

Federal Court



Cour fédérale

Date: 20160208

Docket: T-1808-14

Citation: 2016 FC 148

Ottawa, Ontario, February 8, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**CANADIAN PARKS AND WILDERNESS
SOCIETY AND JASPER ENVIRONMENTAL
ASSOCIATION**

Applicants

and

**MALIGNE TOURS LTD. AND PARKS
CANADA AGENCY**

Respondents

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of the decision of the Superintendent of Jasper National Park [Superintendent], dated July 25, 2014 which approved for further consideration in the development review process the concept proposal of Maligne Tours Ltd. [Maligne Tours] to develop 10 to 15 tent cabins

under a new licence of occupation at Maligne Lake in Jasper National Park, Alberta, subject to a park management plan amendment [Decision].

II. BACKGROUND

[2] Both Applicants are non-profit societies with longstanding interests in the maintenance and restoration of ecological integrity within Jasper National Park, as well as Canada's national parks generally. Canadian Parks and Wilderness Society [CPAWS] is registered under the *Canada Not-for-profit Corporations Act*, SC 2009, c 23, while Jasper Environmental Association [JEA] is registered under the Province of Alberta's *Societies Act*, RSA 2000, c S-14.

[3] The Respondent, Maligne Tours, is a private corporation registered in Alberta under the *Business Corporations Act*, RSA 2000, c B-9 and has operated since 1953. The Respondent, Parks Canada Agency [Parks Canada], is a body corporate responsible for the implementation of the policies of the Government of Canada and the directions of the Minister of the Environment [Minister] that relate to Canada's national parks, pursuant to the *Parks Canada Agency Act*, SC 1998, c 31 [Agency Act].

[4] Maligne Tours leases land from Parks Canada at the north end of Maligne Lake, a glacier-fed lake in Jasper National Park and operates a day lodge and supporting facilities including gift shops, a cafeteria and a boat tour service to Spirit Island. Maligne Tours became the sole provider for such services in the early 1970s. Maligne Tours' leasehold falls within an area under consideration for designation as a critical habitat under Canada's *Species at Risk Act*, SC 2002, c 29 [SARA].

[5] Maligne Lake is a popular attraction throughout the year. Its core tourist season is in the summer when the lake and its surrounding trails are frequented by approximately 300,000 visitors. As a high elevation lake, it is typically ice-bound from early November to the beginning of June. Parks Canada decided in the late 1960s and early 1970s that there would be no commercial visitor accommodations at Maligne Lake, and that the facilities at the north end of the lake would be redeveloped to support day-use activities only. This intent has been reinforced by subsequent park management plans and has not been seriously reconsidered. Maligne Tours has nevertheless made repeated requests over the years for the opportunity to provide commercial accommodations.

[6] In 2012, Maligne Tours approached Parks Canada with ideas for the renewal and redevelopment of its tour facilities at Maligne Lake, including overnight visitor accommodation. In January 2013, Parks Canada informed Maligne Tours that it was willing to consider a redevelopment proposal, subject to conditions, including the submission of a more detailed concept proposal to be included in the *Maligne Valley Area Concept Implementation Strategy [Implementation Strategy]*, which Parks Canada intended to introduce for public review later in the year. The intent of the *Implementation Strategy* was to advance the priorities for Maligne Valley as set out in the *2010 Jasper National Park Management Plan [Management Plan]*, including the improvement of visitor ability to connect with the area and the updating of infrastructure, while ensuring the maintenance of high conservation values – particularly with regards to caribou preservation and the improvement of space and security for wildlife such as grizzly bears and harlequin ducks. In May 2013, Parks Canada provided terms of reference to Maligne Tours to guide its redevelopment proposal.

[7] A draft *Situation Analysis for the Maligne Valley* [*Situation Analysis*] was provided to the Applicants on October 29, 2013. This document was intended to inform the *Implementation Strategy* and its process, and Parks Canada provided a public comment period which ended on November 22, 2013. Findings from the consultation process were released on March 7, 2014.

[8] Both Applicants provided comments on issues they identified in the *Situation Analysis*. On November 19, 2013, in a letter to the Superintendent, JEA expressed concern in regards to the potential impact the proposed redevelopment could have on caribou and grizzly bears in the Maligne Lake area. On November 22, 2013, CPAWS wrote to Parks Canada with concerns about information gaps in the *Situation Analysis* and its redevelopment proposals generally.

[9] Maligne Tours' *Concept Proposal for Responsible Experiential Enhancement at Maligne Lake* [*Concept Proposal*] was received by both Applicants on November 14, 2013. Included in the *Concept Proposal* were three major initiatives:

- a) The redevelopment of Maligne Tours' day lodge into a 66 unit hotel [*Hotel Proposal*];
- b) The development of a new 10-15 tent cabin overnight site, which would require a new leasehold area [*Tent Cabin Proposal*]; and
- c) The introduction of 12 different visitor experience activities.

[10] Parks Canada received public comments on the *Concept Proposal* until December 15, 2013. Legal counsel for the Applicants responded to the *Concept Proposal* in a letter to the Superintendent on December 9, 2013, submitting that the Minister could not and should not approve the proposed redevelopment for the following reasons:

- a) The proposed development was contrary to the Management Plan;

- b) The proposed development was contrary to the Guiding Principles and the Outlying Commercial Accommodation Guidelines [OCA Guidelines];
- c) The proposed development was contrary to the conditions set out in the 2003 renewal of the lease and licenses of occupation for the Maligne Lake developments;
- d) The proposed development could jeopardize the survival and recovery of the Maligne Herd of Southern Mountain Caribou;
- e) The proposed development would interfere with the use by grizzly bears and harlequin ducks of habitat adjacent to the Maligne Lake Day Use Area; and
- f) There was no social science evidence to support the need for overnight accommodation at Maligne Lake.

[11] Parks Canada's decision-making process in respect of Maligne Lake's *Concept Proposal* involves several steps. While Phase 1 involved the preparation of the *Concept Proposal* at a pre-design level of detail, Phase 2 will involve the preparation of a more detailed Project Proposal that integrates the elements of experiential renewal accepted by Parks Canada for further consideration alongside a Detailed Environmental Impact Analysis. Approvals at this stage will be in the form of permits and lease and licence agreement negotiations.

[12] From October 2013 to January 2014, Parks Canada received approximately 1842 submissions of feedback, including the written responses of three aboriginal communities, related to the *Concept Proposal*. Support for Maligne Tours tended to welcome a sustainable proposal that will enhance Jasper tourism, as well as the need for an updating of the current day facilities to reflect evolving visitor needs and interests. Objections centered on concerns related to the more contentious, proposed overnight accommodations (the lodge and the tent cabins).

[13] The Applicants received the Superintendent's Record of Decision on July 30, 2014.

III. DECISION UNDER REVIEW

[14] In a letter to Maligne Tours which accompanied a copy of the Record of Decision, the Superintendent indicated that while the *Implementation Strategy* process and a caribou recovery plan remain works in progress, Parks Canada was able to determine which elements of the *Concept Proposal* would proceed to the Phase 2 development review stage. After identifying the respective scope, merits and concerns of each of the 14 elements of the *Concept Proposal*, the Record of Decision accepted all but the proposal for the 66-room lodge.

