

## DECISION NO. 2006-WIL-018(a)

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

<b>BETWEEN:</b>	Michael David Winger	<b>APPELLANT</b>
<b>AND:</b>	Regional Manager	<b>RESPONDENT</b>
<b>AND:</b>	Akisqnuq First Nation	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board David H. Searle, C.M., Q.C., Chair	
<b>DATE:</b>	February 21, 2007	
<b>PLACE:</b>	Cranbrook, BC	
<b>APPEARING:</b>	For the Appellant: Michael Winger For the Respondent: Joseph McBride, Counsel For the Third Party: Darwin Hanna, Counsel	

## APPEAL

Michael David Winger appeals the August 18, 2006 decision of Wayne Stetski, Regional Manager, Environmental Stewardship (the "Regional Manager"), Kootenay Region, Ministry of Environment (the "Ministry"). The Regional Manager refused to renew guide outfitter licence GOBC0516205 to Mr. Winger and refused to reissue to him guide outfitter certificate number 400838 (the "Certificate"). The Certificate and licence would give Mr. Winger the exclusive right to guide hunters in the guide outfitter territory described in the Certificate.

The Environmental Appeal Board has the authority to hear this appeal pursuant to 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.

Mr. Winger requests that his guide outfitter licence be renewed and that a new guide outfitter certificate for the territory be issued to him.

## BACKGROUND

The Certificate at issue in this appeal gives the certificate holder the right to guide hunters in a large area, a guide outfitter territory, which stretches from the southern boundary of the Kootenay National Park down to Canal Flats in the south, and then from the Columbia River on the west, to the Kootenay river in the east.

Over the years, the boundaries of this guide territory have changed, most notably in the 1980s. The current boundaries are not in dispute.

Also over the years, various individuals have held guide outfitter certificates and licences for the territory. Prior to Mr. Winger, the guide outfitter licence and certificate had been held by Richard Horn, of Horn Outfitters Ltd. Prior to Mr. Horn, they had been held by Gerald Kent Kebe. Prior to Mr. Kebe, licence and certificate had been held by Alfred Joseph. Mr. Winger came to hold the licence and the Certificate for the territory as follows.

It appears that in late 2004, early 2005, Mr. Horn had been negotiating the transfer of his guide outfitter licence and certificate with Ronald Arnett, the business partner of Mr. Winger. Mr. Arnett and Mr. Winger operated Triple H Outfitters Ltd.

On April 26, 2005, Mr. Horn signed a "Relinquishment of Guide Area", relinquishing the right to guide in the territory to Mr. Winger. A "Relinquishment of Guide Area" is a standard Ministry form, stating that the person who holds a licence and/or guide outfitter certificate relinquishes the rights, granted by those documents, to another person who the present holder believes is qualified to be licensed as a guide outfitter in British Columbia. The certificate relinquished by Mr. Horn had a term expiring in 2012. The form is addressed to the Regional Manager and is witnessed by a commissioner for taking affidavits.

Mr. Winger then applied to the Ministry for a guide outfitter licence and a guide outfitter certificate for the subject territory, providing a copy of Mr. Horn's "Relinquishment of Guide Area" with his application.

The Akisqnuq First Nation (the "First Nation"), previously known as the Columbia Lake Indian Band<sup>1</sup>, learned of Mr. Horn's intention to transfer his rights in the area. The First Nation's legal counsel advised both Mr. Horn and the Regional Manager that the First Nation's position was that it was the "beneficial owner" of the guide outfitter territory and asked the Ministry to reject any transfers or authorizations relating to the guide outfitter licence, and the guide territory, until the First Nation had been properly consulted. This claim of beneficial ownership is not based on a claim of aboriginal rights or title. In this case, it is based on their claim to have purchased the territory many years ago.

The Regional Manager advised Mr. Winger and Mr. Arnett that they should meet with the First Nation to try to resolve this matter.

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<sup>1</sup> At the appeal hearing and in this decision, the names Akisqnuq First Nation and Columbia Lake Indian Band were used interchangeably.

