
- he does not understand where the word "Maiyoo" in relation to Keyoh came from; that he speaks Carrier and this is not a Carrier word;
- he had concerns regarding the finances of the MKS under the Appellant's leadership, and expressed mistrust of the Appellant's motives in general;
- he is opposed to having Ms. P. A'Huille as a registrant as that would enable the Appellant to have access to the Trapline;
- when he received the Appellant's offer to purchase his share of the Trapline, he went to the "Treaty Office" and the April 22, 2021, letter was written on his behalf by Tina Erickson who "knows about these things;"
- the reference to "family" in the April 22, 2021, letter meant him, his wife, his two sons and his grandson—he does not include his daughter because she is married and lives in the North, and would be included in her husband's holdings; and,
- when the April 22, 2021, letter was written he had decided he would not agree to having Ms. P. A'Huille added to the Trapline registration.

[169] The Respondent argues that Mr. Prince is an older individual whose testimony was at times unclear and confused; he had difficulty identifying signatures and documents; however, as some of those documents were 45–50 years old, the confusion is not "unrealistic".

[170] As noted elsewhere in this decision, Mr. Fred Sam is a former Chief and present Councillor of the Nak'azdli Band. He testified on his own behalf and not as a representative of the Nak'azdli Band in any capacity. He testified that:

- he had agreed to testify to help Mr. Prince, but that he also gets along with Ms. P. A'Huille who is his second cousin, and is not aware of any "problems" she has caused;
- there are approximately 40 Keyohs within the Nak'azdli territory; all Nak'azdli people belong to a Keyoh, and are also members of the Nak'azdli Band;
- he is not a member of the Keyoh involved in this appeal;
- he learned about Keyohs from listening to his parents;
- much of the knowledge of "traditional" systems has been lost because of the involvement of the church and various governments and that as a result, current practices may not be based on traditional ones;
- he was not aware of the term "Keyohwhudachun" and surmised that it may have been a term developed by the church;

- he had never heard that the Nak'azdli Band considered Mr. Prince as the Keyoh Holder;
- in terms of leadership of the Keyoh, Mr. Prince may be the leader of his family as determined by his family, but that would not apply to the Keyoh overall;
- to his knowledge, there is no single leader for a Keyoh; there is "no one voice over others;"
- while he did not know why this particular Keyoh was also registered under the *Societies Act* as the Maiyoo Keyoh, he surmised it may be in order to access funding;
- in terms of rights-based negotiations, the Nak'azdli Band would be responsible for discussions relating to resource impacts on hunting, fishing, and other similar activities; and,
- he hopes that the families can reconcile and make things work.

[171] The Respondent argues that it would not be appropriate for me to add Ms. P. A'Huille to the Trapline as there is clear evidence of hostility between the Appellant and Mr. Prince, and they are not wiling to try to talk to each other. While there is often no good solution where families fight, it would be more problematic to add Ms. P. A'Huille as a registrant and force the parties together given the current situation. The complete lack of ability to communicate with each other is in itself a reason not to add Ms. P. A'Huille to the Trapline.

[172] The Respondent argues that fur bearer management must be proactive as opposed to reactive, especially where there are populations at risk. If the lack of communication and the animosity between the Appellant, Ms. P. A'Huille, and Mr. Prince were not apparent before the hearing, they are readily apparent now. As the Respondent actively administered the *Act* on a daily basis during her tenure as acting deputy regional manager, the Respondent argues that I should defer to her judgement as regards issues of fur bearer and trapline management. The testimonies of Mr. Scheideman and the Respondent demonstrated they are experienced and qualified biologists knowledgeable as to their roles and the management of fur bearer populations in relation to the Trapline and the Omineca Region.