[15] The Record of Decision states that in reaching its decisions on the *Concept Proposal*, particular attention was paid to land use direction in the *Management Plan* as well as Parks Canada's 2007 document, *Redevelopment Guidelines for Outlying Commercial Accommodations and Hostels in the Rocky Mountain National Parks*. These policies, as well as Parks Canada's mandate, serve as the framework for ensuring the maintenance of the values for which the Canadian Rocky Mountain Parks UNESCO World Heritage Site designation was made. Furthermore, the feedback and commentary received by Parks Canada and Maligne Tours was taken into consideration in the Superintendent's decision-making, and will go on to shape the more detailed submissions to be developed by Maligne Tours in Phase 2, should they decide to proceed with the elements of the *Concept Proposal* that have been accepted.

[16] In 2013, Parks Canada's initial view on incorporating seasonal visitor accommodations into a redeveloped Maligne Valley was that a hotel proposal ought to be considered, even though it is inconsistent with current policy. Policy must evolve with time and take into account the

potential for proposed projects to contribute to visitor experiences at Maligne Lake. Preliminary approval cautioned that Parks Canada was open to a consideration of the commercial accommodation proposal, but no assurances of future development approvals were provided.

[17] The Record of Decision states that Parks Canada's first priority in decision-making is ecological integrity. Elements of the *Concept Proposal* that are granted further consideration in Phase 2 will be subject to the environmental impact analysis of Parks Canada. This analysis investigates how components of the proposal interact with ecological integrity, and its results will be used to support subsequent decision-making on the proposal. Visitor experience was a further policy consideration.

[18] Consideration was also given to the terms and conditions of Maligne Tours' current lease, as well as guidance from several existing Parks Canada policies including: *Parks Canada Guiding Principles and Operational Policies (2004)*; *Parks Canada's Limits to Growth and Development Policy Framework*; *Parks Canada's Redevelopment Guidelines for Outlying Commercial Accommodations and Hostels in the Rocky Mountain National Parks (2007)*; and *Parks Canada Management Directive 4.4.6 – Outlying Commercial Accommodations*. In national parks, preference is given to basic accommodation facilities such as campgrounds, hostels and shelters. The commercial sector may be invited to provide roofed facilities due to severe climate conditions and the lack of existing or adjacent facilities, but such facilities must not impair the wilderness experience of others, and will be assessed within the context of the *Management Plan*. They must also stringently conform to the zoning plan.

[19] The *Management Plan* - which provides the policy framework for achieving Parks Canada's mandate for strengthening visitor experiences and learning opportunities, improving protection of ecological and cultural resources, strengthening relationships with Aboriginal people and promoting Park stewardship - also guided the Decision. Its key strategies and area concepts contribute to ensuring that visitor use does not impair ecological integrity. This is done by paying careful attention to protecting grizzly bear and caribou populations, wildlife movement corridors, aesthetic values, wilderness attributes and the experiences of other visitors. The Record of Decision notes that the *Management Plan*, unlike its previous version, makes no direct statement on the subject of overnight commercial accommodations at Maligne Lake.

[20] The key factors considered with regards to the *Concept Proposal* included:

- Consistency with realty and land use policies: their merits and potential positive and negative effects with respect to ecological integrity; visitor experience; cultural resources; public enjoyment; and learning opportunities;
- Sitting, scale, massing and architectural treatment of buildings;
- The capacities of the area's infrastructure and natural environments to support the proposals;
- Potential influence on visitation and economic circumstances; and
- Feedback from the public and Aboriginal communities with interests in Jasper National Park.

[21] The Tent Cabin Proposal was accepted for further consideration in the development review process, subject to a successful amendment to the *Management Plan* to allow consideration for release of new lands. The Decision (contained within the Record of Decision) describes the scope of the proposal as an off-lease activity, targeted at young urban couples, new Canadian couples, international visitors and other independent vacationers, that will require the

release of new land under licence of occupation to accommodate 10-15 tent cabins which can house two guests each. The tent cabins will use electric power and propane for heating but will not provide for cooking or fire pits, as breakfast and dinner will be served at the Maligne Lake Chalet. The merits of the project include the increased diversification of accommodations in the Park - a Parks Canada priority - and the opportunity to celebrate the stories of early tourism traditions at Maligne Lake, while helping to fulfill directions in the *Management Plan* to renew visitor experiences and learning opportunities and to update infrastructure at Maligne Lake.

[22] The Decision identified concerns about the fixed roof lodge proposal (detraction from scenic values, failure to support ecological goals and policies, etc), but found that such concerns apply to a lesser extent to the Tent Cabin Proposal for which the development needed is smaller in scale, less intense and easily reversible, enabling an adaptive management approach.

Additional concerns include: the need for active management (including the enforcement of regulations related to wildlife attractants) and intelligent design in order to avoid and respond to wildlife-human conflicts; the required release of new lands (which contradicts s 4.7.1 of the *Management Plan*); the potential for the quality of visitor experiences to be reduced by the lack of privacy for cabin guests; and the location of the cabin site which is imbedded within a heavily visited day-use area.

[23] The Decision indicates that Parks Canada is prepared to consider the Tent Cabin Proposal, subject to the successful completion of an amendment to the *Management Plan*. This, alongside the other decisions contained within the Record of Decision, allows for the development of a comprehensive project proposal which will be considered by Parks Canada

alongside a Detailed Environmental Impact Analysis, the review of which will provide additional opportunities for public comment.

IV. ISSUES

[24] The Applicants have raised the following separate but interrelated issues in this application:

1. Does the Decision unlawfully contravene the *Management Plan*?
2. Did the Superintendent err in law or jurisdiction by making the Decision contingent on a future amendment in the *Management Plan*?
3. Is the Decision unreasonable given its failure to support the maintenance and restoration of ecological integrity?

V. STANDARD OF REVIEW

[25] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[26] In *Canada (Attorney General) v Banff (Development Appeal Board)*, 2013 ABCA 127 [Banff], the Alberta Court of Appeal held that the standard of correctness will apply to decisions of a Development Appeal Board “on the interpretation of statutes, bylaws, and other similar planning instruments.” However, given that the first issue for determination in this judicial review engages the expertise of the Superintendent and is primarily based on the interpretation of the *Management Plan* within the context of a particular set of facts, deference should be extended and the standard of review will be reasonableness: *Dunsmuir*, above, at paras 53-54.

[27] As regards the second issue, a true jurisdictional issue is reviewable on the standard of correctness. However, in this instance, the Superintendent is acting within his statutorily-granted jurisdiction in allowing the Tent Cabin Proposal to advance through the development review process towards the next phase of consideration. Given the discretionary nature and the expertise and experience that this necessitates, the Superintendent’s Decision, made pursuant to his authority to manage a national park, is reviewable on a reasonableness standard: *Burley v Canada (Attorney General)*, 2008 FC 588; *Sunshine Village Corporation v Parks Canada Agency et al*, 2014 FC 604 at para 30 [*Sunshine Village*].

[28] The third issue will clearly also be reviewed on the reasonableness standard.

