Province of British Columbia

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

DECISION NO. 2005-WIL-009(a)

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

BETWEEN:	Calvin Scouten	**APPELLANT**
AND:	Deputy Director	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Robert Wickett, Panel Chair	
DATE:	November 16, 2006	
PLACE:	Kelowna, BC	
APPEARING:	For the Appellant: Calvin Scouten For the Respondent: Darcie Suntjens, Counsel	

PRELIMINARY APPLICATION

Calvin Theodore Scouten has appealed the March 23, 2005 decision of T.J. Ethier, Deputy Director (the "Deputy Director") of the Fish, Wildlife Recreation and Allocation Branch of the Ministry of Water, Land and Air Protection (the "Ministry") to cancel Mr. Scouten's hunting licence and to impose a period of ineligibility of fifteen (15) years, during which Mr. Scouten cannot apply for or obtain a hunting licence within British Columbia.

Mr. Scouten asserts that the 15 year period of ineligibility is excessive in the circumstances and that it ought to be cancelled or significantly reduced.

At the commencement of the appeal, counsel for the Deputy Director raised a preliminary motion. The Deputy Director conceded that the appeal ought to be allowed and submitted that the matter ought to be remitted to the Deputy Director for re-consideration, with or without directions. Mr. Scouten opposed the Deputy Director's application. He submitted that the Board ought to hear and decide the appeal, on the merits.

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

a) send the matter back to the regional manager or director, with directions,

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

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

The Panel granted the Deputy Director's motion at the hearing by remitting the matter back to the Deputy Director with specific directions, and advised the parties that the Panel would follow-up with full written reasons confirming this decision and the directions. This decision contains those reasons.

BACKGROUND

On July 29, 2003, Mr. Scouten was convicted of possession of dead wildlife; to wit, a bighorn mountain sheep other than authorized under a licence or permit, contrary to section 33(2) of the *Wildlife Act*.

On November 27, 2003, Mr. Scouten was ordered to pay a fine of $100, and to pay $1,900 to the Habitat Conservation Trust Fund, pursuant to section 84.1(1)(e)(ii) of the *Wildlife Act*.

The *Wildlife Act* provides for sanctions in addition to those imposed by a court in a criminal proceeding. The *Wildlife Act* provides for administrative action including the cancellation of a hunting licence and the imposition of a period of ineligibility. These administrative actions are separate and distinct from the penalties imposed for the criminal offence, and the Deputy Director is entitled, in assessing whether to impose a licence cancellation and period of ineligibility, to consider acts or offences committed by the person other than those which he or she was convicted of in criminal court. With respect to any findings of fact, the Deputy Director (and the Board) must make findings based on a balance of probabilities, a lower standard of proof than that required in criminal courts (proof beyond a reasonable doubt).

On June 22, 2004, the Director of the Wildlife Branch wrote to Mr. Scouten to advise him that he was considering the imposition of a hunting licence cancellation and period of ineligibility. In the first paragraph of his letter, the Director states:

> It has come to my attention that you have been convicted under s. 33(2) and 48(1)(a) of the *Wildlife Act* and s. 5(1) of BC Reg 8/99 for: unlawful possession of dead wildlife, namely big horn mountain sheep, two counts, guiding without a guide outfitter's licence and hunting big game without hunting and species licences. The conservation officer has recommended licence action. I intend to consider your conduct in this matter and decide what action to take, if any.

The Director provided Mr. Scouten with an opportunity to make a written response to the allegations, such written submission to be received before noon on July 23, 2004.

Enclosed with the letter of June 22, 2004 were a number of documents and submissions. Included in the list of 16 attachments were the following:

a. #4 Tab D – fax transmittal, United States Department of the Interior Fish and Wildlife Service, dated May 25, 2001, to Joe Caravetta from S.A. Roger, S. Parker, totalling 9 pages (the "Schram Statement");

b. #5 Tab E – handwritten affidavit, by Patrick A. Scott, dated May 25, 2001, at Colville, Washington, USA, totalling 7 pages (the "Scott Affidavit");

c. #13 Tab 7 – oral reasons for judgment of the Honourable Judge Cartwright, dated July 29, 2003;

d. #14 Tab 8 – Court Order, No. 52759, Kelowna Registry, Jeffrey James Scouten and Theodore Scouten, dated November 27, 2003, record of proceedings and endorsement;

No written response to the letter of June 22, 2004, was received by the Director and, on March 23, 2005, the Deputy Director issued the decision which forms the basis of this appeal.

