T-81-01

2001 FCT 780

Moresby Explorers Ltd. and **Douglas Gould** (*Applicants*)

v.

The Attorney General of Canada (*Respondent*)

INDEXED AS: MORESBY EXPLORERS LTD. V. CANADA (ATTORNEY GENERAL) (T.D.)
Trial Division, Pelletier J.—Vancouver, May 25; Ottawa, July 9, 2001.

Administrative Law — Judicial Review — Certiorari — Agreement between Canada, Haida Nation providing for management of National Park Reserve on Queen Charlotte Islands, setting up Archipelago Management Board (AMB) to deal with permits for commercial tour operations — Parks Canada, AMB establishing quota policy for tour operators' licences — Applicants building float camp in proposed National Marine Park without authorization — Float camp subsequently relocated outside Park boundaries — Applicants denied user quota for activities related to float camp as unacceptable activity under AMB, Parks Canada policy — Further request for additional quota also denied by Park Superintendent — Policy decisions beyond reach of courts as engaging political accountability of those making decisions — No inappropriate delegation as Superintendent continued to exercise office notwithstanding existence of AMB — Consultation not amounting to fettering of discretion as long as decision maker makes final decision — Standard of review reasonableness simpliciter — Mandate conferred by National Parks Act not extending outside park boundaries through device of business licences on ground of conservation — Blanket refusal to license activities, originating from lawful float camp, located outside park boundaries, beyond Superintendent's power — Decision unreasonable, set aside.

Native Peoples — Lands — Council of Haida Nation making comprehensive land claim over Queen Charlotte Islands — National park reserve established pending resolution of Haida claim — Canada, Haida entering into agreement to co-operatively manage National Park Reserve through Archipelago Management Board (AMB) — Applicants seeking, denied user quota for activities using float camp located outside Reserve — Applicant arguing Parks Superintendent lacking authority to delegate authority to AMB — Canada-Haida agreement legally insufficient to transfer authority to AMB — Considering Haida nation asserting claim to land, it would not delegate its authority to AMB — Superintendent continued to exercise office, AMB notwithstanding.

Environment — National Park Reserve on Queen Charlotte Islands which are claimed by Haida Nation — Operator of float camp, located outside Reserve, denied user quota for kayaking, diving — Licensing policy to freeze activity level pending assessment of Reserve's capacity — Parks Superintendent failing to apply own policy in quota denial for legal activities — Legitimate interest in preserving Reserve's ecological integrity not conferring right to prohibit lawful conduct by attaching conditions to park business licence on ground of conservation.

This was an application for judicial review of a decision by the Superintendent of the National Park Reserve on the Queen Charlotte Islands, British Columbia, refusing to allocate user quota to the applicants for activities associated with their float camp. In July 1988, Canada and British Columbia entered into an agreement to establish a National Park Reserve and a National Marine Park on the Queen Charlotte Islands. The agreement prohibited British Columbia from allowing any interest to exist in these reserves without Canada's consent, pending the transfer of these lands to Canada. The latter accepted the transfer of administration and control of the National Park Reserve from

British Columbia in March 1995. In November 1980, the Council of the Haida Nation had submitted to Canada a comprehensive land claim over the Queen Charlotte Islands and, in accordance with Parks Canada policy, a national park reserve was established there pending resolution of the Haida claim. In January 1993, Canada and the Haida Nation concluded an agreement concerning the management and operation of the Archipelago, which includes the National Park Reserve in the Queen Charlotte Islands, setting up a four-person Archipelago Management Board (AMB). Under the agreement, Parks Canada and the AMB established a quota policy for tour operators' licences, the purpose of which was to freeze business activities at existing levels until the impact of those activities on the Park's ecological and cultural integrity and the quality of the visitor experience could be assessed. In 1989, the applicants built a float camp in an area located in the proposed National Marine Park. Their request for a commercial operators registration was denied by Parks Canada on the basis that it could not support any commercial facilities such as the float camp without a management plan in place to support this use. The applicants' float camp continued to occupy the National Marine Park area without authorization, which forced Parks Canada officials to give them notice to remove unauthorized float camp attachments. In 1998, the applicants relocated their float camp to Crescent Inlet, outside the northern boundary of the National Marine Park. Twice, the applicants were denied user quota for activities related to the float camp on the basis that it was an unacceptable activity according to the AMB and Parks Canada policy. They applied again for additional quota with respect to the 2001 season; their request was once again refused by the new Park Superintendent, which gave rise to this application for judicial review. The main issue was whether the Park Superintendent acted illegally or without jurisdiction in refusing to allocate user quota to the applicants for activities associated with their float camp.

Held, the application should be allowed.

There is no right of appeal from a decision of the Superintendent but there is a right of judicial review. The issue before the Superintendent was whether quota should be allocated for park utilization involving the use of a float camp currently outside the boundaries of any park reserve. The Superintendent had greater relative expertise than the Court had in relation to the questions which must be addressed. She was "on the ground" in the area whose preservation is in issue. It is unlikely that the decision in issue was one which must be made correctly. The differing demands of the various interests which must be accommodated and the elements of greater relative expertise on the part of the Superintendent argue for a standard of review less than correctness. A standard of review of reasonableness respects the Superintendent's greater knowledge of local conditions while recognizing that the aspects of the decision involving the application of a policy to a given set of facts are matters in which the Court has its own expertise. Consequently, the standard of review is reasonableness *simpliciter*.

The applicant, Moresby, argued that the Superintendent as the delegate of the Minister's authority was not entitled to delegate her authority to the AMB and that such a delegation would fly in the face of the maxim "*delegatus non potest delegare*". All of Moresby's dealings with respect to its business licence have been through the offices of the AMB. Canada submitted that decisions involving quota allocation are policy decisions which are not justiciable. Pure policy decisions are generally beyond the reach of the courts because they engage the political accountability of those who make such decisions. Although, in Canada, there is no formal doctrine of division of powers as between the branches of government, courts are reluctant to interfere with "political decisions" except in response to a constitutional challenge to their validity. It is not the function of the courts to assess the wisdom of government policy, as expressed either in legislation or in specific acts. To that extent the argument as to justiciability must succeed, but there are limits to this immunity from review. The references to visitor utilization in section 5 of the *National Parks Act* are sufficient authorization for the Superintendent to limit access to the park in order to preserve it for future generations and maintain its ecological integrity. There is no impediment to the implementation of a quota scheme which is designed to protect the park. The barrier to transfer of jurisdiction is the Constitution, not

administrative law principles. Since the *Gwaii Haanas Agreement* between the Haida and Canada is legally insufficient to justify any transfer of authority to the AMB, the issue was how authority for management of the Park could be moved from its statutory designate, the Superintendent, to the AMB. It is unlikely that Parliament would have authorized the Governor in Council to rewrite the law by agreement with the Haida. Keeping in mind that the Haida nation has asserted a claim to this land, it would be contrary to the logic which lead to the creation of the AMB for either party to delegate its authority to the AMB. Each must be seen to act under the authority which it claims. The AMB provides an administrative structure in which issues are discussed and decisions made, and the fact that a staff member provided information on the business licence scheme or the quota policy does not mean that the AMB dictated the policy to the Superintendent. Inappropriate delegation was not the issue since the Superintendent has continued to exercise her office notwithstanding the existence of the AMB. All matters which were to be decided by the Superintendent were decided by her, albeit in the forum of the AMB. The fact that one who must decide a question discusses the issues with another does not mean that the decision maker has surrendered his authority to the other. If the decision had to be consensual, the Superintendent must have agreed with it.

It was also argued that the Superintendent had fettered her discretion by agreeing to consult with the Haida Nation, in the forum of the AMB, and in attempting to reach a consensus. If consensus is reached, it represents the free exercise of the Superintendent's discretion. If not, the decision is referred to others while the Superintendent retains the right to act unilaterally. The quota allocation is part of the licence which was issued to Moresby. The Superintendent had to agree to the issuance of that licence. Consultation does not amount to fettering of discretion as long as the decision maker makes the final decision. The Superintendent did not act unlawfully in delegating her authority to issue licences to the AMB. The fact of another signature on the form did not invalidate the Superintendent's approval of the licence.

The last issue was whether the Superintendent properly exercised her discretion in setting the conditions of Moresby's licence. The business licensing policy was intended to fix the activity level in the Park Reserve at its historic level while the park management plan was being developed and the carrying capacity of the park assessed. There was no obvious reason why the Superintendent's and the ABM's opposition to the float camp would necessarily result in the disallowance of park use, for quota purposes, connected with kayaking and diving. It is not obvious why the usage associated with those activities could not be taken into account in setting Moresby's quota. That usage was part of the historic level of use sustained by the park. The Superintendent did not properly apply her own policy as it related to Moresby. Refusing to recognize that use for purposes of quota was confusing the issue of the float camp with the issue of historic level of use of the park facilities. The rationale that these activities could not be recognized because the use of the float camp was an illegal activity ignored the fact that kayaking and diving are perfectly legal. The mandate conferred on the Minister of Environment and the Superintendent to preserve the ecological integrity of the park lands gave them a legitimate interest in the conduct of operations in areas which impact on the park lands. But a legitimate interest is not the same as a right to prohibit that which is otherwise lawful in an area outside the park's jurisdiction by means of conditions attached to a park business licence. The float camp was clearly beyond the Superintendent's control once it was relocated outside the boundaries of the conservation area. The mandate conferred by the *National Parks Act* does not extend to regulating behaviour outside park boundaries through the device of business licences on the ground of conservation. The Superintendent was entitled to refuse to license activities originating from the float camp if they were not in compliance with applicable provincial legislation and standards, and to ask for proof of compliance as part of the licensing requirement. However, a blanket refusal to license activities originating from a lawful float camp located outside the park boundaries was beyond the Superintendent's power. In refusing to credit Moresby with user days/nights for activities originating from the float camp, the Superintendent failed to comply with its own policy. That decision was unreasonable and should be set aside.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 91, 92.

Environment and Land Use Act, R.S.B.C. 1996, c. 117, s. 6.

Federal Court Rules, 1998, SOR/98-106, Tariff B, column IV.