[29] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above,

at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[30] The following provisions of the *Agency Act* are applicable in this proceeding:

Minister Responsible

4. (1) The Minister is responsible for the Agency and the powers, duties and functions of the Minister, in that capacity, extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to

(a) areas of natural or historical significance to the nation, including national parks, national marine conservation areas, national historic sites, historic canals, historic museums established under the Historic Sites and Monuments Act, Saguenay-St. Lawrence Marine Park and Rouge National Urban Park;

(b) heritage railway stations, heritage lighthouses, federal heritage buildings, historic

Ministre Responsable

4. (1) Le ministre est responsable de l'Agence et, à ce titre, ses attributions s'étendent de façon générale à tous les domaines de compétence fédérale non attribués de droit à d'autres ministères ou organismes et liés :

a) aux lieux naturels ou historiques d'importance pour la nation, notamment les parcs nationaux, les aires marines nationales de conservation, les lieux historiques nationaux, les canaux historiques, les musées historiques créés en vertu de la Loi sur les lieux et monuments historiques, le parc marin du Saguenay — Saint-Laurent et le parc urbain national de la Rouge;

b) aux gares ferroviaires patrimoniales, aux phares patrimoniaux, aux édifices

places in Canada, federal archaeology and Canadian heritage rivers; and

féderaux patrimoniaux, aux lieux patrimoniaux au Canada, à l'archéologie fédérale et aux rivières du patrimoine canadien;

(c) the design and implementation of programs that relate primarily to built heritage.

c) à la mise sur pied et la mise en œuvre de programmes visant principalement le patrimoine bâti.

Ministerial Direction

Instruction du Ministre

(2) The Minister has the overall direction of the Agency, which shall comply with any general or special direction given by the Minister with reference to the carrying out of its responsibilities.

(2) Le ministre fixe les grandes orientations à suivre par l'Agence, à qui il incombe de se conformer aux instructions générales ou particulières qu'il lui donne en ce qui a trait à la réalisation de sa mission.

[31] The following provisions of the *Canada National Parks Act*, SC 2000, c 32 [*Parks Act*] are applicable in this proceeding:

2. (1) "ecological integrity" means, with respect to a park, a condition that is determined to be characteristic of its natural region and likely to persist, including abiotic components and the composition and abundance of native species and biological communities, rates of change and supporting processes.

2. (1) « intégrité écologique » L'état d'un parc jugé caractéristique de la région naturelle dont il fait partie et qui sera vraisemblablement maintenu, notamment les éléments abiotiques, la composition et l'abondance des espèces indigènes et des communautés biologiques ainsi que le rythme des changements et le maintien des processus écologiques.

...

...

Parks dedicated to public

4.(1) 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 parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.

...

Management by Minister

8. (1) The Minister is responsible for the administration, management and control of parks, including the administration of public lands in parks and, for that purpose, the Minister may use and occupy those lands

Ecological Integrity

(2) Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.

...

Management Plans

11. (1) The Minister shall, within five years after a park is established, prepare a management plan for the park containing a long-term

Usage public des parcs

4. (1) Les parcs sont créés à l'intention du peuple canadien pour son bienfait, son agrément et l'enrichissement de ses connaissances, sous réserve de la présente loi et des règlements; ils doivent être entretenus et utilisés de façon à rester intacts pour les générations futures.

...

Autorité Compétente

8. (1) Les parcs, y compris les terres domaniales qui y sont situées, sont placés sous l'autorité du ministre; celui-ci peut, dans l'exercice de cette autorité, utiliser et occuper les terres domaniales situées dans les parcs.

Intégrité Écologique

(2) La préservation ou le rétablissement de l'intégrité écologique par la protection des ressources naturelles et des processus écologiques sont la première priorité du ministre pour tous les aspects de la gestion des parcs.

...

Plan directeur

11. (1) Dans les cinq ans suivant la création d'un parc, le ministre établit un plan directeur de celui-ci qui présente des vues à long terme

ecological vision for the park, a set of ecological integrity objectives and indicators and provisions for resource protection and restoration, zoning, visitor use, public awareness and performance evaluation, which shall be tabled in each House of Parliament.

sur l'écologie du parc et prévoit un ensemble d'objectifs et d'indicateurs relatifs à l'intégrité écologique, et des dispositions visant la protection et le rétablissement des ressources, les modalités d'utilisation du parc par les visiteurs, le zonage, la sensibilisation du public et l'évaluation du rendement; il le fait déposer devant chaque chambre du Parlement.

Review of Management Plans by Minister

(2) The Minister shall review the management plan for each park at least every 10 years and shall cause any amendments to the plan to be tabled in each House of Parliament.

Examen du plan directeur par le ministre

(2) Le ministre procède à l'examen du plan au moins tous les dix ans par la suite et, le cas échéant, fait déposer ses modifications devant chacune de ces chambres.

...

...

Powers of superintendents

16. (3) Regulations made under this section may authorize the superintendent of a park, in the circumstances and subject to the limits that may be specified in the regulations,

(a) to vary any requirement of the regulations for purposes of public safety or the conservation of natural resources in the park;

(b) to issue, amend, suspend and revoke permits, licences and other authorizations in

Pouvoirs du directeur

16. (3) Les règlements pris sous le régime du présent article peuvent habilitier le directeur d'un parc, dans les circonstances et sous réserve des limites qu'ils prévoient, à :

(a) en modifier les exigences à l'égard du parc en vue de la protection du public ou de la préservation de ses ressources naturelles;

(b) délivrer, modifier, suspendre ou révoquer des licences, permis ou autres

relation to any matter that is the subject of regulations and to set their terms and conditions; and

autorisations relativement à ces matières et en fixer les conditions;

(c) to order the taking of any action to counter any threat to public health or to remedy the consequences of any breach of the regulations in the park.

(c) ordonner la prise de mesures afin de parer aux menaces pour la santé publique ou de remédier aux conséquences des contraventions aux règlements dans le parc.

VII. ARGUMENT

A. *Applicants*

(1) Contravention of the *Management Plan*

[32] Section 4.7.1 of the *Management Plan* prohibits, by way of the “Direction on Outlying Facilities and Marmot Basin,” the release of new land for overnight commercial accommodation outside of the community of Jasper [Prohibitive Provision]. The Record of Decision acknowledges that the Tent Cabin Proposal will require the release of new land, and is therefore clearly contradictory to s 4.7.1 of the *Management Plan*.

[33] The Prohibitive Provision is binding, either as ministerial direction pursuant to s 4 of the *Agency Act*, or as subordinate legislation, or both. The Applicants submit that the Prohibitive Provision constitutes a “general or special direction” of the Minister, and is supported by the *Management Plan* and its supporting policy which consistently reference it as “direction.” The Federal Court of Appeal has said that such directive provisions are capable of being binding on

Parks Canada: *Peter G White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190 [*Peter G White*].

[34] The Applicants say that the *Management Plan* is legislative in nature as it addresses the overall direction of Jasper National Park for the next 10 to 15 years, applies to general governance over time, and serves as a framework for planning and decision-making for the whole park. It is therefore consistent with the criteria set out in the Supreme Court of Canada's decision in *Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31; it has general application, is accessible to the public, and establishes rights and obligations of others over a period of time.

[35] In order to determine whether the *Management Plan* is subordinate legislation with the power of law, the Applicants apply a two-step analysis, scrutinizing first the statutory scheme to determine whether the enabling statute is capable of supporting a power to create subordinate legislation, then the instrument itself to determine whether it is mandatory. See *Guelph (City) v Wellington-Dufferin-Guelph Health Unit*, [2011] OJ No 6396 at para 102; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] SCJ No 1 at paras 33-37. The Applicants say that as per s 4(2) of the *Agency Act*, the *Management Plan*'s legislative intent is in part to permit the Minister to bind Parks Canada through ministerial direction. Further, the *Management Plan* was promulgated and tabled in Parliament by the Minister under the statutory authority of the *Parks Act* and *Agency Act*. These are exercises of authority that the Federal Court of Appeal has identified as possibly giving the force of law to a management plan: *Peter G White*, above.