[173] The Respondent argues that *UNDRIP* does not have the force of law in BC, and that neither the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44, nor the *Interpretation Act*, RSBC 1996, c. 238, direct or compel a reviewing authority to examine or consider specific evidence in the manner asserted by the Appellant. If I were to find that the "Keyoh system" met the definition of "relevant Indigenous knowledge," I would only be required to consider whether the provisions of the *Act* detract from the existing Aboriginal rights. The Respondent says these provisions are consistent with *UNDRIP*. The Respondent argues that in this instance section 100.2 of the *Act* does not detract from Aboriginal rights and is not inconsistent with *UNDRIP*.

Analysis and Findings

[174] The parties agree that whether the Application should be granted is within the discretion of the decision maker as applied under the *Act*. As I have found above that the Decision is set aside, and I consider that I have sufficient evidence before me to decide this matter, I will decide if the Application is to be granted using the authority provided in section 101.1(5)(c) of the *Act*. In making this decision, I will be considering all of the evidence that was before me, whether or not it is specifically stated or referenced in these reasons. I note further that there is more evidence before me than was before the Respondent when she made the Decision.

[175] There are several other elements of this appeal that the Parties agree on, some of which include:

- that this is not an appeal respecting section 35 of the *Constitution Act* regarding Aboriginal and treaty rights;
- the Trapline shares a similar boundary with the Keyoh of the extended A'Huille family, members of which have been associated with the Trapline since at least 1936, with Mr. Prince and Ms. S. A'Huille being the only registrants since 1974; and,
- the relationship between Mr. Prince, Ms. P. A'Huille and the Appellant, as it pertains to the Application, is fractured, and Mr. Prince does not agree that Ms. S. A'Huille's share of the Trapline should be transferred to Ms. P. A'Huille.

[176] The evidence was clear that the statutes concerning the use and administration of traplines have been in place since 1926 when traplines were established by the Province on Crown lands, and that the trapline boundaries reflected areas used by First Nations persons for trapping and cultural purposes. While the *Act* exempted "an Indian residing in British Columbia" from the requirement to hold a licence to trap fur bearing animals as this activity fell under the use of resources for food, social or ceremonial purposes, no such exemption was made for the requirement to hold a trapline registration if they wished to use the trapline for commercial purposes, for example to sell pelts. While the statute addressing traplines has changed over the years, and in title from the *Game Act* to the *Wildlife Act*, this approach has remained consistent across the various amendments and remains the case today. Although prior to 1989 the *Act* only provided for a trapline to be registered to a single individual, the linkage between the Keyoh and the trapline boundaries meant that the Province allowed traplines held by First Nations individuals to have multiple registrants. In this Trapline, for example, application for registration was made in 1974 in the name of "Richard Prince and Co.," noting that the application was for a group which included Richard Prince and Sally Sam (Ms. S. A'Huille). The *Act* was changed in 1989 to allow for registration of more than one individual to traplines and for those situations to be deemed as a tenancy in common.

[177] From my review of the legislation, it is clear to me that government created, or intended to create, a trapline regulation scheme under the *Act* which includes and pays heed to the needs of First Nations people as regards trapping related activities.

[178] Earlier in this decision, I found that, for the purposes of this Application, consideration must be given to the fact that Ms. S. A'Huille nominated by way of her will Ms. P. A'Huille to receive her share of the Trapline.

[179] The evidence and testimony presented at the hearing indicates that there has not been any concern around fur bearer or species-at-risk management on the Trapline. Instead, the evidence was that commercial logging, forest fires, and climate change have impacted the habitat in the Trapline area and that habitat reduction has negatively impacted species populations. The actual fur bearer population numbers for either the area in general or the Trapline specifically were not entered into evidence, although the testimony of the Appellant and Mr. Prince was that trapping activity has been adjusted to reflect the change in fur bearer populations. I note that this change was voluntarily undertaken by the registrants and not at the behest or order of the Regional Manager.

[180] The evidence presented shows that the Appellant has been involved in the preparation of a sustainable management scenario, which seeks to enhance the resource capacity of the Keyoh.