Gwaii Haanas Agreement, between the Government of Canada, represented by the Minister of the Environment and the Council of the Haida Nation, for and on behalf of the Haida Nation and represented by the Vice President of the Council respecting the land area known variously as Gwaii Haanas and South Moresby, and generally referred to herein as "the Archipelago". Ottawa, January 1993, ss. 1.1, 3.4, 4.1, 4.3, 4.4, 4.5, 5.1, 5.2, 5.3, 5.4, 5.5, 9.1, 9.2.

Gwaii Haanas National Park Reserve Order, SOR/96-93.

National Parks Act, R.S.C., 1985, c. N-14, ss. 2 "superintendent" (as enacted by R.S.C., 1985 (4th Supp.), c. 39, s. 1; S.C. 1998, c. 31, s. 55), 4, 5 (as am. by R.S.C., 1985 (4th Supp.), c. 39, s. 3; S.C. 1992, c. 1, s. 100), 7(1) (as am. by R.S.C., 1985 (4th Supp.), c. 39, s. 5), 8.2 (as enacted by R.S.C., 1985 (4th Supp.), c. 39, s. 7), 8.5(1) (as enacted by S.C. 1992, c. 23, s. 1).

National Parks Businesses Regulations, 1998, SOR/98-455, ss. 1 "business", "licence", 3, 5(1),(3).

Park Act, R.S.B.C. 1996, c. 344.

Parks Canada Agency Act, S.C. 1998, c. 31, s. 5(1),(2).

CASES JUDICIALLY CONSIDERED

APPLIED:

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 11 Admin. L.R. (3d) 1; 43 Imm. L.R. (2d) 117; 226 N.R. 201.

CONSIDERED:

Carpenter Fishing Corp. v. Canada, [1998] 2 F.C. 548 (1997), 155 D.L.R. (4th) 572; 221 N.R. 372 (C.A.); *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441; (1985), 18 D.L.R. (4th) 481; 12 Admin. L.R. 16; 13 C.R.R. 287; 59 N.R. 1; *Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, c. A-7 et al.*, [1978] 2 S.C.R. 1198; (1978), 84 D.L.R. (3d) 257; 19 N.R. 361; *Brant Dairy Co. Ltd. et al. v. Milk Commission of Ontario et al.*, [1973] S.C.R. 131; (1972), 30 D.L.R. (3d) 559; *Baluyut v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 420 (1992), 56 F.T.R. 186 (F.C.T.D.); *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, [1997] 1 F.C. 405 (1996), 106 F.T.R. 210 (F.C.T.D.); *Holland v. Canada (Attorney General)* (2000), 188 F.T.R. 305 (F.C.T.D.).

REFERRED TO:

Moresby Explorers Ltd. v. Gwaii Haanas National Park Reserve, [2000] F.C.J. No. 1944 (T.D.) (QL); *Maple Lodge Farms Ltd. v. R.*, [1981] 1 F.C. 500 (1980), 114 D.L.R. (3d) 634; 42 N.R. 312 (C.A.); *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392; [1952] 4 D.L.R. 146.

APPLICATION for judicial review of a decision by the Superintendent of the National Park Reserve of the Queen Charlotte Islands, British Columbia, refusing to allocate user quota to the applicants for activities related to a float camp situated outside the Reserve. Application allowed.

APPEARANCES:

Christopher Harvey for applicants.

Suzanne S. Williams for respondent.

SOLICITORS OF RECORD:

Fasken Martineau DuMoulin LLP, Vancouver, for applicants.

Miller Thomson LLP, Vancouver, for respondent.

The following are the reasons for order and order rendered in English

[1] PELLETIER J.: This is the sequel to the decision of this Court in *Moresby Explorers Ltd. v. Gwaii Haanas National Park Reserve*, [2000] F.C.J. No. 1944 (QL), in which it was held that Moresby Explorers Ltd.'s (Moresby) application for judicial review was out of time. Another season has rolled around bringing another application which does not, on its face, present an issue of timeliness. The facts, which are lengthy, are largely taken from my decision in the first case.

[2] On July 12, 1988, Canada and British Columbia (B.C.) signed a "Memorandum of Agreement for The Establishment of South Moresby National Park and National Marine Park, Queen Charlotte Islands, B.C." (the Park Agreement) which set the foundation for the creation of a terrestrial national park reserve (the National Park Reserve) and a national marine park reserve (National Marine Park) in the Queen Charlotte Islands.

[3] B.C. transferred administration and control of the National Park Reserve to Canada on or about March 27, 1992 pursuant to Order in Council No. 438, and amended on September 10, 1992 by Order in Council No. 1432 [see *Gwaii Haanas National Park Reserve Order*, SOR/96-93].

[4] The Park Agreement addressed the delay between the transfer of administration and control of the National Park Reserve and the National Marine Park from B.C. to Canada, and the subsequent designation of these lands as national parks. Sections 23 and 24 of the Park Agreement, *inter alia*:

> (a) prohibited B.C. from allowing any interest to exist in the National Park Reserve or the National Marine Park without the consent of Canada, pending the transfer of these lands to Canada;
>
> (b) restricted Canada's use of the lands to activities consistent with the *National Parks Act* [R.S.C., 1985, c. N-14] and its regulations;

(c) required B.C. to request the Environment and Land Use Committee, pursuant to the *Environment and Land Use Act* [R.S.B.C. 1996, c. 117] recommend passage of a B.C. order in council authorizing Canada to exercise jurisdiction over the National Park Reserve on behalf of B.C.; and

(d) required B.C. to consider Canada's requests for B.C. to take action to remedy any particular problems with respect to the National Park Reserve.

[5] As contemplated by section 24 of the Park Agreement and pursuant to section 6 of the *Environment and Land Use Act* (ELUC), B.C. passed Order in Council 586 on or about April 19, 1989. This order transferred authority to manage the National Park Reserve to the Canadian Parks Service, its Director General, and Canadian Parks Service officers and enabled them to manage and administer the land on behalf of B.C. as if the lands were a recreation area under the provincial *Park Act* [R.S.B.C. 1996, c. 344. This allowed the Director General to issue permits over the subject lands.

[6] Canada accepted the transfer of administration and control of the National Park Reserve from B.C. on March 28, 1995 by Order in Council P.C. 1995-3/534.

[7] The National Park Reserve was officially set aside as a national park reserve and became subject to the *National Parks Act* and regulations on or about February 22, 1996.

[8] In or about November, 1980 the Council of the Haida Nation (the Haida) submitted to Canada a comprehensive land claim over the Queen Charlotte Islands, and on June 30, 1983 Canada accepted the Haida claim for negotiation. In accordance with Parks Canada policy, Canada proceeded to establish a national park reserve in the Queen Charlotte Islands, pending the disposition of the Haida claim.

[9] Section 39 of the 1988 Park Agreement contemplated the involvement of the Haida in the planning and implementation of initiatives relating to the National Park Reserve and the National Marine Park, and this formed the basis for Canada to negotiate agreements with the Haida to cooperatively manage these lands.

[10] Order in Council P.C. 1992-1591, dated July 16, 1992, authorized the federal Minister of the Environment to enter into an agreement on behalf of Canada with the Haida concerning the management and operation of the Archipelago (which includes the National Park Reserve) in the Queen Charlotte Islands.

[11] On or about January 30, 1993 Canada and the Haida entered the Gwaii Haanas/South Moresby Agreement (the *Gwaii Haanas Agreement* [between the Government of Canada, represented by the Minister of the Environment and the Council of the Haida Nation, for and on behalf of the Haida Nation and represented by the Vice President of the Council respecting the land area known variously as Guaii Haanas and South Moresby, and generally referred to herein as "the Archipelàgo".]) (see Schedule A) to co-operatively manage the Archipelago. The Archipelago covers the National Park Reserve area, and has been designated by the Haida as a Haida heritage site.

[12] The *Gwaii Haanas Agreement* provides for the establishment of a four-person Archipelago management board (the AMB) whereby Canada and the Haida share and co-operate to “examine all initiatives and undertakings relating to the planning, operation and management of the Archipelago”. The Superintendent of the National Park Reserve on behalf of Canada co-chairs the AMB with a representative of the Haida.

[13] Matters that the AMB address include guidelines for the care, protection and enjoyment of National Park Reserve with respect to such things as permits for commercial tour operations.

[14] Nothing in the *Gwaii Haanas Agreement* fetters or limits the authority of the Superintendent. However, before the Superintendent takes any action, he or she must make an effort to first arrive at a consensus among AMB members for such action.

[15] In accordance with the *Gwaii Haanas Agreement*, Parks Canada and the AMB established the quota policy for a business licensing process in the National Park Reserve.

[16] In 1995, the AMB encouraged tour operators to keep records of their trips and clients, and participate in a voluntary business licensing system by which quota was issued to tour operators to access the National Park Reserve.

[17] In 1996, after the National Park Reserve was officially designated as a national park reserve, a mandatory business licensing system replaced the voluntary process.

[18] Both the voluntary and the mandatory licensing systems were designed to regulate commercial tour operators’ access to the National Park Reserve. One of the objectives of the mandatory licensing system was to freeze business activities at existing levels until the impact of those activities on the Park’s ecological and cultural integrity, and the quality of the visitor experience in the National Park Reserve could be assessed.

[19] The quota policy contained the following elements:

> (a) User quota was calculated based on information submitted by tour operators for trips conducted in the National Park Reserve area prior to its designation in 1996;
>
> (b) No licences or allocation were given to operators who did not work in the National Park Reserve before 1996;
>
> (c) the existing operators could not change the type of service that they provided before 1996 to make themselves eligible for quota; and
>
> (d) new operators or changes in use would only be considered once a management plan was in place for the National Park Reserve to ensure that the area was managed in accordance with the management plan;

(e) no user quota would be granted to the extent that the activities of a tour operator were in conflict with the quota policy or with legislation.

[20] If no conflict arose with policy or legislation, then user quota was calculated and allocated in the following manner:

(a) the highest number of trips done in any one year prior to 1996;

times:

(b) the demonstrated capacity of the operator's trips, which was the average of the five trips with the highest number of people (crew and clients) on trips conducted prior to 1996;

times:

(c) the length of trips conducted in the year when the most trips were done.