[36] The Applicants say this is made evident through the use of mandatory and unambiguous language such as “shall” and “must,” the *Management Plan* is mandatory: *Peter G White*, above, at paras 30, 70; *Banff*, above. This is further made clear in the Record of Decision’s explanation for the removal of a provision in a previous version of the document, stating that it was eliminated “in part because it restricted flexibility to consider new ideas of potential merit.” Given that the Record of Decision indicates that Parks Canada will have to undertake a review of the *Management Plan* to allow for consideration of the release of additional lands, the Superintendent clearly realized that the prohibition against the release of new lands is mandatory, as an amendment would otherwise not be required.

[37] The Applicants further submit that the Superintendent failed to apply the OCA Guidelines as required by the *Management Plan*. Section 2.6 of the OCA Guidelines prohibits new OCAs outside the town site of Jasper. Where the OCA Guidelines define an OCA as “any privately operated, road-accessible mountain national park visitor accommodation,” the Record of Decision defines OCA as a “privately owned and operated low-density, roofed, overnight visitor accommodation...on leased land within a national park and accessible by road.” This reliance on an unsupported definition marks a failure to consider the OCA Guidelines in the context of the Tent Cabin Proposal, something that the Applicants submit the Superintendent was obligated to do.

[38] In making the Decision in contravention of the Prohibitive Provision included in the *Management Plan*, and by failing to apply the OCA Guidelines, the Superintendent erred in law or, in the alternative, acted unreasonably.

(2) The Contingent, Future *Management Plan* Amendment

[39] By making his approval of the Tent Cabin Proposal contingent on a future amendment to the *Management Plan*, the Applicants submit that the Superintendent erred in law or jurisdiction or, in the alternative, made an unreasonable decision. In terms of the first argument, the power to consider and decide upon amendments to the *Management Plan* is the jurisdiction of the Minister; the Superintendent is not authorized by the legislative and policy scheme to consider a future amendment, and so he disregarded or misapprehended the parameters of his decision-making authority. The Court should not sanction *ultra vires* conduct, as to do so would undermine the hierarchical nature of delegated authority.

[40] The alternative, second argument, is that the Superintendent exercised his discretion improperly, particularly through the consideration of irrelevant grounds and the making of the Decision for an improper purpose: *Chernipeski v Lacombe (Town)* (1996), 45 Alta LR (3d) 207 [*Chernipeski*]. The Superintendent was required to only consider the current *Management Plan* and the statutory scheme that authorizes his activity, not speculative implications such as a potential future amendment: *R v Fortune*, 2012 BCSC 2031.

[41] The Applicants further submit that a potential future amendment was considered for an improper purpose, something that the Supreme Court of Canada has held will result in an *ultra vires* decision: *Shell Canada Products Ltd v Vancouver (City)*, [1994] 1 SCR 231 [*Shell Canada*]. The purpose for considering an amendment to the *Management Plan* is not stated in the Record of Decision. However, no review has been conducted to identify “changed

circumstances,” and no “changed circumstances” have been identified that would warrant amendment. Commercial development is not a “changed circumstance.” It can therefore be assumed that the consideration of a future amendment was done solely to allow the proposed commercial accommodations. This purpose is contrary to the governing legislation. In *International Union of Operating Engineers, Local 904 v Newfoundland (Labour Relations Board)*, 135 Nfld & PEIR 350 (SCTD) [*Operating Engineers*], the Newfoundland Supreme Court (Trial Division) held that the Board should not seek a legislative amendment to defeat the anticipated effect of a submission it had taken under reserve. The Applicants argue that similarly, in the present case, the Superintendent should not seek and rely on an amendment to the *Management Plan* to defeat the anticipated effect of making a decision based on the existing *Management Plan*. This is an improper purpose.

[42] The Applicants say that the amendment process is clearly intended to keep development decisions separate from long-term management plan decisions. The piecemeal amendment of the *Management Plan* for the furtherance of development would be antithetical to its primary purpose of maintaining ecological integrity for future generations.

(3) The Failure to Support Ecological Integrity

[43] The Applicants further submit that the Superintendent did not comply with the legal obligations set out in the *Parks Act*, the *Management Plan*, the OCA Guidelines and SARA to give first priority to ecological integrity. The Record of Decision says that the “ecological concerns identified for the fixed roof/hotel accommodation element apply to a lesser extent to the tent cabins...” and goes on to identify an additional concern related to potential for wildlife-

human conflicts (created by the tent cabin site). The evidence of impacts to ecological integrity associated with the Tent Cabin Proposal make the Decision unreasonable, particularly given the reliance of the Superintendent on the same ecological concerns to justify the rejection of the Hotel Proposal.

[44] No evidence was provided to support the assertion that concerns related to the Tent Cabin Proposal will be significantly less than those related to the Hotel Proposal. The Applicants argue that, given that the Tent Cabin Proposal requires the release of additional lands and increases the opportunity for wildlife-human conflicts, it is arguable that some of the impacts would be even more significant. Furthermore, the reversibility assumption is questionable, as even with a less-permanent construction, a guest unit will create an ecological footprint of similar impact.

[45] Parks Canada has identified the status of the caribou as one of the most pressing challenges facing Jasper National Park, and has determined that commercial development is one of the threats to their survival. Most of the Maligne Valley has been identified by Parks Canada as important caribou habitat and its own documents identify the impact on the sustainability of the herd if even one caribou is lost. The Maligne herd subpopulation has declined from 68 animals in 1998 to 4 in 2014. The Committee on the Status of Endangered Wildlife in Canada [COSEWIC] evaluated Southern Mountain Caribou as endangered in May 2014, meaning they face imminent extirpation or extinction.

[46] Parks Canada has the responsibility to implement SARA in the national parks; this includes an obligation to protect species at risk and their habitats. The Minister released the

“Strategy for the Woodland Caribou, Southern Mountain population (*Rangifer tarandus caribou*) in Canada” as required under SARA – the goal of which, the Applicants argue, is clearly not being met. Given the current state of the herd and that commercial development has been identified as a threat, it is clear that allowing further development and releasing further lands in the area would be contrary to the recovery strategy and the requirements of SARA.

[47] The Applicants say that the protection of ecological integrity in the Maligne Valley also necessitates the protection and recovery of grizzly bears and their habitat, a priority identified by Parks Canada in the *Management Plan*. COSEWIC recommended in 2002 and 2012 that grizzly bears be identified as a species of special concern under SARA.

[48] Additional development within the Maligne Valley is not compatible with the recovery of the Maligne caribou herd and protection of grizzly bears, and the Tent Cabin Proposal poses a new risk to their habitat security. Loss of an ecosystem is contrary to the obligations of the Minister under s 8(2) of the *Parks Act: ZooCheck Canada v Parks Canada Agency*, 2008 FC 540. The Applicants argue that, in this case, to allow development that contributes to the loss of a species is similarly contrary to those same obligations.

[49] The Record of Decision is contradictory and unreasonable because it disallows the Hotel Proposal for its failure to comply with Parks Canada documents (the *Management Plan* and OCA Guidelines, when denying its approval) but ignores the failure of the Tent Cabin Proposal to comply with those same documents.

[50] The Applicants submit that the national, public nature of the matter at hand and the importance of maintaining ecological integrity make it vital that the Court order the declaratory relief sought: *Nagalingam v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 362 at para 18. The prohibitions sought are appropriate: the Superintendent has acted outside of his authority and Parks Canada must be prevented from taking future steps prior to the determination by the Court of the legality of the Decision. Certiorari is also appropriate and the Decision should be squashed.