Mr. Winger and Mr. Arnett met with the First Nation on July 26, 2005. In a letter dated July 27, 2005, legal counsel for the First Nation advised the Regional Manager that Mr. Winger and the First Nation had reached an interim agreement, the terms of which he set out in the letter and which will be discussed later in this decision. In general, the First Nation consented to Mr. Winger holding a guide outfitter licence and certificate for the territory for a short time, until January 31, 2006, without prejudice to the First Nation's beneficial ownership.

On August 11, 2005, the Regional Manager issued to Mr. Winger:

- 1) a guide outfitter licence for the area, expiring January 30, 2006; and
- 2) the Certificate for the area, expiring January 30, 2006.

As a result, Mr. Winger was able to guide in the territory for the fall 2005 hunting season.

In an application dated March 1, 2006, Mr. Winger applied to renew his guide outfitter licence. Although not specifically requested, the Regional Manager also considered this to be an application for a new guide outfitter certificate to replace the one that had expired January 30, 2006.

At the request of the Regional Manager, on July 20, 2006, Dave Dunbar, the head of the Fish and Wildlife Section in the Kootenay Region, informed Mr. Winger that his applications were being denied. Mr. Winger was "not pleased" by the decision, and wanted to discuss it with the Regional Manager to understand why that decision had been made and to determine his next course of action.

The Regional Manager telephoned Mr. Winger to discuss the decision. He left a message on Mr. Winger's answering machine advising that his Certificate and licence had expired in January, and that "there were no successor rights".

These oral communications were ultimately followed up by a letter dated August 18, 2006, in which the Regional Manager described his reasons for denying the applications. He states:

On March 1, 2006 you applied to renew the guide outfitter licence you held last year under number GOBC0516205. This letter confirms my previous oral advice that I am denying your application.

I understand that you also wanted me to reissue the guide outfitter certificate you held temporarily last year under number 400838. I am also denying your application because I have concluded that you are not entitled to the beneficial interest in the guiding privileges.

We have extensive records on our files and have received information from the ?Akisq'nuk Indian Band confirming their past ownership of this territory. Our records also include when the territory was consolidated with the purchase by the ?Akisq'nuk Indian Band of the northern portion (between Kootenay National Park and Pedley Creek) from Chuck Christian in 1983.

After reviewing these records and speaking to the individuals involved, I have concluded that the ?Akisq'nuk First Nation is entitled to the beneficial interest in the guiding privileges in the area. I am currently

awaiting their advice on the name of a nominee to apply for a licence and certificate.

...

Mr. Winger appealed the decision to the Board by way of Notice of Appeal dated September 12, 2006. He asks the Panel to overturn the Regional Manager's decision and to order the Regional Manager to issue him a guide outfitter licence and a guide outfitter certificate for the territory.

The Regional Manager and the First Nation both submit that Mr. Winger's appeal should be dismissed.

At the hearing, the Panel was advised that a new licence and certificate for the guide outfitter territory has not been issued while this appeal is pending, although the First Nation has contracted with a guide outfitter and has advised the Regional Manager that it will "support the Ministry of Environment issuing" a guide outfitter licence and certificate to this guide outfitter, who will operate the territory "on our behalf".

## **ISSUES**

Whether Mr. Winger should be granted a new guide outfitter licence and certificate for the territory at issue in the circumstances.

## **RELEVANT LEGISLATION**

Guiding (accompanying and assisting someone to hunt wildlife for reward) is regulated by the *Wildlife Act*, R.S.B.C. 1996, c. 488.

According to section 51(1) of that Act, a regional manager has the discretion to issue a guide outfitter's licence:

- 51(1) A regional manager may issue a guide outfitter licence to a person who
- (a) is a citizen of Canada or a permanent resident of Canada
  - (b) has held assistant guide licences for 24 months and actively guided during that time, and
  - (c) has public liability insurance and other qualifications prescribed by regulation.

- (2) A guide outfitter licence authorizes the holder to guide persons to hunt only for those species of game and in the area described in the licence.