In the letter of March 23, 2005, the Deputy Director said this:

> As required under section 24 of the *Wildlife Act*, I have considered whether to cancel your angling, hunting and firearm licencing privileges as a result of the charges and surrounding circumstances for: **unlawful possession of dead wildlife, namely Bighorn Mountain sheep, 2 counts, guiding without a guide outfitters licence and hunting big game without hunting and species licences.**
>
> **I have reviewed your file and my decision, made on March 18, 2005, is that your hunting licencing privileges are cancelled for fifteen (15) years. That is, you are ineligible to hunt and/or obtain or renew a British Columbia hunting licence until 23:59 hours on March 18, 2020.**
>
> **Be advised that your hunting licencing privileges will only be reinstated after you have <u>also</u> successfully completed the Conservation and Outdoor Recreation Education (CORE) program and notified this office of having done so.** [emphasis in original]

The Deputy Director then indicated that he had considered the same 16 attachments as referred to in the letter of June 22, 2004. In addition, the Deputy Director noted that, he had received "no written submission from **Jeffrey James Scouten"** [emphasis added].

It is to be noted that Jeffrey Scouten is the son of Calvin Scouten and a co-accused with respect to offences charged under the *Wildlife Act*. Although the Deputy

Director's letter makes no reference to Calvin Scouten, it is common ground that Calvin Scouten did not provide a written response to the opportunity to be heard.

In imposing the 15 year licence suspension, the Deputy Director noted the following factors in reaching his decision:

1. Your flagrant and gross abuse of wildlife regulations.

2. Your flagrant disregard for the law.

3. You have demonstrated disrespect for the wildlife resource and the environment.

4. Egregious behaviour.

5. Illegal guiding and black market hunting are serious offences.

6. Your lack or [sic] remorse.

7. Your repetitive pattern of illegal behaviour with full intent to violate the law.

8. Not as culpable as Jeffrey J. Scouten.

Mr. Scouten's notice of appeal dated April 28, 2005 is very brief. It requests only that "the hunting bans be lifted." In his statement of points received by the Board on October 5, 2006, Mr. Scouten raises several matters relating to his family history, including their hunting and use of firearms over the years, and he states that he wishes to "focus point by point on statements by Schram and Scott in their affidavits."

It is apparent on the face of the record, being the letter of June 22, 2004 offering the opportunity to be heard and the decision letter of March 23, 2005, that the Director and the Deputy Director erred in stating that Mr. Scouten had been convicted of two counts of possession of big horn mountain sheep, guiding without a guide outfitter's licence and hunting big game without a hunting and species licence. In fact, Mr. Scouten had only been convicted of one count of possession of a big horn mountain sheep.

It is apparent from the concession made by counsel for the Deputy Director, and from the face of the record, that the Deputy Director mistakenly considered convictions recorded against Jeffrey Scouten in his assessment of a licence suspension in respect of Calvin Scouten. This is confirmed on page two of the decision letter of March 23, 2005, where the Deputy Director notes that "no written submission received from Jeffrey James Scouten." It appears that this page, which is identical to that issued to Jeffrey Scouten in respect of the licensing action taken against him, was mistakenly included in Calvin Scouten's material.

It was also conceded by counsel for the Deputy Director that, in imposing the 15 year period of ineligibility, the Deputy Director took into account the contents of the Scott Affidavit and Schram Statement without making it clear to Mr. Scouten that he intended to do so. It should be understood that the Scott Affidavit and Schram Statement contain evidence from two individuals attesting to a variety of violations of the *Wildlife Act* and Regulations by Calvin and Jeffrey Scouten. The evidence of violations detailed in the Scott Affidavit and Schram Statement are completely unrelated to the facts surrounding the conviction entered against Mr. Scouten in July of 2003. In fact, the evidence contained in the Scott Affidavit and the Schram Statement is denied by Mr. Scouten.