B. *Respondents – Parks Canada*

[51] Parks Canada fundamentally disagrees with the Applicants' characterization of the Decision. It was a Phase 1, conceptual level decision and has simply permitted the Tent Cabin Proposal to proceed to Phase 2 of the development review process. At that point, a detailed examination of the Tent Cabin Proposal's interaction with ecological integrity will occur, and Maligne Tours will need to submit to the Superintendent a more robust proposal as well as an environmental impact analysis for review and consideration.

(1) The Decision is Lawful

[52] Parks Canada submits that the Decision is lawful because: the Superintendent had the legal authority to make it; it does not contravene the *Management Plan*; and management plans are guidelines, not subordinate legislation or binding directions.

[53] As per the *Agency Act*, the Minister's powers, duties and functions extend to all matters relating to national parks over which Parliament has jurisdiction and which are not otherwise assigned. In *Canadian Parks & Wilderness Society v Canada*, 2003 FCA 197 [*CPAWS v Canada*], the Federal Court of Appeal found the Minister's power to authorize the construction of a road through a national park arose from the Minister's responsibility to administer and manage national parks as per s 8(1) of the *Parks Act*. The Court pointed out that responsibility, without power, would be of little practical utility (at para 41). In addition, the Court noted that, as stated in *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at para 7, the judicial approach in construing statutes should be to avoid a narrow, technical construction and to give effect to the legislative intent as applied to the administrative scheme involved.

[54] The Court has repeatedly recognized the legislative authority and responsibility of superintendents to manage national parks: *Sunshine Village*, above, at para 30. The Superintendent of Jasper National Park has broad authority to manage the daily affairs of the park and issue an array of permits. He may require further information from applicants in order to do so: *National Parks Building Regulations*, CRC, c 1114, ss 5-8 [*Building Regulations*]; *National Parks General Regulations*, SOR/78-213, ss 6-14 [*General Regulations*]. Like the superintendent's decision in *Sunshine Village*, above, the Superintendent's Decision in the present case "was fully within his jurisdiction to make" (at para 37).

[55] The Decision does not contravene the *Management Plan* as it has only been decided that the Tent Cabin Proposal may be accepted for further consideration in the development review process, subject to an amendment of the *Management Plan* to allow for the release of new lands

for the proposed tent cabins. The design-level proposal has not yet been provided and the Detailed Environmental Impact Analysis has not yet been conducted. As such, it cannot yet be said whether the Superintendent will even approve the proposal at Phase 2.

[56] Furthermore, Parks Canada argues that management plans are guidelines, not binding directions or subordinate legislation. They are administrative in nature, do not confer enforceable rights, and make no provisions for penalties if they are contravened. It should be noted that the requirement for management plans at s 11 of the *Parks Act* is included with other provisions that concern the administration of parks, while regulation-making powers are located elsewhere. In addition, while the *Parks Act* provides that a community plan for a park community must be consistent with the management plan for the park, it fails to require that management decisions (of superintendents or other managers) be consistent with management plans. This is similarly not required by the *Building Regulations* nor the *General Regulations*.

[57] Inconsistency between a proposed project within a national park and a management plan is anticipated by environmental assessments. Section 1 of the Schedule to the *Comprehensive Study List Regulation*, under the former *Canadian Environmental Assessment Act*, SC 1992, c 37, required a comprehensive study in respect of a physical work that is contrary to a park's management plan.

[58] Parks Canada submits that the *Management Plan* is part of a continuous cycle of consultation and decision-making. It is not legally binding. Parks Canada's "Guide to Management Planning," relied on by the Applicants, contemplates flexibility and changes to the

plan, suggesting that consideration should be given to whether significant new strategies or initiatives may require reviews to plan objectives, and providing for “significant opportunity to respond to new corporate direction.” Amendments to plans are matters of judgment to be applied on a case-by-case basis. The *Management Plan* itself references Parks Canada’s policy approach to management planning, indicating that it is to serve as a framework, and that it will be reviewed in five years. It provides strategic direction as opposed to specific prescriptive measures.

[59] This Court has ruled that management plans are not subordinate legislation; they are guidelines for particular decisions in the future in light of conditions as they may evolve: *Brewster Mountain Pack Trains Ltd v Canada (Minister of Environment)*, 66 FTR 18 at para 27 [*Brewster*].

[60] Parks Canada says that *Peter G White* and *Banff*, both above, cited by the Applicants do not support the proposition that management plans constitute binding direction on the Minister. To hold otherwise would impede the ability of the Minister, conferred by s 8(1) of the *Parks Act*, to discharge responsibility to the Superintendent to manage Jasper National Park.

(2) Outlying Commercial Accommodation Guidelines

[61] The Superintendent employed the detailed definition of “outlying commercial accommodation” stipulated in the *Parks Management Directive* 4.6.6, which makes specific mention of “roofed” accommodation. The definition cited by the Applicants is a briefer

definition, which should be read in context. The complete quote, from the 2007 OCA Guidelines, is as follows:

...people seeking accommodation in a more natural setting have access to a variety of hostels, lodges and cabins located outside national park communities. The lodges and cabins are known as Outlying Commercial Accommodation (OCA's). OCAs are defined as any privately operated, road-accessible, mountain national park visitor accommodation outside the communities of Banff, Lake Louis, Field, Jasper and Waterton.

[62] Parks Canada submits that the OCA Guidelines do not constitute an impediment to the consideration of tent cabins, as they focus on permanent, non-canvas structures and do not address alternative forms of accommodations (such as yurts, four season tents or “ready to camp tents”) and do not apply to campgrounds or the Maligne Lake Day Lodge. Either way, the OCA Guidelines are simply guidelines and the Minister and Parks Canada can address any inconsistencies between them and the Tent Cabin Proposal in the *Management Plan* review and amendment process.

(3) The Decision is Reasonable

[63] Parks Canada says that the Decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law. Considerable deference should be afforded to the view of park officials that particular action is not inconsistent with the due discharge of broad statutory duties: *CPAWS v Canada*, above, at para 45. The Decision rightly considered key policy considerations, the OCA Guidelines and the *Management Plan*, while acknowledging the need for policy to evolve with time. Furthermore, the Superintendent recognized that the Tent

Cabin Proposal would support directions in the *Management Plan* by renewing visitor experiences, while updating and diversifying infrastructure at Maligne Lake.

[64] The Superintendent's granting of first priority to the consideration of ecological integrity means that there are other priorities to be considered in the administration and management of national parks: *CPAWS v Canada*, above, at para 68. The *Parks Act* lays out some of these other priorities. For instance, s 4(1) says that the national parks of Canada are dedicated to the people of Canada for "their benefit, education and enjoyment." The Record of Decision also identifies the priorities of enhancing visitor experience and educative opportunities and reveals that, while other considerations were assessed, ecological integrity was given priority in two ways. This occurred first at a conceptual level in the way that possible impacts of the tent cabins were considered. The Superintendent's preliminary view was that permitting very limited development in an intensely used day-use area would not impede caribou conservation efforts or alter habitat security for grizzly bears. Secondly, the prioritization of ecological integrity is also visible in the acknowledgment in the Record of Decision that a detailed environmental impact analysis would take place at Phase 2, if the Tent Cabin Proposal proceeds to the development review process.

[65] Parks Canada argues in the alternative that the Applicants' contention that ecological integrity has not been rightly prioritized is premature. The information that will be generated by an environmental impact analysis will inform the Phase 2 decision. This Court should not accept the proposition that no further consideration should occur. The Federal Court of Appeal has held

that a reviewing court should not reweigh the factors considered, be they ecological, social or economic: *CPAWS v Canada*, above, at para 99.