[21] As part of the Canada-Haida co-operative management of the National Park Reserve pursuant to the *Gwaii Haanas Agreement*, the AMB reviewed all applications for business licences to obtain user quota for the National Park Reserve.

[22] The business licences and user quota were then issued by the Superintendent pursuant to the *National Parks Businesses Regulations, 1998*, SOR/98-455 under the *National Parks Act*. (This is the respondent's position with respect to the issuance of licences. Moresby's position will be explored below.)

[23] In 1989, the applicants established a float camp in De la Beche Inlet which is located in the proposed National Marine Park.

[24] In 1990, the applicants applied to Parks Canada for the commercial operators registration. This was a voluntary process. The applicants' request was denied by Parks Canada on the basis that it could not support any commercial facilities such as the float camp in the proposed National Park Reserve or National Marine Park without a management plan in place to support this use. Further, the applicants were advised by Parks Canada officials that the float camp did not form any proprietary right that would be compensable upon these areas attaining designation as national park reserves.

[25] A 1995 visitor survey was conducted by Parks Canada for the National Park Reserve to determine public opinion. It included questions related to structures similar to the applicants' float camp. The results of the 1995 survey indicated that the public was not supportive of float camps in the areas that would be designated as national parks.

[26] The applicants' float camp continued to occupy the National Marine Park area without authorization.

[27] Pursuant to the Park Agreement, and at Canada's request, on or about February 28, 1996, B.C. ordered the applicants to remove all of their improvements from the foreshore of De la Beche Inlet within 60 days.

[28] In March and May of 1996, Parks Canada officials gave the applicants notice to remove unauthorized float camp attachments, including a water line which was drawing water from inside the National Park Reserve. The float camp remained in De la Beche Inlet in May 1996.

[29] The applicants were issued quota to use the National Park Reserve in 1996, but only for activities that did not involve the float camp as it was not authorized to occupy De la Beche and it did not conform to the acceptable uses, or Parks Canada policy.

[30] In the spring of 1997, the Director General of Parks, Western Canada, refused the applicants' request for additional user quota of 900 user days/nights for activities related to the float camp on the basis that the float camp did not have a licence of occupation and it was not an acceptable activity according to the AMB and Parks Canada policy. These grounds for denying quota to float camp activities were communicated to the applicants several times in 1997.

[31] Canada requested B.C.'s assistance with respect to the float camp, and the Ministry of Environment, Lands and Parks provided the applicants with a notice of trespass in August 1997 requiring them to remove the float camp from the designated National Park Reserve and the National Marine Park by September 30, 1997.

[32] In the fall of 1997, the applicants submitted further information for trips operated in the Park Reserve in 1988 (pre-1996). The applicants' received an additional 25 user nights of quota, for powerboat tours which did not involve the float camp.

[33] In or about 1998, the applicants relocated the float camp to Crescent Inlet, outside the northern boundary of the National Marine Park (the float camp), and in October of the same year they applied for a 1999 business licence and user quota.

[34] A business licence and user quota of 1,597 user days/nights for powerboat tours/transport within the National Park Reserve was issued to the applicants by Superintendent Stephen (Steve) Langdon on November 30, 1998 pursuant to the *National Parks Act* and its regulations.

[35] The applicants protested their 1999 user quota in a letter to the Superintendent dated December 11, 1998, and in particular the fact that they did not have user quota for activities related to their float camp. In response to the protest, the Superintendent stated:

> While I understand your desire to diversify your business, the Archipelago Management Board (AMB) have always maintained that your business will not receive an allocation for trips that involved your float camp while it was located in De la Beche Inlet. Your diving and kayaking tour documentation indicated that the float camp was used during these trips, and thus you cannot be issued an allocation for diving and kayak tours under current policies.
>
> The AMB cannot assign your business additional allocation at this time. However, once the backcountry management plan is complete, you will have an opportunity to apply for additional allocation if impact monitoring programs indicate that Gwaii Haanas can support increased use levels. I expect that the draft backcountry management plan will be released

> for public and stakeholder review in March, 1999. I encourage you to continue to participate in the discussions that will be established to review the draft, and look forward to our continued dialogue to resolve your ongoing concerns.

[36] In March 1999, a final draft of the Gwaii Haanas Backcountry Management Plan was released which requires park reserve activities to be consistent with the *National Parks Act* and regulations, the *Gwaii Haanas Agreement*, Parks Canada principles and operational policies, and Gwaii Haanas guiding principles and management goals. The final version of this Plan was produced in September 1999.

[37] In June, 1999 the applicant again wrote to the Superintendent of Gwaii Haanas with respect to user quota for his float camp activities. The Acting Superintendent, Ronald Keith Hamilton, indicated that he would not interfere with the decision:

> As was stated to you in a letter, dated January 29, 1999, from Steve Langdon, the Archipelago Management Board (AMB) will not provide you with an allocation for trips that involved your float camp while it was located in De la Beche Inlet. Your diving and kayaking tour documentation indicated that the float camp was used during these trips, and thus you cannot be issued an allocation for diving and kayak tours under current policies.

[38] Following the rejection of its application for judicial review, Moresby applied again for additional quota with respect to its licence for the 2001 season. The request was refused in a letter signed by Richelle Léonard, the new Park Superintendent, dated December 20, 2000. The letter was on AMB letterhead. Ms. Léonard signed in her capacities as Park Superintendent and Co-chair of the AMB. Her letter provided as follows:

> No additional allocation for user-days/nights will be issued to you, consistent with previous decisions that the existence of the float camp will convey no proprietary rights or future right to compensation and that it may not be permitted within the proposed National Marine Conservation Area once established.

[39] This decision is the subject of this application for judicial review.

[40] The licence itself was issued on January 25, 2001 and was in the following form:

GWAII HAANAS NATIONAL PARK RESERVE/

HAIDA HERITAGE SITE

2001 Business Licence

> Business owners and their employees have a continuing responsibility to minimize the impact of their activities upon Gwaii Haanas. By being aware of what constitutes proper conduct within Gwaii Haanas, business operators set an example and send a message to visitors through their business practices. They share a responsibility to educate and inform visitors about Gwaii Haanas' unique and sensitive features.
>
> No person shall, within Gwaii Haanas, carry on any trade, calling, industry, employment or occupation carried on for gain or profit unless he/she is a holder of an annual licence issued pursuant to the *National Parks Act*, National Parks Businesses Regulations and the Council

of the Haida Nation.

Moresby Explorers Ltd. and/or Douglas Gould is hereby licensed to carry on powerboat tours/transport in Gwaii Haanas National Park Reserve/Haida Heritage Site up to December 31, 2001, subject to all terms and conditions set out in the attached Schedule A.

Approved under the Authority of the *National Parks Act*, National Parks Business Regulations	Approved under the Authority of Council of the Haida Nation
«Richelle Léonard»	"illegible"
Superintendant	[signature]
Jan 25/01	Jan. 26.01
Date	Date

…

SCHEDULE A

Gwaii Haanas National Park Reserve/Haida Heritage Site 2001 Business Licence

…

7. The licensee is entitled to no more than 1,541 user-days/nights for powerboat tours/transport within Gwaii Haanas up to December 31, 2001.

[41] The statutory provisions dealing with the administration of national parks are reproduced in Schedule B to these reasons.

[42] The *National Parks Act* entrusts the management of the national parks to the Minister (subsection 5(1) [as am. by R.S.C., 1985 (4th Supp.), c. 39, s. 3]). The Governor General in Council is authorized to make regulations with respect to "controlling trades, business, … occupations and other activities or undertakings and prescribing the places where any such activities or undertakings may be carried on, and the levying of licence fees" (paragraph 7(1)(*p*)). The *Parks Canada Agency Act* [S.C. 1998, c. 31] provides that the duties and functions of the Minister under the *National Parks Act* may be exercised by the Agency, and those duties may be carried out by Agency officers or employees "appointed to serve in the Agency in a capacity appropriate to the exercise of the power or the performance of the duty or function" (subsections 5(1) and 5(2)). The *National Parks Businesses Regulations, 1998* provide that no person may carry on a business in a park without a licence issued by the Superintendent. In the course of issuing licences, the Superintendent may have regard to the "preservation, control and management" of the park. (paragraph 5(1)(*d*)). In addition to granting the licence, the Superintendent is authorized to attach conditions to licences to deal with "any other matter that is necessary for the preservation, control and management of the park." (paragraph 5(3)(*d*)).

[43] Moresby argues that the Superintendent as the delegate of the Minister's authority, constituted as such by the *National Parks Businesses Regulations, 1998*, is not entitled to delegate her authority to the AMB. There is no statutory mandate for such a delegation which, on its face, would fly in the face of the maxim "*delegatus non potest delegare*". Opinion is divided as to whether it is more serious to act without statutory mandate or to fly in the face of a latin maxim. The evidence that the Superintendent has delegated or abdicated her authority arises from the circumstances of the AMB. All of Moresby's dealings with respect to its business licence have been through the offices of the AMB. Inquiries are directed to AMB staff and are responded to by them. The Superintendent signs the licences as Co-chair of the AMB as does a representative of the Haida Nation. At various points, Moresby was advised in correspondence that the AMB would not approve or grant additional quota.

[44] For example, in a letter dated April 15, 1996, from Mr. Ron Hamilton, Manager, Heritage Resource Conservation, Moresby was advised that:

> The AMB recognizes that your float camp may be incompatible with the final management plan, hence the notification of the potential incompatibility.

[45] In 1999, Moresby was advised in another letter from Mr. Hamilton that:

> … the Archipelago Management Board (AMB) will not provide you with an allocation for trips that involved your float camp while it was located in De la Beche Inlet. Your diving and kayaking tour documentation indicated that the float camp was used during these trips, and thus you cannot be issued an allocation for diving and kayak tours under current policies.

[46] The decision from which this application for judicial review is taken was written on AMB letterhead and was signed by Richelle Léonard in her capacity as Co-chair of the AMB as well as Park Superintendent.

[47] Moresby notes as well that the provisions of the *Gwaii Haanas Agreement*, cited below, make it clear that the Superintendent must take all issues relating to park management to the AMB. The Superintendent does not have the ability to control the AMB due to the requirement that decisions be made by consensus. The result, in Moresby's eyes, is that the AMB is the real decision maker.