As a consequence of the foregoing, namely the Deputy Director's consideration of convictions which were not in fact registered against Mr. Scouten and his consideration of the affidavit and statement, counsel for the Deputy Director quite properly conceded that Mr. Scouten had not received a fair opportunity to be heard and that, therefore, the appeal ought to be allowed and that the matter be remitted to the Deputy Director for reconsideration. Mr. Scouten opposed the remittal back to the Deputy Director.

ISSUE

Whether the issue of cancellation of Mr. Scouten's hunting licence and imposition of a period of ineligibility should be referred to the Deputy Director for reconsideration, with or without directions, or whether the Board should consider the appeal and substitute its own order for that made by the Deputy Director.

DISCUSSION

As previously noted, the Deputy Director concedes that the appeal must be allowed. He further concedes that, in determining the period of ineligibility to be imposed upon Mr. Scouten, he inadvertently considered criminal convictions which had not, in fact, been imposed upon Mr. Scouten. Further, the Deputy Director had considered as truthful the allegations contained in the Scott Affidavit and the Schram Statement without notifying Mr. Scouten that he intended to do so, thereby depriving Mr. Scouten of the opportunity to refute the allegation contained in those documents.

The only issue left for the Panel is the remedy to be afforded upon the allowance of the appeal. The Deputy Director submits that when an error on the face of the record of this sort is manifest, the proper order is to remit the matter to the Deputy Director for reconsideration. The Deputy Director submits that the Board is an appellate tribunal, not a tribunal of first instance, therefore, it should not be determining the period of ineligibility for Mr. Scouten without the benefit of the determination from the Deputy Director founded upon the proper facts.

In support of this submission, the Deputy Director cites a previous decision of the Board, *Barry Anthony Barnes* v. *Deputy Director of Wildlife* (Decision No. 2005-WIL-004(b), October 3, 2005). In the *Barnes* decision, the Board considered a set of

facts that were, in part, similar to this case. There, the Deputy Director considered convictions for matters that had not, in fact, been imposed upon Mr. Barnes. It was conceded by the Deputy Director that he had erred in considering those unrelated matters and that, as a consequence, Mr. Barnes had not been given a fair opportunity to be heard. On this issue, the Board said this:

> Given that Mr. Barnes was never provided with a fair opportunity to be heard in the first instance, and that there would be a reasonable apprehension of bias if this matter were sent back to the Deputy Director for reconsideration, the Panel finds that the appropriate remedy in these circumstances is to remit the matter to the Director, or a different delegate of the Director for consideration.

And later, the Board said:

> However, the Panel also finds that the Deputy Director did not provide Mr. Barnes appropriate notice, did not consider Mr. Barnes' submissions when rendering his decision and there was a reasonable apprehension of bias on the part of the Deputy Director in this case. Therefore, the Panel refers this matter to the Deputy Director or in the alternative, a designate of the Director for a full hearing on its merits. In that regard, Mr. Barnes should be provided with a new notice that includes the full grounds of the specific licence action contemplated.

It is to be noted that there is no allegation of bias in this case. Further, there is no suggestion that the Deputy Director did not consider Mr. Scouten's submission on the opportunity to be heard. In fact, Mr. Scouten made no submissions during the opportunity to be heard.

For his part, Mr. Scouten submits that this Panel ought to decide this matter now so as to bring matters to a conclusion. Mr. Scouten submits that it would be an inconvenience for him to be compelled to travel to Victoria for a new opportunity to be heard and, in any event, the matter has been going on for far too long and it ought to be dealt with now.

Mr. Scouten also submits that he had pointed out to the Deputy Director, on several occasions, that the Deputy Director had erred in considering convictions for which Mr. Scouten had not been found liable. All of these representations were, of course, made to the Deputy Director after the imposition of the decision. Unfortunately, as a consequence of the doctrine of *funtus officio*, the Deputy Director is not in a position to simply "cancel" or "change" his decision without an order from the Board with respect to the appeal.