(4) Improper Purpose

[66] Parks Canada submits further that the evidence does not support a claim that the Decision was made for an improper purpose or was based on an irrelevant consideration. What the evidence does reveal is that the Superintendent pursued a proper purpose of furthering the policies and objectives of the *Parks Act*, correctly prioritizing ecological integrity and taking into account the Tent Cabin Proposal's potential to enhance visitor experience and connection with Maligne Lake.

[67] Parks Canada argues that the present case is not comparable to a situation where a town council used its planning powers to facilitate the sale of town land to recoup development costs: *Chernipeski*, above. Nor is it similar to one where a city used its powers to affect matters outside its boundary when it prohibited doing business with a company due to that company's business presence in South Africa: *Shell Canada*, above. Nor is it analogous to one where an administrative board breached the duty of fairness by seeking a legislative amendment with retroactive effect to defeat the anticipated consequence of a submission taken under reserve: *Operating Engineers*, above.

[68] There is nothing improper about the Decision contemplating future review and possible amendment of the *Management Plan*. The Minister is responsible for the administration and management of the Park and must approve of amendments to the *Management Plan*. The

Applicants' contention that Parks Canada cannot consider a proposal that is inconsistent with a management plan runs counter to the *Parks Act*, policy and the jurisprudence.

C. *Respondents – Maligne Tours Ltd.*

[69] Maligne Tours stresses the fact that the Superintendent did not decide that the Tent Cabin Proposal was approved subject to *Management Plan* amendment. Rather, the *Concept Proposal* was "accepted for further consideration under Phase 2 of the review process" and Parks Canada is "prepared to consider it subject to successful completion of an amendment to the park management plan." The Superintendent also did not represent to Maligne Tours that he had the authority to unilaterally make the amendment to the *Management Plan* required for the Tent Cabin Proposal to be considered for further review.

(1) The Authority of the Superintendent

[70] Maligne Tours contends that it is clear that the Superintendent has the authority by way of the *Parks Act* to authorize the development of a tent cabin site and to permit various associated activities in Jasper National Park. Subsection 16(3)(b) of the *Parks Act* allows the Superintendent "to issue, amend, suspend and revoke permits, licences and other authorizations in relation to any matter that is the subject of regulations and to set their terms and conditions." Furthermore, the *General Regulations* state that the Superintendent "may, where it is necessary for the proper management of the park, designate the activities other than those referred to in section 7 that may be carried on only by the holder of an authorization for that purpose." Within this discretion, the Superintendent "may prescribe any terms and conditions in any such

authorization” taking into account, *inter alia*, “the preservation, control and management of the park.” In addition, the Tent Cabin Proposal falls within the Superintendent’s legislative responsibility as set out by the *Parks Act*, the *General Regulation* and the *Building Regulations*.

(2) The Contingent, Future *Management Plan* Amendment

[71] Maligne Tours argues that the discretion held by the Superintendent to decide matters that fall within his legislative authority implies a power to make decisions based on a triggering event – a condition precedent. Furthermore, the jurisprudence supports the idea that administrative decision-makers have an implied power to make discretionary, contingent decisions. In *EC Argue Holdings Ltd v Edwold No 158 (Rural Municipality)*, 2000 SKCA 34, the Saskatchewan Court of Appeal implicitly endorsed this principle by not taking issue with city council’s approach to granting a rezoning application subject to a by-law amendment. British Columbia courts have similarly adopted the principle that decision-makers may decide matters subject to a condition precedent. For instance, in *Harrison v Vancouver (City)*, [1983] BCJ No 539, the Court endorsed a condition precedent decision and ruled that the decision-maker was “entitled to decide the matter in stages.” The Court called this approach, of permitting a preliminary application, “both intelligent and realistic.” The Superintendent employed this same type of realistic approach and the Record of Decision was simply a decision that the Tent Cabin Proposal was not being rejected.

[72] Furthermore, the discretion granted under s 7.1 of the *General Regulations* and the *Building Regulations* provides the lawful authority to the Superintendent to make decisions that are subject to a condition precedent.

(3) The *Management Plan* Has Not Been Contravened

[73] The Superintendent has not in fact or law contravened the Prohibitive Provision of the *Management Plan*, because the Superintendent did not approve or order the release of any new land for overnight commercial accommodation development. Similarly, the Superintendent did not err in law or jurisdiction by approving the Tent Cabin Proposal for further consideration, because it is fully within his authority to make decisions, within his purview, subject to a condition precedent.

VIII. ANALYSIS

[74] The Applicants' central argument in this application is that the Decision of the Superintendent to further consider the tent cabin element of Maligne Tours' concept proposal was unlawful and/or *ultra vires* the jurisdictional power of the Superintendent.

[75] They say this is so because the tent cabin element of the concept proposal is not permissible under s 4.7.1 of the *Management Plan*, which prohibits the release of new land for overnight commercial accommodation outside of the community of Jasper, and because s 4.7.1 is a binding ministerial direction pursuant to the *Agency Act* and/or subordinate legislation. In addition, they say that the Decision fails to apply the OCA Guidelines as required by the *Management Plan*.

[76] As the Decision makes clear, the Superintendent did not approve the tent cabin element of the concept proposal, and recognized that an amendment to the *Management Plan* would be

required before “Parks Canada is prepared to accept the tent cabin component for further consideration in the development review process...” It is not entirely clear whether this means that “an amendment to the Management Plan to allow consideration for release of new lands” will be required before Phase 2 of the development review process can commence, or whether Phase 2 can go ahead without the amendment, but no final approval decision can be made until an amendment is secured.

[77] What is clear, however, is that the Tent Cabin Proposal is far from being approved and may never be approved, either because it is rejected on its merits or because no amendment to the *Management Plan* to release new lands for overnight accommodation is ever effected. The Decision is no more than the consent of Parks Canada to proceed to Phase 2 of the review process, subject to the overriding consideration of an amendment to the *Management Plan*.

[78] For review purposes, then, the Court is not looking at an approval of the Tent Cabin Proposal. It is simply looking at the Decision to allow further consideration of that proposal, subject to the overarching condition precedent of an amendment to the *Management Plan*.

[79] The Applicants say, however, that even further consideration of a concept proposal that does not, at the time of the Decision, conform to the *Management Plan* is unlawful and/or *ultra vires* under the *Management Plan*, the *Agency Act* and the OCA Guidelines.

[80] The Applicants agree that it is not unlawful or *ultra vires* for the Superintendent to consider concept proposals *per se*. However, they say that what he cannot do is to consider a

concept proposal that requires an amendment to the *Management Plan*, and he must apply the prohibition of the current *Management Plan* to any concept proposal that is submitted. They say this is required, not only as a matter of law, but also as a matter of principle because it would undermine the whole legislative scheme for protection and management of national parks if amendments to the *Management Plan* are “instigated as a reactive response to a development proposal that is inconsistent with the Management Plan.”

[81] The implications of this position are fairly serious. If parks development and *Management Plan* evolution are totally disconnected in this way, it would mean that no conceptual proposals for development could be considered (and would eventually not even be made) that required consideration of an amendment to the *Management Plan*. Further, if amendments to the *Management Plan* can only be considered at a macro level and without regard for development proposals, then Parks Canada and the Canadian public will be deprived of valuable and, in my view, necessary input. The question before me, however, is whether the current legislative, regulatory and guideline scheme for Jasper requires the kind of separation of concept proposal consideration and management plan amendment that the Applicants’ position entails.