[48] The second line of attack on the decision is that the AMB's own policy of "level of historic use" has not been properly applied to Moresby because the policy has been misconstrued by reference to irrelevant and extraneous considerations. The illegality of the float camp anchorage in De la Beche Inlet, and the references to the backcountry policy are instances of considerations which are irrelevant to the question of Moresby's entitlement to quota on the basis of level of historic use.

[49] Canada argues first and foremost that decisions involving quota allocation are policy decisions which are not justiciable. It relies upon a series of cases from Canada and England in support of the proposition that judicial review does not lie with respect to the making of policy. A representative example of such statements can be found in the

following extract from *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548 (C.A.) where the following appears, at paragraph 28:

> The imposition of a quota policy (as opposed to the granting of a specific licence) is a discretionary decision in the nature of policy or legislative action.

[50] Later, in the same case [at paragraph 29], the following caution appears:

> When examining an attack on an administrative action—the granting of the licence—a component of which is a legislative action—the establishment of a quota policy—reviewing courts should be careful not to apply to the legislative component the standard of review applicable to administrative functions. The line may be a fine one to draw but whenever an indirect attack on a quota policy is made through a direct attack on the granting of a licence, courts should isolate the former and apply to it the standards applicable to the review of legislative action as defined in *Maple Lodge Farms*.

[51] Canada argues the whole issue of quota policy, as opposed to the issue of a specific licence is beyond the scope of this Court's power of judicial review.

[52] Furthermore, Canada points to the *National Parks Act* which it says authorizes it, in fact requires it, to act in the interests of conservation and preservation of wilderness areas. It claims that this gives it the right to impose conditions on business licences relating to matters occurring outside the park boundaries. Parks Canada policy and international conventions both require the Agency to act in the best interests of the environment and the local ecology. These obligations justify the Superintendent's concerns about the operation of Moresby's float camp.

[53] It is perhaps appropriate to deal first with Canada's argument as to justiciability, going as they do to the root of the argument. It is indisputable that pure policy decisions are generally beyond the reach of the courts. This is explained in many ways but ultimately the Court's reticence to interfere with such decisions is, or should be, due to the fact that policy decisions engage the political accountability of those who make such decisions. We do not have a formal doctrine of division of powers as between the branches of government in this country but, for the most part, there is a reluctance on the part of the courts to interfere with "political decisions" except in response to a constitutional challenge to their validity. See the discussion in *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441 where, following a lengthy review of the American and English jurisprudence on this issue, the Supreme Court concluded, at page 472:

> Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the <u>effect</u> of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*.

[54] This arises in the constitutional context but the point is the same whether the issue is constitutional law or administrative law: it is not the function of the courts to assess the wisdom of government policy, as expressed either in legislation or in specific acts, such as an international agreement. To that extent the argument as to justiciability must succeed. But as pointed out in *Carpenter*, there are limits to this immunity from review. The policy is reviewable on the grounds set out in *Maple Lodge Farms Ltd. v. R.*, [1981] 1 F.C. 500 (C.A.).

[55] Moresby challenges the right of the Minister and the Superintendent to impose a quota policy, whatever its content, saying that they lack the legislative authority to do so. Sections 4 and 5 [as am. by R.S.C., 1985 (4th Supp.), c. 39, s. 3; S.C. 1992, c. 1, s. 100] of the *National Parks Act*, *supra*, provide an indication of a wide discretion on the part of the Minister to take whatever steps are necessary to ensure the maintenance of the parks for future generations:

> **4.** The National Parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the National Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.
>
> **5.** (1) Subject to section 8.2, the administration, management and control of the parks shall be under the direction of the Minister.
>
> (1.1) The Minister shall, within five years after the proclamation of a park under any Act of Parliament, cause to be laid before each House of Parliament a management plan for that park in respect of resource protection, zoning, visitor use and any other matter that the Minister considers appropriate.
>
> (1.2) Maintenance of ecological integrity through the protection of natural resources shall be the first priority when considering park zoning and visitor use in a management plan. [Emphasis added.]

[56] While Moresby points to particular pieces of legislation which it says clearly establish the right to introduce quotas, it is my view that the nature of the subject-matter dictates what is appropriate language to establish a right to control access to the park, for that is what the quotas in issue here are intended to do. In my view, the references to visitor utilization in the context of preserving the park for future generations and maintaining the ecological integrity of the parks are sufficient authorization for the Superintendent to limit access to the park for those purposes. I conclude that there is no impediment to the implementation of a quota scheme which is designed to protect the park. There is no evidence before me that the quota scheme in issue here is anything other than a means of protecting the ecological integrity of the Gwaii Haanas area.

[57] Consequently, I agree that while the wisdom of the quota policy is not a subject for judicial review except on the basis set out in *Maple Lodge Farms* i.e. bad faith, extraneous considerations etc., the application of the policy to specific cases of licensing can be reviewed on the usual grounds of judicial review, providing care is taken to avoid trenching upon the policy issues implicit in the licensing decision.

[58] Turning now to the issue of delegation, Moresby's analysis relies upon certain Supreme Court of Canada cases dealing with delegation between the federal and provincial governments to further inter-provincial marketing schemes: *Reference respecting the Agricultural Products Marketing Act, R.S.C. 1970, c. A-7 et al.*, [1978] 2 S.C.R. 1198 and *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392.

[59] The issue of delegation has a different cast in the constitutional sense than it does in the administrative law context. The marketing board cases generally arise as a result of a "division of powers" challenge to a particular scheme, where it is alleged that one level of government is invading an area of jurisdiction reserved to the other level of government by the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5]]. Or, to be somewhat more precise, such cases arise when a citizen complains that the two levels of government have ignored the strictures of the Constitution in their haste to achieve administrative efficiency. In that context, delegation is a matter of the division of powers in sections 91 and 92 of the *Constitution Act, 1867* and not an issue to be decided according to administrative law principles. The following short passage from *Reference respecting the Agricultural Products Marketing Act* upon which Moresby relies, illustrates the point nicely, at page 1232:

> Nor can a federal-provincial agreement be a basis for enlarging either the legislative authority of Parliament or of a provincial Legislature. If the power asserted is not found in the Constitution, it cannot be given by agreement.

[60] Moresby relies on this passage as authority for the proposition that neither the Park Agreement nor the Gwaii Haanas Agreement can confer jurisdiction upon the AMB which the applicable legislation confers on others. However, it can be seen from the passage that the barrier to transfer of jurisdiction is the Constitution, not administrative law principles. The focus on the division of powers appears clearly enough from this extract itself but if any doubt remains, one need only read the preceding two sentences, at pages 1231-1232:

> The intimation is that, in the case of a product passing into interprovincial and export trade as well as having an intraprovincial market, overall regulatory control may be exercised under federal legislation where it is the result of a Dominion-Provincial agreement to which all Provinces were parties. This is to take an enlarged view of the federal trade and commerce power which is not supported by an existing authority.

It is clear from these sentences that these cases do not address the issues raised by improper delegation as they appear in an administrative law context.

[61] Moresby also relies upon cases having to do with delegation from one agency to another: *Brant Dairy Co. Ltd. et al. v. Milk Commission of Ontario et al.*, [1973] S.C.R. 131.

[62] In the *Brant Dairy* case, provincial regulations provided that the Ontario Milk Commission has the power to fix, cancel or reduce milk producer's quotas. The Commission purported to make its own regulations which delegated this power to the

Ontario Milk Marketing Board which then dealt with quota matters in its own name. The Supreme Court of Canada held that the wholesale delegation of the Commission's powers had the effect of converting a legislative power into an administrative power and was impermissible delegation.

[63] If, as Moresby asserts, the effective decision maker in this matter is the AMB, what is the legal basis for its assertion of authority? While the authority of the Superintendent can be traced to the *National Parks Act*, there is no equivalent clear trail of authority for the AMB. There is authority for the *Gwaii Haanas Agreement* in subsection 8.5(1) [as enacted by S.C. 1992, c. 23, s. 1] of the *National Parks Act* which provides as follows:

> **8.5** (1) The Governor in Council may authorize the Minister to enter into an agreement with the Council of the Haida Nation respecting the management and operation of the lands described in Schedule VI, referred to in this section as the Gwaii Haanas Archipelago.

[64] The difficulty is that while an agreement has been signed, there is no authorization for it by the Governor General in Council, either in the form of an authorization to proceed or a ratification of the Agreement. As a result, the *Gwaii Haanas Agreement* is legally insufficient to justify any transfer of authority to the AMB.

[65] Assuming that this surprising conclusion is the result of insufficient or inadequate legal research and that the *Gwaii Haanas Agreement* has been properly authorized, the issue still remains how authority for management of the Park could be moved from its statutory designate, the Superintendent, to the AMB. The argument would have to be that in providing for an agreement with respect to the management of the Park area, Parliament must be taken to have authorized Canada to negotiate an agreement which incorporated terms which differed from those contained in the Act. If that were not the case, what purpose would an agreement as to the management of the Park serve? It is not necessary to negotiate an agreement to do exactly what the Act says is to be done.

[66] There is an inherent improbability in the notion that Parliament would authorize the Governor in Council to rewrite the law in an agreement with the Haida . Whether one characterizes this as an aspect of the rule of law, or as a matter of political accountability, the result is the same. It is repugnant to our system of government to contemplate a situation in which laws passed in Parliament after public debate are modified or set aside by the government in an agreement negotiated in private. Even if one assumed that this were possible, only the clearest words could justify it. One would not expect to see such a doctrine invoked by implication, as it would have to be in this case.

[67] Furthermore, there is subject-matter for this Agreement without having recourse to such a theory. The *Gwaii Haanas Agreement* is a solution to the problem of competing claims over the same territory. Both Canada and the Haida Nation claim competence to manage the Gwaii Haanas area. Canada relies upon the *National Parks Act* and the legislation specific to the Gwaii Haanas Park Reserve. The Haida Nation relies upon its claim of Aboriginal rights in its ancestral territory. It is in the interests of both parties to join in a structure which permits decisions to be made without having to

decide by whose authority they come to be made. The requirement that consensus be sought on all decisions is a device for allowing decisions to be made without allocating jurisdiction for the subject-matter of the decision to one party or the other. It is fundamental to the interests of both parties to be able to say that a particular decision was made by their authority. For that reason, it would be contrary to the logic which lead to the creation of the AMB, for either party to delegate, or be seen to delegate, their authority to the AMB. Each must be seen to act under the authority which it claims.