[181] It was clear from the evidence and the testimonies that the Appellant, Ms. P. A'Huille, and Mr. Prince have very different positions as to who should be registered to the Trapline. It was also clear that the same individuals care about the area from a personal, cultural, and fur bearer management perspective. The families of Ms. P. A'Huille and Mr. Prince have been associated with the Trapline for at least 88 years.

[182] It would appear from the evidence that the relationship between Mr. Prince and the A'Huille family regarding Trapline registration has been strained since at least 1975. The evidence also showed that the Ministry has not had any Trapline related fur bearer management concerns at, or since, that time. The concern expressed by the Respondent was that in the absence of agreement or the ability to discuss coming to agreement as to who should be registered on the Trapline, there was no means of ensuring effective fur bearer management within trapping activities. This concern does not, in fact, appear to have come to fruition over the past 40 years or more.

[183] The testimony of the Respondent and of Mr. Scheideman was that the BMP was not a mandatory requirement, but rather a means of assisting in appropriate fur bearer management practices on Traplines. The evidence before me, however, paints a different picture as to how the BMP is perceived in the Omineca Region. When Mr. Prince attended the Treaty Office, he appears to have been told that his agreement was "required" for changes to the Trapline registration. I understand that the Treaty Office is not within the purview of the Respondent, but it does show how the issue of registrant approvals is treated within the community. Additionally, the Appellant was told by Ms. Dreher of Front Counter BC that Mr. Prince would be required to sign the transfer forms and to grant

permission for the Appellant to continue to act as an assistant trapper on the Trapline. I note that the following text appears on the Ministry Trapline Transfer Forms: "Permission must be obtained from all registered trapline holders before additional names may be added, or the trapline registration transferred." In fact, there is no such requirement. There is an unwritten BMP promoting this approach, but it is not a requirement under the *Act* or the *Regulation*.

[184] It is clear to me that from the time Mr. Prince was told that, in order for Ms. P. A'Huille to be added as a registrant he had to sign the Application, he decided not to sign. He testified that if she were added to the Trapline registration, he may not be able to have his sons added to the registration in the future. This view may have arisen from his being told that such additions required the signatures of all registrants. Whether for this reason, or for any other reason, Mr. Prince would not agree to share the Trapline registration with Ms. P. A'Huille.

[185] I note there is no provision in the *Act* or the *Regulation* that refers to an "assistant trapper." Section 41(b) of the *Act* provides that anyone, who wishes to trap on a trapline, other than a registrant, must have the written permission of a registered holder for the trapline to do so. I take this provision to require the following: the permission must be granted, the permission must be in writing, and the written permission must be granted by one of the trapline registrants. There is no requirement that all registrants agree that the individual may trap on the trapline, or to provide written permission of the same. Further, there is no requirement that the Regional Manager, or other Ministry personnel, provide approval of the decision that the individual may trap on the trapline, or even that they be advised of the same. I make no comment or observation on the effectiveness of this approach. I note only that it is the approach set out in the *Act*. It is, therefore, the approach that the parties must be bound by, and that they must comply with.

[186] It is clear to me that the *Act* considers the management of traplines, as evidenced by the ability of the regional manger to take action under section 61 to manage traplines. The management of the trapline was addressed before me, and it was demonstrated that:

- Ms. P. A'Huille's family has had a long history with the Trapline;
- Ms. P. A'Huille's family has participated in efforts to address sustainable practices in the Keyoh, which is the same general area as the Trapline, demonstrating concern for fur bearer management in the area; and,
- the Ministry considers that trapping on the Trapline has not negatively impacted fur bearers or species-at-risk management.