[82] The Applicants’ position is heavily dependent upon the Court accepting the *Management Plan* as binding, either as a Ministerial direction pursuant to the *Agency Act* or as subordinate legislation. What they seem to mean by this is that if the Superintendent receives a concept proposal it can only be considered on the basis of what appears in a current management plan and, if it does not, it must be rejected outright. This would be so, if the Applicants’ argument is

accepted, even if the Superintendent regarded the proposal as highly desirable for the management and future sustainability of the park, and as protection for the park and its habitat and wildlife.

[83] In the present case, s 4.7.1.2 of the *Management Plan* reads as follows:

Apply the *Marmot Basin Ski Area Site Guidelines for Development and Use (2008)* and *Parks Canada's Ski Area Management Guidelines*. Consider proposals that are consistent with the growth limits and parameters identified in the site guidelines.

[84] It is fully acknowledged by the Superintendent (Record of Decision, 8.2.3) that the Tent Cabin Proposal “Requires release of new land for overnight accommodation outside the community of Jasper which contradicts the *Management Plan* (Section 4.7.1.2 – page 41).”

[85] However, nowhere in the *Management Plan*, either directly or by implication, does it say that the Superintendent cannot “consider” a concept proposal that, before approval, requires an amendment to the *Management Plan*. And this is the conduct that the Applicants say is unlawful and *ultra vires*. I think that it is clear that a concept proposal that is contrary to the *Management Plan* could not be *approved*, but that is not what is at issue here. The conduct which the Applicants seek to prohibit is “consideration.”

[86] The Applicants are clearly of the view – and on the record before me it would appear that most of the people who provided responses to the Superintendent about Maligne Tours’ concept proposal share that view – that no overnight accommodation should be allowed at Maligne Lake. However, there is nothing before me to suggest that overnight accommodation ever will be

allowed, or that any amendment to the *Management Plan* to permit it has any chance of coming about. Understandably, the Applicants want to nip this concept proposal in the bud. To do so, they are asking the Court to prevent the Superintendent and Parks Canada from even considering it. This would require the Court to find that, as a matter of law, whenever Parks Canada receives a concept proposal that requires a *Management Plan* amendment before it could be approved, that proposal must be rejected outright without any consideration of its merits and the possible benefits it might bring for the park. Surely, the Applicants do not want the Court to embrace a position that could prevent consideration of habitat and wildlife enhancing proposals if they happen to require some amendment to the current *Management Plan*?

[87] Section 4.7.1 of the *Management Plan* says that “[n]o new land will be released for overnight commercial accommodation outside the community.” The Applicants point out that this language is mandatory and is binding on the Superintendent. As the Decision makes clear, the Superintendent regarded it as binding, which is why he said that the Tent Cabin Proposal was subject to an amendment to the *Management Plan*. But this provision does not mandate the Superintendent to not consider concept proposals that require a *Management Plan* amendment. That is a different issue altogether. The *Management Plan* is not mandatory when it comes to concept proposals. Indeed, it would be very odd if it was because such a provision could prevent the consideration of desirable and park-enhancing concept proposals on the sole ground that they require a by-law amendment. The Applicants have accused the Superintendent in this application of using the tail to wag the dog, by which they mean that he used the Tent Cabin Proposal as an incentive to amend the *Management Plan*. In my view, however, the dog is not the *Management Plan*. The dog is Jasper National Park and its future well-being, and if the *Management Plan* can

be used to prevent the consideration of concept proposals that require a by-law amendment, then the Applicants are using the current *Management Plan* to wag the dog.

[88] In my view, then, even if I were to regard the *Management Plan* as a Ministerial direction or some kind of subordinate legislation, I do not see how the present scheme mandates the Superintendent not to consider concept proposals that require amendments to the *Management Plan* before they can be fully considered and/or approved. But it also seems to me that the Applicants' view of the legal status of a *Management Plan* is at odds with the jurisprudence on point. For example, in *Brewster*, above, Justice MacKay had the following to say about the nature of management plans generally:

[27] What then is the status and nature of the management plan? I accept the submission on behalf of the respondent that upon its approval by the Minister in November 1988 the management plan for the park became effective. Tabling in the House of Commons, here done in December 1989, is a statutory requirement under the Act, but the Minister has full responsibility for the management and administration of the park and for development of a management plan within that responsibility. It is also his or her responsibility to review the plan periodically and to table amendments in the House. It was suggested by counsel for the respondent that once approved, the management plan was binding in the same way regulations under the Act would be, but I am not persuaded that this is so. The requirements for a plan are included with other provisions in s. 5 for administration of parks, which is within the authority of the Minister, not within s. 7, which provides a wide range of matters upon which the Governor in Council, not the Minister, may make regulations. Moreover, the nature of a management plan generally is to provide a framework of principles, standards, or objectives which are to be used as guidelines for particular decisions in future. The more detailed the provisions of a plan, for example in the naming of those who shall be recognized as providing services, the more likely it is that the plan will have to be modified as conditions, including major players, change. Thus, in my view, the fact that the plan as approved stipulates that resident outfitters shall be limited to two, cannot legally be more than guidance for the Minister and those

who act for him under the plan. The Minister remains responsible for administration and management of the park on an ongoing basis in light of conditions as they may evolve, regardless of what a management plan previously approved by him or her may provide.

...

[36] It may be argued that after approval of the management plan by the Minister, the superintendent and the Minister only had authority to grant an R.O.L. to two others named in the plan, but that argument assumes a legal status for the plan which, as I have already indicated, is not justified. It is not equivalent to a regulation. While it does provide guidance for administration of the park, its provisions must be followed in a manner consistent with the Minister's obligations under the Act to serve the objectives there set out, and under administrative law principles to do so in a manner consistent with the principle of fairness towards those affected by the administrator's decisions. If particular provisions of the approved plan are found to be in conflict either with the Minister's obligations under the Act or with obligations under the law to act fairly in decisions affecting others, the provisions of the plan must give way. A decision made in reliance upon the plan's provisions may be quashed by certiorari in circumstances where it is concluded that the process by which the decision was made violates the principle of fairness.

[89] The Applicants rely upon *Peter G White*, and *Banff*, both above, for their position that the *Management Plan* in this case was binding on the Superintendent in the sense that he could not consider the Tent Cabin Proposal because of s 4.7.1. However, as Parks Canada points out, the Federal Court of Appeal in *Peter G White*, did not decide that the management plan in that case was legally binding at all, let alone in the particular sense put forward by the Applicants in the present case. And in *Banff*, it was the Incorporation Agreement for the Town of Banff that mandated the land-use by-laws and actions and decisions made under those by-laws had to conform with the management plan. That is not analogous to the situation in the present case where there is no such instrument as the Incorporation Agreement and where the *Management*

Plan itself uses language that is reflective of the general status of management plans referred to by Justice MacKay in *Brewster*, above. The *Management Plan* for Jasper National Park is to “serve as a framework for planning and decision making.” The *Management Plan* is intended to “guide the parks overall direction...” and “is expected to provide strategic direction as opposed to specific prescriptive measures.”

[90] The Parks Canada *Directive on Management Planning and Reporting* has the following to say about the purpose of management plans:

4 Context

Management plans are prepared for Parks Canada’s administered heritage places based on legal requirements and Agency policies about management planning and reporting. While not a legally-binding document, a management plan serves as a key accountability document and is a key instrument for engaging Aboriginal peoples (First Nation, Inuit and Métis) and Canadians in the management of Parks Canada’s heritage places.