[68] Lest this be considered to be fanciful conjecture on my part, section 1.1 to the *Gwaii Haanas Agreement* provides evidence as the position of each party with respect to the Park Reserve:

> The Haida Nation sees the Archipelago as Haida Lands, subject to the collective and individual rights of the Haida citizens, the sovereignty of the Hereditary Chiefs, and jurisdiction of the Council of the Haida Nation. The Haida Nation owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly.
>
> The Government of Canada views the Archipelago as Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.
>
> The Haida have designated and managed the Archipelago as the “Gwaii Haanas Heritage Site”, and thereby will maintain the area in its natural state while continuing their traditional way of life as they have for countless generations. In this way the Haida Nation will sustain the continuity of their culture while allowing for the enjoyment of visitors.
>
> …

[69] The AMB provides an administrative structure in which issues are discussed and decisions made. It has staff which carry out some of the many functions associated with running a park. The fact that one of those staff might convey information about the business licence scheme or the quota policy does not mean that the AMB dictated the policy to the Superintendent. Specifically, the fact that Anna Gajda, Backcountry Activites Officer, wrote to Moresby in March of 1996 to advise, among other things, that no quota would be allocated to Moresby arising from the use of its float camp does not prove that the Superintendent was not responsible for that decision. It simply shows that the Superintendent has the benefit of an administrative staff in running the park.

[70] While this may be fine in theory, Moresby points to an incident which it says is evidence of the fact that the AMB can overrule the Superintendent. Moresby arrived at a gentleman’s agreement with Ron Hamilton (who was Superintendent at the time) that he would be given one year’s notice to move his float camp. The following year, 1996, he was ordered to move his float camp without the notice which he had been promised. The justification for failing to keep the agreement was set out in a letter from Anna Gajda, on AMB letterhead, dated March 28, 1996 in which she said:

> Although Mr. Hamilton gave you verbal assurance of one year advance notice for float

> camp removal at the Commercial Operators' Meeting in October 1995, this assurance was given before he was aware that your operation was in violation of the National Parks Act and Regulations. I refer you to a letter concerning this matter which is being forwarded to you under separate cover.

[71] Mr. Hamilton's letter dated April 15, 1996 sets out the violations of policy and legislation which triggered the demand for removal:

> Other operators have not been given the same notice of "no proprietary interest" because their operations are not in potential conflict with Parks Canada policy as is your float camp. The float camp comes under the definition of a "backcountry lodge", Parks Canada Management Directive 4.6.16. According to this directive, a backcountry lodge will be considered only when it is consistent with an approved park management plan. Further to that, the directive states that no new backcountry lodges will be permitted unless provided for in the park management plan. The AMB recognizes that your float camp may be incompatible with the final management plan, hence the notification of the potential incompatibility.

[72] There is nothing in these two letters which would support the position that the AMB overruled the Superintendent on the issue of the year's notice to remove the float camp. It is reasonably clear that the commitment to one year's notice was not respected. The issue is why that was so. Anna Gajda's letter clearly states that Mr. Hamilton changed his mind when he became aware of the legal position of the float camp. Mr. Hamilton's letter does not directly address the removal notice but does set out that the float camp does not comply with Parks Canada policy. The reference to the incompatibility between the float camp and Parks Canada policy being recognized by the AMB is, if anything, recognition that the AMB applied Parks Canada policy and not the other way around. The fact that the commitment was not respected does not prove Moresby's theory as to why it was not respected.

[73] Inappropriate delegation is not the issue in this case because the Superintendent has continued to exercise her office notwithstanding the existence of the AMB. Business licences, which the *National Parks Businesses Regulations, 1998* say shall be issued by the Superintendent, are in fact signed by the Superintendent. This is not a case where the Superintendent purported to vest her authority in the AMB which then made decisions which only the Superintendent could make. All matters which are to be decided by the Superintendent are decided by her, albeit in the forum of the AMB.

[74] It is the fact of having to consult and reach a consensus which underlies Moresby's allegation of unlawful delegation. But the fact that the Superintendent has a discretion to exercise does not dictate the process by which it will be exercised. The fact that one who must decide a question discusses the issues with another does not mean that the decision maker has surrendered his authority to the other. The AMB provides a structure for consultation with the Haida Nation which has the happy effect of blending competing jurisdictional claims.

[75] It is important to note that section 9.2 of the *Gwaii Haanas Agreement* specifically preserved Canada's right to assert its jurisdiction:

> 9.2 Nothing in this Agreement shall fetter or limit, or be deemed to fetter or limit, in any manner the rights, jurisdiction, authority, obligations or responsibilities of either party or their representatives, except to the extent of the requirement that all reasonable efforts must have been made to reach consensus through the process set out in section 5 of this Agreement.

This provision also undermines the theory of legislative reallocation by agreement in that it explicitly invokes the terms of the Act as it stands. This is inconsistent with an intention to amend the Act by agreement.

[76] In the end, it is the fact of having to achieve a consensus which is most telling against Moresby's argument. If the decision must be consensual, then, by definition, the Superintendent must have agreed with it. Were decisions made on a majority basis, it would be possible to prove that the Superintendent had ceded her discretion with respect to a particular issue by showing that she voted against a resolution which she subsequently put into force. In this case, if the Superintendent does not agree with a decision, that decision must be referred to others. If agreement is not reached after further consultation, the Superintendent is empowered to act unilaterally. In those circumstances, improper delegation cannot be shown.

[77] To some extent, the same point can be made with respect to the argument that the Superintendent has fettered her discretion by agreeing to consult with the Haida Nation, in the forum of the AMB, and in attempting to achieve consensus. If consensus is reached, then it represents the free exercise of the Superintendent's discretion. If it is not, the decision is referred to others while the Superintendent retains the right to act unilaterally. Moresby would argue that one cannot assume that the Superintendent is implementing her own point of view as that is the very issue raised by the application. While that may be true, it does not reflect the fact that Moresby has the burden of establishing its case. It cannot simply assert that the Superintendent has fettered her discretion and put the Minister to the task of proving otherwise.

[78] There is a superficial difference between the positive act of issuing a licence and the negative act of withholding quota. In a situation where consensus is required, all must agree in order for a change to occur. But a failure to agree by any party is sufficient to maintain the *status quo*. Moresby could argue that the fact that quota was withheld leaves open the possibility that the Superintendent is being prevented from giving it more quota because of disagreement on the AMB. In order for this argument to succeed, there would have to be evidence on which it could be found that the Superintendent did not agree with the reduced quota. The evidence is all to the contrary. Furthermore, the dichotomy which is the basis of the argument is a false one. The quota allocation is part of the licence which was issued to Moresby. In order for that licence to be issued, the Superintendent had to agree. There is no way to separate the two issues.

[79] There is some authority on the question of consulting as a form of fettering discretion. In *Baluyut v. Canada (Minister of Employment Immigration)*, [1992] 3 F.C. 420 (T.D.), a visa officer had to decide whether to interview a visa applicant without her spouse being present when the immigration policy manual required that all dependent

applicants should be present for the interview. The applicant was in the United States and was scheduled to be interviewed in Los Angeles. Her spouse was in the Philippines and could not afford to travel to Los Angeles for the interview. The visa officer consulted with senior consular staff and decided that she could not interview the applicant without her husband being present. McGillis J. decided that the visa officer had fettered her discretion by simply implementing the views of senior consular staff [at page 426]:

> A review of the facts of this case demonstrates that Mrs. Roa [the visa officer] failed to exercise any independent judgment in the matter and thereby fettered the exercise of her discretion. When confronted with the explanation proffered by Mrs. Baluyut, on the date scheduled for the interview, Mrs. Roa consulted with senior personnel at the Consulate and did exactly what she was told by them to do.

[80] This case is not authority for the proposition that consultation with others is necessarily fettering one's discretion, but rather that the failure to exercise independent judgment following such consultation can amount to fettering one's discretion.

[81] Another instance of consultation/deferral arose in *K.F. Evans Ltd. v. Canada (Minister of Foreign Affairs)*, [1997] 1 F.C. 405 (T.D.). The facts are set out in the headnote to the case [at page 406]:

> This was an application to set aside the Minister's decision under section 7 of the *Export and Import Permits Act*, refusing permits to export a quantity of unprocessed logs from Canada because the applicant had not obtained approval from the British Columbia Timber Export Advisory Committee (TEAC). The Committee had been established to advise the provincial Minister of Forests with respect to exemptions from legislation requiring the processing in British Columbia of certain timber harvested in that Province. Although the logs came from private rather than federal lands and were not caught by the provincial statute, they are subject to section 7 of the Act which prohibits their exportation unless a permit is obtained from the Minister of Foreign Affairs and International Trade. Logs have been under federal export control since 1940 (*War Measures Act*) when their supply was a matter of concern. The applicant applied to the Minister for export permits without first making an application to the British Columbia Ministry of Forests; it was advised that the applications were incomplete because the TEAC process had not been gone through. Under that process, notice of an application for permission to export logs is sent by the British Columbia Ministry of Forestry to processors of logs within the Province who wish to purchase the logs that are the subject of the notice. If offers are received, they are referred to TEAC for determination as to whether they are fair. If TEAC determines that the offers are fair, there is determined to be a lack of supply in British Columbia and federal permission to export is not given. Applicant made application, under protest, to the provincial Ministry of Forests. Offers for applicant's logs were received and TEAC determined them to be fair. Applicant could have obtained a much higher price on the international market.

[82] On these facts, it was alleged that the Minister had either failed to exercise his discretion or had fettered it. The basis for the argument was the Minister's treatment of TEAC's decision as determinative of the question before him. Reed J. held, in effect, that the Minister had abdicated his responsibility for making a decision by simply adopting the TEAC position without consideration of the particulars of the case before him [at page 422]:

> The decision the Minister made, repeatedly, and that made by his officials, acting as his delegate, was that the TEAC process governed. Neither the Minister nor his delegates made an independent decision on the merits of the applicant's applications. Documents describing the role of the TEAC process, prior to the present challenge to that process, demonstrate that its role was treated as determinative of whether to grant or to refuse an export permit.