[187] The Respondent argued that if I were to grant the Application, I would, in effect be wading into a family dispute. I must respectfully disagree. Denying the Application would not resolve the family dispute, but would instead benefit one party at the expense of the other. Regardless of the Respondent's position on this issue, avoiding involvement in the family dispute is a discrete issue from proper fur bearer management on this Trapline. To

suggest that the Application should not be granted because it involves family members that are in dispute is problematic. What is before me in deciding the Application is the legislated process that allows, limits, and shapes the granting of trapline registrations. To import considerations that are not within the *Act* into a statutory decision such as this would be both impermissible and a legal error. I cannot give consideration to this argument of the Respondent.

[188] The Respondent also argued that as the Nak'azdli Band has asserted a claim of Aboriginal title and rights in the area, it would be inappropriate for me to consider granting the Application as they are not engaged in this appeal. As I noted earlier in this decision, the Respondent set out that the views of the Nak'azdli Natural Resources office were not relevant to her Decision and to the Ministry's larger goal of First Nations reconciliation.

[189] The Application concerns a Nak'azdli Band member who has long been associated with the area and, through her family, with this Keyoh and this Trapline. In other words, granting this Application results in no change to the historical rights and privileges accorded to Ms. P. A'Huille's family or others in the vicinity. The Application does not affect section 35 Aboriginal title or rights. Further, I note that the existence of the Trapline, and the rights that may be exercised under it, are unaffected by any decision I can make on the Application. The limited decision before me is whether Ms. P. A'Huille is to be added to the Trapline as a registrant. This decision, while affecting the management of the Trapline, does not grant further rights to trap in any area that do not already exist by virtue of the previous decision to establish the Trapline.

[190] Turning to the Appellant's assertion that Ms. P. A'Huille should be granted a 2/3 share of the Trapline, I note that although there appears to have been some dissatisfaction with the fact that Mr. Prince held a 50% share of the Trapline, the 1974 application which lists both Sally Sam and Richard Prince as the Trapline registrants does not indicate that the individuals are other than equal share holders. As the most recent evidence of registration to the Trapline shows merely that two individuals are registrants, and as my consideration is based at least in part on the historical registrants to the Trapline, I find no basis to stray from the presumption that each of the registrants holds an equal share of the Trapline.

[191] For the reasons set out above, I find that Ms. S. A'Huille's share of the Trapline is transferred to Ms. P. A'Huille effective immediately.

[192] In her evidence, the Respondent noted, correctly, that consideration of the trapline cabin was outside of her authority under the *Act.* Now that the Application for the Trapline registration has been approved, the Appellant can make an application through the proper channels.

[193] In deciding this Application in accordance with the *Act*, it was not necessary for me to go into some of the other issues raised by the parties in the appeal. These issues include whether Keyohwhudachan is a title that should be applied to either Ms. P. A'Huille

or Mr. Prince, how it is determined who holds this title, and what it means for someone to hold such a position. I have no doubt these are sensitive and important issues. I also have no doubt that they are best resolved by the claimants themselves, perhaps with the assistance of others, in accordance with their own traditions.

Will there be an order for costs?

Appellant's Submissions

[194] The Appellant submits that the Board awards costs only in exceptional situations, and that this appeal is one of those exceptional situations. The Appellant argues the evidence shows the Respondent based the Decision almost entirely on Mr. Scheideman's Recommendation, and that this encouraged her to fetter her discretion. The Appellant asserts he and Ms. P A'Huille have been put to considerable expense to avoid being dispossessed of the Trapline, a trapline which is an important element of their family territory. The expense would not have been necessary but for the Respondent's failure to consider the Application on its merits, instead choosing to prefer an unwritten BMP over the established Procedure. Further, the expense was compounded by the Respondent's decision to call four witnesses, three of whom gave contradictory testimony to each other.