A management plan identifies the long-term strategic direction for a heritage place and how it will be managed, consistent with Parks Canada’s mandate and vision. Long-term strategic direction and objectives identified in management plans guide actions at heritage places that contribute to reaching the Agency’s Strategic Outcome and priorities. A management plan ensures integrated delivery of Parks Canada’s mandate: protecting heritage resources, promoting public understanding and appreciation and facilitating visitor experiences.

This Directive, together with its associated Guidelines and tools, aims to guide the management planning and reporting process by facilitating ongoing legislative compliance, focusing the use of resources, improving the consistency and timeliness of reporting, and improving the use of information for results-oriented decision-making that is financially sustainable.

[91] In this application, the Applicants are seeking to make the *Management Plan* a “legally-binding document” in a very strict and specific sense that is at odds with its purpose as a general guideline that provides long-term strategic direction. They are attempting to use s 4.7.1 as a “specific prescriptive measure” that prevents the Superintendent from even considering concept proposals that require amendments to the *Management Plan*. In my view, that does not accord with the guidance provided by the *Management Plan* itself or with any jurisprudence that has been cited.

[92] I can find nothing in the *Management Plan*, the *Parks Act*, the *Agency Act*, any regulation, or any jurisprudence to support the proposition that the Superintendent cannot consider a concept proposal that does not comply with a current *Management Plan*.

[93] The Applicants do not argue that the Superintendent does not, as part of his authority under the *Parks Act* to manage the affairs of the park, have the authority to consider and decide concept proposals. They simply say that this cannot be done with concept proposals that do not comply with the current *Management Plan*.

[94] It is evident that, as yet, no decision has been made that contravenes the *Management Plan*. In fact, the Superintendent has made it clear that Maligne Tours’ concept proposal cannot be implemented at any time unless the *Management Plan* is amended in a way that would permit the implementation of the proposal. In other words, it is clear from the Decision that Maligne Tours’ proposal will never be approved if it contravenes the *Management Plan*, either in its present or future form.

[95] Amendments to the *Management Plan* have their own process and, as yet, there is no reason to think that any proposed amendments will not be legitimate and made in accordance with that process. If they do, the Applicants will have recourse to the Court. Hence, whether amendments occur before or after a concept proposal is submitted cannot render illegitimate any amendment properly enacted.

[96] The Applicants argue that, in addition to being unlawful, the Superintendent's Decision is also improper because:

- a) He took into account future amendments to the *Management Plan* that are irrelevant to the Decision he has to make in which he can only look to the current *Management Plan*;
- b) He was not exercising his power for a legitimate purpose because he was using "his discretion to facilitate the approval of development that is contrary to" the *Management Plan* and the *Parks Act*, and "an amendment was being investigated as a reactive response to a development proposal that is inconsistent with the Management Plan," and "it can be assumed that an Amendment to the Management Plan was considered for the sole purpose of allowing this commercial accommodation within Jasper National Park, a purpose contrary to the intent of the governing legislation."

[97] There is simply no evidence before me to support accusations that the Superintendent is seeking amendments to the *Management Plan* to accommodate Maligne Tours. The reasons for allowing Maligne Tours to proceed to Phase 2 of the conceptual review process are clearly set out in the Decision. By pointing out that Maligne Tours' proposal will require an amendment to the *Management Plan*, the Superintendent is not saying that such an amendment will be desirable or possible. At this juncture, the Court has no reason to believe that any future amendments will be made in an unlawful manner; the Court cannot pre-judge actions that may not even take place.

[98] The issue before me is whether it was unlawful or *ultra vires* for the Superintendent to allow Maligne Tours' concept proposal to go to Phase 2 of the review process. The Applicants say that, in doing this, the Superintendent took into account potential future amendments to the *Management Plan* that were irrelevant. I fail to see how they can be considered irrelevant when the implementation of Maligne Tours' proposal cannot proceed without appropriate amendments. The Superintendent allows the review process to continue to Phase 2, but makes it very clear that approval has not been granted. He says that "Parks Canada is prepared to consider it, subject to successful completion of an amendment to the park management plan..."

[99] The Applicants are asking the Court to say that Parks Canada cannot even consider the proposal at a time when a "detailed and comprehensive project proposal, integrating the elements of experimental renewal proposal [*sic*] that have been accepted by Parks Canada for further consideration, together with a Detailed Environmental Impact Analysis" has not be produced.

[100] In my view, Parks Canada cannot be prevented from considering project proposals. And project proposals cannot be accepted or implemented unless they comply with a validly enacted and/or amended management plan.

[101] The Applicants clearly wish to ensure that no amendments to the *Management Plan* are made that would permit Maligne Tours' proposal to proceed. But the Court has no basis to believe that any such amendment will not, or cannot, be lawfully enacted. Consequently, I see no reason in law or logic why Parks Canada cannot invite Maligne Tours to proceed with Phase 2 of the concept review on the contingency basis set out in the Superintendent's Decision.

A. *Unreasonable*

[102] As a further ground for reviewable error the Applicants say that the Decision is unreasonable because it doesn't support the maintenance and restoration of ecological integrity. The Applicants go on to point out their view of the negative impacts that Maligne Tours' proposal, if implemented, would have upon the ecological integrity of the area.

[103] These are the very matters that Parks Canada now wants to examine closely in Phase 2 of the review process. As yet, no decision has been made about the desirability of the Tent Cabin Proposal. The only decision that has been made is to allow further detailed submissions on all matters of concern so that a decision on the desirability and legality of the proposal can be made at some time in the future, assuming Maligne Tours wishes to proceed.

[104] If that future decision is ever made and the Applicants disagree with it in any way, they have full recourse to this Court. For present purposes, the Applicants seek to prevent such a decision from ever being made. However, the Court can only examine reasonableness from the perspective of the Decision that has been made, and that Decision is simply to allow Maligne Tours to proceed to Phase 2 and make further submissions that will be examined and a decision made.

[105] The reasons for proceeding to Phase 2 with the Tent Cabin Proposal while rejecting the fixed roof accommodation proposal outright are set out in the Decision. The Applicants may

disagree with those reasons but the Court cannot say they fall outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[106] Before deciding to proceed to Phase 2 of the review process, the Superintendent refers to the key policy considerations – including ecological integrity – as well as the OCA Guidelines and the *Management Plan*. He notes the ecological concerns and says why – on a preliminary assessment – the limited development contemplated by the Tent Cabin Proposal in an intensely used area should not impede caribou conservation efforts or change grizzly bear habitat, and he also points out the need for a detailed environmental impact analysis before any approval decision can be considered.

[107] This is not an approval decision. The Applicants' concerns will get a full airing as part of Phase 2 – assuming that Phase 2 even takes place. For the purpose of simply deciding that further consideration should be given to the proposal, the Decision is reasonable and there are no grounds upon which the Court can interfere.

B. *Costs*

[108] The parties have agreed that they will bear their own costs of this application and will not seek costs from each other.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. No order is made as to costs.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1808-14

STYLE OF CAUSE: CANADIAN PARKS AND WILDERNESS SOCIETY
AND JASPER ENVIRONMENTAL ASSOCIATION v
MALIGNE TOURS LTD. AND PARKS CANADA
AGENCY

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: OCTOBER 27, 2015

JUDGMENT AND REASONS: RUSSELL J.

DATED: FEBRUARY 8, 2016

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