[83] A case which deals directly with the issue of consultation is *Holland v. Canada (Attorney General)* (2000), 188 F.T.R. 305 (F.C.T.D.), which deals with an application for judicial review of a decision by the Commissioner of the Royal Canadian Mounted Police denying the applicant a permit to carry a restricted weapon. The decision was challenged on the basis that the Commissioner had consulted with various others in the course of making his decision. MacKay J. held, at paragraph 23, that this was not fatal to the decision:

> In light of the legislative purpose and the broad grant of discretion, the Court will only interfere in limited circumstances, where it is clear that the statutory considerations have been ignored, or others have been given undue weight, or there is serious procedural unfairness. In this case, the record discloses that the Commissioner consulted with a number of parties and relied on particular members of the R.C.M.P. to provide him with information in relation to the application. In my view, this is not fettering discretion as long as the final decision rested with the statutory decision-maker. The Commissioner of the R.C.M.P. has a broad range of responsibilities. It is reasonable for him to enlist the assistance of members of the Force to assist in discharge of those responsibilities. In my opinion in the circumstances of this case, that includes asking for a preliminary review of the application in this case, including information on the opinions of civic and provincial officers concerning the threat to life alleged and the issuance of a permit to carry a concealed weapon. Reference by the Commissioner to the information thus provided does not constitute fettering his discretion in making his conclusion, and it did not result in unlawful delegation of his decision.

[84] The difference between *Holland* and the case before the Court is that in *Holland* the consultation was a discrete process related to a specific application whereas in this case, the consultation process is structured and applies to a broad range of issues, including the particular issue of the conditions of Moresby's licence. But that does not alter the principle that consultation does not amount to fettering discretion as long as the decision maker makes the final decision.

[85] In the end, I am unpersuaded that the Superintendent unlawfully delegated her authority to issue licences to the AMB. The licences (with conditions attached) were issued and signed by the Superintendent. The fact of another signature on the form does not somehow invalidate the Superintendent's approval of the licence. The structure of the AMB is such that the licence could only be issued if the Superintendent agreed that it should be.

[86] This leaves the question of whether the Superintendent properly exercised her discretion in setting the conditions she did when issuing Moresby's licence. Moresby argues that she did not. First, the Superintendent does not have the authority to implement a quota scheme in the absence of a specific grant of authority to do so. Even

if she did, she did not apply it fairly to Moresby. And finally, the Superintendent acted on the basis of irrelevant considerations in exercising her discretion as she did.

[87] Since this is a review of the exercise of a discretionary power, the issue of standard or review must be addressed. The framework for analysis is found in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

[88] There is no right of appeal from a decision of the Superintendent though there is a right of judicial review.

[89] The nature of the question is largely one of fact. The decision is one relating to the utilization and protection of the resources of the park reserve. The issue before the Superintendent is whether quota should be allocated for park utilization which involved the use of a float camp which is currently outside the boundaries of any park reserve. This involves consideration of the impact of the float camp on the park environment and the effect of its utilization on sustainable patterns of use.

[90] The Superintendent has greater relative expertise than does the Court in relation to the questions which must be addressed. She is “on the ground” in the area whose preservation is in issue. There is an element of polycentric decision making in that the requirements of the environment and of the Haida have to be weighed, but there is also an element of entitlement, in the sense of the application of a general policy to a specific set of facts. With regard to the latter, the Superintendent has no greater expertise than the Court.

[91] In the circumstances, it is unlikely that the decision in issue is one which must be made correctly. The differing demands of the various interests which must be accommodated and the elements of greater relative expertise on the part of the Superintendent argue for a standard of review less that correctness. On the other hand, there is not so much difference in expertise that the Court should limit its intervention to cases of patent unreasonableness. A standard of review of reasonableness respects the Superintendent’s greater knowledge of local conditions while recognizing that the aspects of the decision which involve the application of a policy to a given set of facts are matters in which the Court has its own expertise. Consequently, I find that the standard of review is reasonableness *simpliciter*.

[92] The rationale for the quota policy was to freeze the utilization of park resources at existing levels while the park management plan was being developed:

> 8. My role as a Public Consultation Assistant expanded in 1995 when I became involved in preparing in [*sic*] the business licensing system to regulate commercial tour operators’ access to the National Park Reserve. This process was designed to freeze business activities at their current level until levels of impact to the Park’s ecological and cultural integrity as well as the quality of the visitor experience could be assessed. [Affidavit of Anna Gajda, sworn August 27, 1999.]

[93] Since the adoption of the Backcountry Management Plan, the levels of quota have been adjusted to reflect other considerations:

> 19. A quota system has been used in Gwaii Haanas to regulate use of the area in compliance with Parks Canada policy. Initially the quota levels were frozen to maintain user levels and types of activities as they existed prior to 1996. This freeze was put in place pending a Backcountry Management Plan for the Park Reserve.
>
> 20. Since 1999 when the Backcountry Management Plan was finalized, the quota levels have been reviewed and revised.
>
> 21. For example, in 1999 daily limits for independent travellers to Gwaii Haanas were increased by 25 people per day, and in 2000 those limits were increased again as recommended by the Backcountry Management plan. [Affidavit of Anna Gajda sworn February 28, 2001.]

[94] The activities which were carried out by Moresby before the introduction of the quota system included kayak rental, transportation, overnight tours, kayak guiding and diving. (Affidavit of Douglas Gould sworn January 16, 2001 at paragraph 4.)

[95] No quota has been allocated to Moresby for diving and kayaking activities:

> … the Archipelago Management Board (AMB) have always maintained that your business will not receive an allocation for trips that involved your float camp while it was located in De la Beche Inlet. Your diving and kayaking tour documentation indicated that the float camp was used during these trips, and thus you cannot be issued an allocation for diving and kayak tours under current policies. [Letter from Steve Langdon, Co-chair Archipelago Management Board dated January 29, 1999—Exhibit P to the affidavit of Douglas Gould sworn January 16, 2001.]

[96] The rationale for denying quota for these activities, apart from the issue of the float camp itself, was said to be the following:

> … any user nights associated with the float camp can therefore not be applied to your quota; as well, user nights could not be converted to day-use quotas (and vice versa) as this would constitute a change in service which is prohibited under the Terms of Condition of all Business Licenses. [Letter from Ron Hamilton, Manager, Heritage Resource Conservation dated May 9, 1996—Exhibit H to the affidavit of Douglas Gould sworn January 16, 2001.]

[97] In a document prepared in March 1998 to explain the business licensing policy for members of the public, Anna Gajda set out parameters of the licences to be granted:

> 3. Only those businesses that have operated in Gwaii Haanas in past years will have the opportunity to apply for a Gwaii Haanas business licence and then only operating the same type of business as previously had been run (i.e. no change in service). The objective is not to penalize any commercial operators, but to freeze them at their “previous best” level of operation until control over the environmental damage is achieved, and until there is a management plan to guide any future expansion of visitation into the area.
>
> …

> 5. A business will not necessarily be issued a business licence if the business' activity is inconsistent with the draft management plan for Gwaii Haanas, or conflicts with any applicable legislation.

[98] What emerges from these texts is that the business licensing policy was intended to fix the activity level in the Park Reserve at its historic level while the park management plan was being developed and the carrying capacity of the park assessed. There was no intention at that stage to disallow particular types of activities which had been undertaken in the past. The restrictions against changes in service were designed to prevent "bootstrapping" in the sense of operators getting into new activities solely for the purpose of acquiring a quota allocation for that activity. There was no intention to penalize or restrict operators beyond maintaining the *status quo*.

[99] As was seen earlier, there is legislative justification for the establishment of a quota while a management plan was being developed was in accordance with the Act. In the case of Moresby, the *status quo* was unacceptable to the Superintendent since it involved the float camp. But the use of the float camp is a different issue from the question of level of historic use of park facilities. There is no evidence before me that diving and kayaking could not be carried out without the use of a float camp. I have no doubt that the logistics would become more complicated but there is no reason for me to believe that those activities become impossible to sustain without using a forward base such as a float camp. As a result, there is no obvious reason why the Superintendent's (and the AMB's) opposition to the float camp would necessarily result in the disallowance of park use, for quota purposes, connected with kayaking and diving. The Superintendent could take (for the purposes of this discussion) whatever steps she thought appropriate with respect to the float camp but still count the user days/nights associated with kayaking and diving as part of Moresby's quota base.

[100] Even if it were shown that kayaking and diving could not be carried out without a forward base, it is not obvious why the usage associated with those activities could not be taken into account in setting Moresby's quota. That usage was part of the historic level of use which the park sustained. Its inclusion would not add to the pressure on the park. The rationale that allowing these user days/nights to be counted for other activity would amount to a change in service misses the point that the change in service policy was designed to prevent acquiring new quota. It was not designed to cause loss of quota entitlement, which is the effect that the application of that policy had in this case.

[101] In my view, the Superintendent did not properly apply her own policy as it related to Moresby. The kayaking and diving activities which had previously been carried on from the float camp were legitimate use of the park area which were in place before the licensing arrangements were instituted. Refusing to recognize that use for purposes of quota was confusing the issue of the float camp with the issue of historic level of use of the park facilities. The rationale that these activities could not be recognized because the use of the float camp was an illegal activity ignores the fact that kayaking and diving are perfectly legal. How one deals with an unwanted float camp is a separate issue from an operator's historic level of use of park facilities.

[102] This leads to the issue of the position taken by the park administration with regard to the float camp. Canada's position is that its mandate to protect the park environment and ecology permits or requires it to take into account the possible deleterious effects of the camp on the park environment even when it is anchored outside the park boundaries and the boundaries of the proposed marine conservation area. The Court was directed to lengthy extracts from Parks Canada policies and international conventions in support of Canada's right to act so as to protect the park ecology by limiting activities in the surrounding areas to the extent that it can through the licensing process.

[103] There is no doubt that the Superintendent has a broad mandate to do what is required to protect and conserve the natural splendour of the Gwaii Haanas area for the benefit of future generations. But it does not follow that every activity in proximity to the park is therefore subject to the park administration's control through the devices of licensing or access control.