Having considered all of these submissions, the Panel concludes that this matter ought to be remitted to the Deputy Director for reconsideration with specific directions, which will be set out below.

The Panel acknowledges that this matter has taken some time to move through the system and that it would be preferable to bring matters to a conclusion. However,

there is a matter of potential unfairness to Mr. Scouten if the Board were to consider this matter afresh and impose a decision of first instance.

Specifically, the process of the Board requires Mr. Scouten to present his case first as he is the appellant. In these circumstances, Mr. Scouten would be compelled to address the Scott Affidavit and the Schram Statement without having either of those two witnesses available to give evidence and without having heard the Deputy Director's position with respect to the admissibility and weight to be given to those statements. In essence, the appellant would be required to proceed with his appeal without knowing the case he has to meet.

Even if the Board exercised its jurisdiction to require the Deputy Director to present his case first and thereby reverse the order of presentation, Mr. Scouten would be hearing the Deputy Director's evidence and submissions with respect to the Scott Affidavit and the Schram Statement for the first time, without an opportunity to properly consider his position, prepare a cross-examination or, most importantly, consider what extraneous evidence to call to refute those statements. This potential unfairness would be compounded by the reality that there is no judicial review or appeal on findings of fact made by the Board.

For this reason, the Panel considers that Mr. Scouten will only have a fair opportunity to deal with the allegations against him if the matter is remitted to the Deputy Director to reconsider his decision after giving Mr. Scouten a fair opportunity to be heard with respect to the allegations against him. In this way, the burden of proof will rest with the Conservation Officer Service, which will be required to put their evidence before the Deputy Director before Mr. Scouten is required to reply. In the event that Mr. Scouten is dissatisfied with the eventual decision of the Deputy Director, then he will have a further right of appeal to the Board.

In order to ensure that this matter moves forward at an appropriate pace and that Mr. Scouten is given a fair opportunity to be heard, the Panel imposes the following directions pursuant to section 101.1(5)(a) of the *Wildlife Act*:

a. If the Deputy Director elects to proceed with licensing action against Mr. Scouten, that he will provide notice of his intention to proceed within thirty (30) days of November 16, 2006;

b. That in the same letter giving notice of his intention to proceed with licensing action, the Deputy Director shall clearly set forth to Mr. Scouten the evidence before him that he intends to consider in determining the matter;

c. That the Deputy Director shall offer Mr. Scouten an option to proceed with the opportunity to be heard by response in writing or by oral hearing, at Mr. Scouten's election, such election to be delivered by Mr Scouten to the Deputy Director, in writing, within seven (7) days of receipt by Mr. Scouten of the Deputy Director's letter;

d. The opportunity to be heard, whether oral or written, is to be held not less than thirty (30) days following delivery of Mr. Scouten's election to proceed either orally or in writing;

e. In the event that Mr. Scouten does not deliver his election to proceed either in writing or orally as required above, then the opportunity to be heard shall proceed by written submissions;

f. If, following the opportunity to be heard, the Deputy Director determines that a licence suspension and period of ineligibility are to be imposed upon Mr. Scouten, then the Deputy Director shall give full credit to Mr. Scouten for the period of ineligibility already served by Mr. Scouten, that period being March 18, 2005 through November 16, 2006; and

g. If, in his determination with respect to hunting licence cancellation and period of ineligibility, the Deputy Director is required to make findings of credibility with respect to essential facts, that he set forth in his determination the reasons for his findings of credibility and fact.

DECISION

In making this decision, the Panel has considered all the evidence and arguments presented at the hearing, whether or not they have been specifically reiterated here.

For the reasons set out above, the Panel finds that Mr. Scouten has not been given a fair opportunity to be heard and that the appeal ought to be allowed and the hunting licence suspension, 15 year period of ineligibility and requirement that Mr. Scouten attend the CORE program be rescinded. The Panel directs that the matter be remitted to the Deputy Director for reconsideration and the Panel imposes directions as set out in these reasons.

The appeal is allowed.

"Robert Wickett"

Robert Wickett, Panel Chair
Environmental Appeal Board

November 28, 2006