Respondent's Submissions

[195] The Respondent opposes the Appellant's application for costs, arguing that it is unwarranted. The Respondent disagrees that this appeal can be considered an "exceptional situation" for the purposes of my consideration of the costs application. Section 13.0 of the Board's *Practice and Procedure Manual* (the "Manual") states that the objectives of the costs policy are to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct. The Respondent submits that this statement is directed towards conduct within the appeal process itself and not towards allegations of misconduct arising from the decision that resulted in an appeal. In addressing the issue of contradictory testimony between the witnesses called, the Respondent submits these contradictions are, for the most part, explained by the usual variability in recollection, especially resultant from the passage of time. While the Board may impose an order for costs as a rebuke for bad behaviour, there is no evidence of that being the case here. The Respondent asserts the Appellant's remedy for his dissatisfaction with events leading to, and dissatisfaction with, the Decision is the appeal process itself.

Analysis and Findings

[196] Subsection 47(1)(a) of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45, (the "*ATA*") allows the Board to order a party to pay some or all of the appeal costs of another party or of an intervenor.

[197] The Board has not adopted a policy of "the loser pays the winner's costs" as in a civil court practice. Instead, the Board's policy is focused on encouraging responsible conduct throughout the appeal process, and to award costs in "special circumstances" only. The Manuel sets out a non-exhaustive list of situations that might amount to "special circumstances" which includes: a frivolous or vexatious appeal; a party's action or inaction which results in prejudice to another party; a party's failure to provide notice they will not be attending a hearing; a party's unreasonable delay of a proceeding; a party's failure to comply with an order of the Board which results in prejudice to another party; and, a party's continued return to issues the Board has advised are irrelevant. A Panel is not bound to order costs when one of the listed examples occurs, nor does it have to find that one of the examples occurred to order costs.

[198] It is unusual for the Board to make an award for costs. If the Board adopted the civil court practice of "the losing party pays the costs," recipients of statutory decisions may be discouraged against the legitimate exercise of their appeal rights; that is, experience a "chilling effect." The same could be said to apply if the Board were to consider a costs award based on the number of witnesses called by a party in the normal course of a party pursuing or defending their case. That is not to say that a party should be forced to expend resources inappropriately if another party acts unreasonable in pursuing or defending an appeal. Rather, the usual course of participating in an appeal from a decision made under statutory authority is not a special circumstance which would attract an order for costs.

[199] The Appellant submits that its request for costs arises, in the main, from actions which led to the Decision which was the subject of this appeal. The Respondent submits decision dissatisfaction is addressed by the appeal itself and not by an award for costs.

[200] There is no question that the process by which the Decision was made contributed to the Appellant filing the appeal. I must note however, that the Board's approach to considering cost applications pertains to actions taken during the appeal itself, and not to actions which led to the decision under appeal.

[201] In considering the number of witnesses called by the Respondent and the nature of the witness testimony, I note that all parties disclosed the names of witnesses they intended to call, and that the parties agreed to the number of days set aside for the appeal in advance of the hearing. My review of the reports of the pre-hearing conferences shows that the parties did not object, in the lead up to the hearing, to the number or names of witnesses to be called. The evidence produced during the hearing covered a time frame of approximately 90 years, so a certain amount of witness contradiction or forgetfulness is understandable. In evaluating the number of days the in-person segment of the hearing required, there were, in fact, fewer than the parties had originally agreed to. This was, in my opinion, due at least in part to the cooperation displayed by the parties and their witnesses during the hearing.

[202] The conduct of all parties at the appeal was appropriate and did not occasion rebuke or comment from me as Chair. As a result, I do not see how the "special circumstances" of Section 13 of the Manual are made out. I understand that the Appellant may be frustrated at how the Decision was made, but the appropriate remedy is the outcome of the appeal.

[203] I find that there are no special circumstances present in the appeal before me which warrant an order for costs.

DECISION

[204] In making this decision, I have considered all of the evidence and arguments provided, whether or not they have been specifically reiterated herein.

[205] For the reasons set out above, the appeal is allowed and Ms. S. A'Huille's share of the Trapline is transferred to Ms. P. A'Huille effective immediately. The Appellant's application for costs is denied.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board