[104] The subtext of Moresby's argument is that opposition to its float camp has more to do with history that with its purported illegality. In 1989, the year in which Moresby began its float camp operations, Ron Hooper who was then Superintendent of the South Moresby National Park Reserve, prepared a review of Moresby's proposed operations. That document defined the issue involved as follows:

> Local Sandspit entrepreneurs, Doug Gould and Bill Blount are developing a float camp to be anchored in De la Beche Inlet. There is no adequate federal or provincial legislation to prevent the operations's establishment. The circumstance creates an undesirable precedent, is opposed by representatives of the Council of the Haida Nation, and would present future difficulties once the national marine park is established.
>
> …
>
> Representatives of the Haida Nation have indicated their concern over the matter and are suggesting the CPS [Canada Parks Service?] intervene. They have indicated that if the "government" with no particular prejudice to federal or provincial authority is unable to intervene, they will have to exercise the necessary management control.
>
> Recommended Action
>
> 1. No direct action can be taken by the CPS to prevent the float camp operation until the marine park reserve is established.
>
> 2. Once the float camp is established, a letter should be sent to Blount and Gould indicating that their operation may not be permitted once the marine park reserve is established, and that the existence of the camp during the interim conveys no future proprietary rights. DoJ [Department of Justice?] would need to be consulted regarding the specific wording of the letter. [Exhibit B to the affidavit of Anna Gajda sworn August 27, 1999.]

[105] There can be little doubt that the float camp was unacceptable to both constituent groups of the AMB from the date it was established. The fact of its lawfulness or otherwise is, in my view, secondary to the fact that for various reasons, the interests of

Parks Canada bureaucracy and the Haida Nation coincide in wanting to see an end to the float camp.

[106] The Superintendent is entitled to consider the legality of the float camp. Legality, however, means just that. It does not mean flouting the AMB's (or the Superintendent's) assumption of authority over areas where they have none. A useful example of the latter is found in the position taken by the AMB with respect to cruise ship anchorages. In January 1998, inquiries were received from a small cruise ship line which was considering anchoring for extended periods in areas which would give ready access to the park. The AMB was asked for its position with respect to such activities. After concluding that there was no current way in which such activity could be regulated by the AMB, it adopted the following action item:

> Formalize a policy that limits vessels from anchoring in the same bay, inlet, or cove for more than three consecutive nights. Although the policy would be unenforceable under the *National Parks Act* or the *Marine Conservation Areas Act* (initially), it will serve notice to users that the AMB has the intent to form this regulation under the *Marine Conservation Areas Act*. Records can be kept on those individuals and operators who do not comply with the policy so that once the regulation is in place, a history of non-compliance can be provided to support cases that may arise. [Exhibit X to the affidavit of Anna Gajda sworn August 27, 1999.]

[107] There is no principle of administrative law which allows a decision maker to claim authority over areas where it has none, and then to use a citizen's rejection of that claim of authority as a basis for future transactions with the naysayer. If such considerations entered into the denial of quota for activities associated with the float camp, they would be extraneous considerations and would result in the decision being set aside. There is no evidence that this is the case and so no more need be said about it other than highlighting it as an example of the types of considerations which are extraneous and impermissible.

[108] None of this detracts from the fact that there are legitimate conservation and ecological issues arising from unregulated float camp operation in remote areas which abut onto park lands. The mandate conferred on the Minister and the Superintendent to preserve the ecological integrity of the park lands gives them a legitimate interest in the conduct of operations in areas which impact on the park lands. But a legitimate interest is not the same as a right to prohibit that which is otherwise lawful in an area outside the park's jurisdiction by means of conditions attached to a park business licence. Whatever the position of float camp *vis-à-vis* park administration while it was in De la Beche Inlet, which was within the proposed marine conservation area, it was clearly beyond the Superintendent's control once it relocated to a location outside the boundaries of the conservation area. In my view, the mandate conferred by the *National Parks Act* does not extend to regulating behaviour outside park boundaries through the device of business licences on the ground of conservation.

[109] An argument was made by Canada that the float camp was prohibited by the Backcountry Management Plan. Since the float camp is located outside park boundaries, the management plan cannot purport to regulate it. Once again, this is not

to say that such operations do not require regulation. They undoubtedly do and it is likely that there are provincial laws which apply to them. The enforcement of those laws is a matter for the province.

[110] This leads to the argument most often made against allowing quota for activities associated with the float camp which is that it did not comply with provincial legislation and was therefore unlawful. Much was made of the fact that the park administration could not be seen to license an unlawful operation.

[111] The *National Parks Businesses Licences Regulations, 1998* provide guidance as to the factors to be considered by the Superintendent in granting a business licence:

> **3.** No person shall carry on, in a park, any business unless that person is the holder of a licence or an employee of a holder of a licence.
>
> …
>
> **5.** (1) In determining whether to issue a licence and under what terms and conditions, if any, the superintendent shall consider the effect of the business on
>
> (*a*) the natural and cultural resources of the park;
>
> (*b*) the safety, health and enjoyment of persons visiting or residing in the park;
>
> (*c*) the safety and health of persons availing themselves of the goods or services offered by the business; and
>
> (*d*) the preservation, control and management of the park.
>
> (2) The superintendent must set out as terms and conditions in a licence
>
> (*a*) the types of goods and services that will be offered by the business; and
>
> (*b*) the address, if any, at which, or a description of the area in the park in which, the business is to be carried on.
>
> (3) Depending on the type of business, the superintendent may, in addition to the terms and conditions mentioned in subsection (2), set out in a licence terms and conditions that specify
>
> (*a*) the hours of operation;
>
> (*b*) the equipment that shall be used;
>
> (*c*) the health, safety, fire prevention and environmental protection requirements; and
>
> (*d*) any other matter that is necessary for the preservation, control and management of the park
>
> **6.** Before issuing a licence for any business, the superintendent may require the applicant to furnish a certificate from a medical health officer or sanitary inspector, or both, certifying that the premises in which the business is to be carried on are in a sanitary

condition.

[112] In light of the references to “health, safety, fire protection and environmental protection requirements”, it is reasonable for the park administration to insist that facilities to be used in connection with a licensed business meet the standards applicable to those facilities, whether they are located inside or outside of the park itself. But that does not authorize the park administration to promulgate standards which are to be applied to facilities located outside the park. The park administration is entitled to withhold licensing for activities which originate in facilities which do not comply with the law applicable to such facilities. But if they do comply with those standards, then that is the end of the question. The park authorities are not entitled to promulgate standards for out-of-park facilities for the simple reason that the Superintendent’s jurisdiction is geographically bound.

[113] It appears to me that these considerations do not go to the policy issues underlying the quota scheme. What has been put into issue is the application of the quota system to Moresby as it relates to the calculation of quota with respect to its licence and the prohibition of the use of Moresby’s float camp. The first raises standard issues of judicial review of administrative action, the second raises issues of jurisdiction and extraneous considerations. Neither would be sheltered by the immunity of policy decisions from judicial review

[114] I therefore find that the Superintendent is entitled to refuse to license activities which originate from Moresby’s float camp, so long as it does not comply with applicable provincial legislation and standards. I also find that the Superintendent can ask for proof of such compliance as part of the licensing requirement. But once compliance with applicable provincial legislation and standards is shown, then the fact of the facility itself is not grounds for refusing licensing for activities originating with that facility. In other words, a blanket refusal to license activities, originating from a lawful float camp, located outside the park boundaries is beyond the Superintendent’s power.

[115] I also find that the Superintendent’s refusal to credit Moresby with user days/nights for activities originating with the float camp was a failure to comply with the Superintendent’s own policy in that the Superintendent had no jurisdiction to interfere with such operations prior to 1996. The kayaking and diving were themselves lawful and were part of the level of historic use of park facilities by Moresby. Given that the consequences of not recognizing those activities for quota purposes, and refusing to allow those user days/nights to be used for activities which it did recognize was to take away a part of Moresby’s business, I find that the decisions were made unreasonably and should be set aside.

[116] Having found that the standard of review is reasonableness, does the Superintendent’s decision stray beyond reasonableness into unreasonableness. Context should be taken into account in determining whether the standard of review has been met. Where the consequences of a decision are severe, unreasonableness may be found more easily than when the consequences are more moderate. In this case, the effect of the Superintendent’s decisions was, to use counsel’s phrase, to expropriate a

part of Moresby's goodwill. Fairness requires that a good deal of care be taken with decisions affecting people's livelihood. In the circumstances, I find that the decision was unreasonable and hence subject to being set aside.

ORDER

For the reasons set out above, it is hereby ordered that:

(a) the decision of the Superintendent dated December 20, 2000 refusing to allocate quota to the applicants for activities associated with the applicants' float camp is hereby set aside.

(b) the matter is remitted to the Superintendent for allocation of quota to the applicants in accordance with these reasons. If some difficulty is encountered in calculating quota, the parties have leave to apply for directions.

(c) the licensing of activities involving the applicants' float camp is to be dealt with in accordance with the reasons for decision herein.

(d) the applicants shall have one set of costs of the application to be assessed at the midpoint of Column IV [*Federal Court Rules, 1998*, SOR/98-106, Tariff B].

SCHEDULE A

Gwaii Haanas Agreement

1.1 The parties maintain viewpoints regarding the Archipelago that converge with respect to objectives concerning the care, protection and enjoyment of the Archipelago, as set out in Section 1.2 below, and diverge with respect to sovereignty, title or ownership, as follows:

The Haida Nation sees the Archipelago as Haida Lands, subject to the collective and individual rights of the Haida citizens, the sovereignty of the Hereditary Chiefs, and jurisdiction of the Council of the Haida Nation. The Haida Nation owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly.

The Haida have designated and managed the Archipelago as the "Gwaii Haanas Heritage Site", and thereby will maintain the area in its natural state while continuing their traditional way of life as they have for countless generations. In this way the Haida Nation will sustain the continuity of their culture while allowing for the enjoyment of visitors.

"Haida" means all people of Haida ancestry.

The Government of Canada views the Archipelago as Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.

By virtue of the above, the Constitution Acts and, more particularly, by an agreement between the Governments of Canada and the Province of British Columbia dated July 12, 1988, the Crown in right of Canada is or will become the owner of the Archipelago and an

area within the Archipelago Marine Park Area in order that these lands may [*sic*] constituted as a reserve for a National Park of Canada and a reserve for a National Marine Park of Canada respectively, to which the National Parks Act will apply. The Government of Canada intends to establish the park reserves pending the disposition of any Haida claim to any right, title or interest in or to the lands comprised therein.

For purposes of the Government of Canada's authorization and implementation of this agreement "Haida" refers to the aboriginal people of Haida Gwaii with respect to whom sub-section 35(1) of the Constitution Act, 1982 applies.

…

3.4 This Agreement provides for the establishment of a management board, as set out in Section 4 below, whereby both parties will share and co-operate in the planning, operation and management of the Archipelago respecting both parties' designations in the spirit expressed in this Agreement.

…

4.1 Upon the execution of this Agreement, the parties will establish the Archipelago Management Board ("AMB"), the function of which will be to examine all initiatives and undertakings relating to the planning, operation and management of the Archipelago.

…

4.3 Matters to be addressed by the AMB will also include, but not be limited to, the following:

(a) completion of a joint Purpose and Objectives Statement and Management Plan, in consultation with the public, and amendments thereto as deemed appropriate by both parties;

(b) with respect to Haida cultural activities and traditional renewable resource harvesting activities set out in Section 6.1 below,

(i) the examination of their scope and extent,

(ii) any proposals for related construction, including any cutting of trees which are essential for this purpose and for which there is no reasonable alternative source of materials outside the Archipelago.

(iii) any regulations, guidelines or directives to be enacted, having particular regard for the conservation of natural resources and cultural features and the harmonisation of visitor use of the Archipelago with these Haida activities;

(c) identification of sites of special spiritual-cultural significance to the Haida within the Archipelago, including historic habitation and burial sites, with particular reference to those lands known variously as "Gandle K'in" and "Hotspring Island", and those lands known variously as "SGaang Gwaii" and "Anthony Island", and management of these sites on a case by case basis taking into account the requirements for protection of natural resources and cultural features, for Haida cultural activities and traditional renewable resource harvesting activities set out in Section 6.1, and for visitor understanding and enjoyment;

(d) communications with other departments and agencies of the parties which conduct or authorize activities affecting the planning, operation and management of the Archipelago;

(e) guidelines, including the application thereof on a case by case basis, for the care, protection and enjoyment of the Archipelago concerning, among other things,

(i) permits or licences for commercial tour operations, research or other activities;

(ii) access and use by fishermen, pursuant to sub-section 7.2 below.

(f) annual work plans setting out the work to be done and how it is to be accomplished, including staffing requirements, budgets and expenditures of both parties pertaining to the planning, operation and management of the Archipelago;

(g) formulation of procedures in advance for dealing with possible emergencies concerning public safety and security and threats to the natural resources and cultural features of the Archipelago, recognizing that nothing in this Agreement shall preclude either party from taking appropriate action in the case of an emergency;

(h) strategies to assist Haida individuals and organizations to take advantage of the full range of economic and employment opportunities associated with the planning, operation and management of the Archipelago, taking into account the undertakings of the parties set out in Appendix 4; and

(i) procedures for the conduct of the business of the AMB, consistent with this Agreement.

4.4 The AMB will initially be comprised of two (2) representatives of the Government of Canada and two (2) representatives of the Council of the Haida Nation, totalling four (4) members; the total number of members may be increased or decreased by mutual agreement between the parties, provided that equal representation is maintained.

4.5 Each party will designate one of its AMB members as a co-chairperson, both of whom will be jointly in charge of calling and conducting meetings, and of authenticating minutes. The co-chairpersons may, however, agree that the responsibilities of the chair will alternate between the co-chairpersons.

…

5.1 Deliberations of the AMB on any particular proposal or initiative will strive in a constructive and co-operative manner to achieve a consensus decision of the members, which will be deemed recommendations both to the Government of Canada and the Council of the Haida Nation, by way of referral to their designated representatives, agencies or departments, as deemed appropriate by each party.

5.2 In the event of a consensus decision of AMB members on a matter, any referrals and any steps required to authorize implementation of the decision will be noted at that time in the minutes. During the course of this referral process, the AMB will, if required by either party, discuss the matter further. Upon the conclusion of the referral process, and if there is no objection by either party, the decision will be deemed to have been approved and thereby free and clear to be effected by the appropriate party(ies).

5.3 In the event of a clear and final disagreement of AMB members on a matter, related decisions and any actions arising will be held in abeyance, and will be referred to the

Council of the Haida Nation and to the Government of Canada to attempt to reach agreement on the matter in good faith. The parties may request the assistance of an agreed neutral third party(ies) in attempting to reach an agreement.

5.4 Matters held in abeyance under Section 5.3 will be set aside from the normal business of the AMB until such time as the members receive instructions from the Government of Canada and the Council of the Haida Nation regarding their understanding on the matter.

5.5 Matters set aside under Section 5.4 will not reduce or fetter the obligation and ability of the AMB to continue to deliberate in good faith and to strive to achieve consensus decisions on other proposals and initiatives in accordance with Section 5.0.

…

9.1 This Agreement represents both parties' understanding of their reciprocal good faith and common cause in the protection and preservation of the Archipelago, and is without prejudice to the viewpoint of either party respecting sovereignty, ownership or title. This Agreement shall not constitute or be deemed to constitute a land claims agreement or treaty within the meaning of Section 35 of the Constitution Act of Canada 1982, nor shall it or any actions taken pursuant to it be construed as creating, affirming, recognizing or denying any aboriginal or treaty right or as transferring any competence of either party.

9.2 Nothing in this Agreement shall fetter or limit, or be deemed to fetter or limit, in any manner the rights, jurisdiction, authority, obligations or responsibilities of either party or their representatives, except to the extent of the requirement that all reasonable efforts must have been made to reach consensus through the process set out in section 5 of this Agreement.

SCHEDULE B

National Parks Act ["superintendent" (as enacted by R.S.C., 1985 (4th Supp.), c. 39, s. 1; S.C. 1998, c. 31, s. 55), 7(1) (as am. by R.S.C., 1985 (4th Supp.), c. 39, s. 5), 8.2 (as enacted *idem*, s. 7)]

2. …

"superintendent" means a person appointed under the *Parks Canada Agency Act* who holds the office of superintendent of a park, and includes any other person appointed under that Act who is authorized by that person to act on that person's behalf.

…

4. The National Parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the National Parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

5. (1) Subject to section 8.2, the administration, management and control of the parks shall be under the direction of the Minister.

(1.1) The Minister shall, within five years after the proclamation of a park under any Act of Parliament, cause to be laid before each House of Parliament a management plan for that park in respect of resource protection, zoning, visitor use and any other matter that the

Minister considers appropriate.

(1.2) Maintenance of ecological integrity through the protection of natural resources shall be the first priority when considering park zoning and visitor use in a management plan.

…

7. (1) The Governor in Council may, as he deems expedient, make regulations for

(*a*) the preservation, control and management of the parks;

(*b*) the protection of the flora, soil, waters, fossils, natural features, air quality and cultural, historical and archaeological resources;

(*c*) the protection of the fauna, the taking of specimens thereof for scientific or propagation purposes and the destruction or removal of dangerous or superabundant fauna;

…

(*p*) controlling trades, business, amusements, sports, occupations and other activities or undertakings and prescribing the places where any such activities or undertakings may be carried on, and the levying of licence fees in respect thereof;

…

8.2 The Governor in Council may authorize the Minister to enter into agreements with the government of Alberta for the establishment of local government bodies for the towns of Banff and Jasper and to entrust to those bodies such local government functions as are specified in those agreements.

…

8.5 (1) The Governor in Council may authorize the Minister to enter into an agreement with the Council of the Haida Nation respecting the management and operation of the lands described in Schedule VI, referred to in this section as the Gwaii Haanas Archipelago.

(2) Pending the resolution of the disputes outstanding between the Haida Nation and the Government of Canada respecting their rights, titles and interests in or to the Gwaii Haanas Archipelago, the Governor in Council may, by order, set aside as a reserve for a National Park any portion of the Gwaii Haanas Archipelago or add to such a reserve any other portion of the Archipelago.

(3) This Act applies in respect of the reserve as if it were a park, subject to any regulations made under subsection (4).

(4) For the purposes of implementing an agreement referred to in subsection (1), the Governor in Council may make regulations applicable to the reserve respecting the continuance of traditional renewable resource harvesting and Haida cultural activities by people of the Haida Nation to whom subsection 35(1) of the *Constitution Act, 1982* applies.

PARKS CANADA AGENCY ACT

5. (1) Subject to any direction given by the Minister, the Agency may exercise the powers and shall perform the duties and functions that relate to national parks, national historic sites and other protected heritage areas and heritage protection programs that are conferred on, or delegated, assigned or transferred to, the Minister under any Act or regulation.

(2) An officer or employee of the Agency may exercise any power and perform any duty or function referred to in subsection (1) if the officer or employee is appointed to serve in the Agency in a capacity appropriate to the exercise of the power or the performance of the duty or function, and in so doing, shall comply with any general or special direction given by the Minister.

NATIONAL PARKS BUSINESSES REGULATIONS, 1998

1. …

"business" means any trade, industry, employment, occupation, activity or special event carried on for profit, fund raising or commercial promotion in a park, and includes a business operated by a charitable organization.

…

"licence" means a licence issued by the superintendent under section 5.

…

3. No person shall carry on, in a park, any business unless that person is the holder of a licence or an employee of a holder of a licence.

…

5. (1) In determining whether to issue a licence and under what terms and conditions, if any, the superintendent shall consider the effect of the business on

(*a*) the natural and cultural resources of the park;

(*b*) the safety, health and enjoyment of persons visiting or residing in the park;

(*c*) the safety and health of persons availing themselves of the goods or services offered by the business; and

(*d*) the preservation, control and management of the park.

…

(3) Depending on the type of business, the superintendent may, in addition to the terms and conditions mentioned in subsection (2), set out in a licence terms and conditions that specify

(*a*) the hours of operation;

(*b*) the equipment that shall be used;

(*c*) the health, safety, fire prevention and environmental protection requirements; and

(*d*) any other matter that is necessary for the preservation, control and management of the park.