"Person" is defined in section 1 of the *Wildlife Act* as:

**"person"**, for the purpose of issuing a licence, limited entry hunting authorization or a registration of a trapline, means a natural person;

A regional manager also has the discretion to issue, to a licensed guide outfitter, a certificate granting exclusive guiding privileges in an area for a term of up to 10 years, with discretion to extend:

- 59(1) On application for a guide outfitter's certificate by a person licensed as a guide outfitter, the regional manager may issue a certificate in a form and containing conditions the director may specify granting the holder
- (a) the privilege of acting as a guide in the area described in the certificate, and
  - (b) the exclusive guiding privileges for a period not exceeding 10 years.
- (2) On each 5th anniversary of the date of issue of a guide outfitter's certificate, the regional manager may issue a new certificate, on application by the guide outfitter, for a period not exceeding 10 years.

A licence or certificate may be transferred, as has occurred on various occasions in relation to the subject guide outfitter territory, provided that it is approved by the regional manager:

- 62(1) The privileges conferred in a guide outfitter's licence or certificate may not be transferred without the authorization of the regional manager.

## DISCUSSION AND ANALYSIS

Mr. Winger's argument in support of his appeal is brief and relatively straightforward. He submits that he is entitled to be issued a licence and certificate for this territory because:

- the right to guide in the subject area was relinquished to him on April 26, 2005 by Richard D. Horn, Guide Outfitter Certificate 400820;
- he is qualified to be a guide outfitter in British Columbia (he meets the legal requirements to hold a licence); and
- the rights under Mr. Horn's certificate were transferred to him, and he was given the right to guide the area under the Certificate.

Mr. Winger states that, under the *Wildlife Act*, the right to guide in an area must be given to a qualified individual. The area in question was relinquished and transferred from Mr. Joseph to Mr. Kebe, then from Mr. Kebe to Mr. Horn, and then from Mr. Horn to him. He submits that these guide outfitters transferred their respective interests in the area through the relinquishment forms they executed, these transfers were approved by a regional manager, and that he is the "end of that line" of transfers.

Mr. Winger's understanding is that, if a person has a certificate or licence, he or she essentially "owns" that area for the purposes of guiding hunters in the area. He notes that a certificate is an asset that is part of the guide's estate. This is confirmed in section 64 of the *Act*:

- 64(1) A guide outfitter's certificate is part of the estate of the guide outfitter and, subject to the approval of the regional manager, the heirs or

administrators of a deceased guide outfitter may transfer, within 2 years after the guide outfitter's death, the privileges conferred by the certificate to a person who qualifies under section 51 for a guide outfitter licence.

As there is no indication that the First Nation has ever held the licence or certificate for the territory, Mr. Winger questions why the Ministry is refusing to renew his interest in the area when he is the last one to legally hold the licence and Certificate. He maintains that the Regional Manager's decision is unfair. He notes that guiding in an area is a privilege that is held by an individual and asks, "what is it that the First Nation owns"?

The Regional Manager submits that the First Nation has "beneficial ownership" of the territory identified in the Certificate. He notes that this legal arrangement of beneficial ownership has evolved because the Act requires that a guide outfitter licence and certificate be held by a "natural person", and that person must be a citizen or permanent resident of Canada. If an American company, or, as in this case, a First Nation, wants to purchase a guide outfitter territory, it may do so but then must enter into a legal arrangement with a qualified "person" to hold the guide outfitting licence and the certificate "on its behalf."

The Regional Manager acknowledges that this legal arrangement is not expressly recognized in the *Wildlife Act*, but that regional managers will recognize the interests of a beneficial owner, and consider their views, when making decisions regarding the guide outfitter territory. He points out that the BC Supreme Court has acknowledged this type of arrangement and recognized the importance of the beneficial owner's role in decisions regarding its territory in *Turnagain Holdings Ltd. v. Environmental Appeal Board et al.*, 2001 BCSC 795 (hereinafter *Turnagain*).

In *Turnagain*, an American company, Turnagain Holdings Ltd., purchased a guiding area in BC and entered into an arrangement with a BC resident to hold the guide outfitter licence and certificate. When the Ministry was considering cancelling the certificate due to alleged illegal hunting activities, Turnagain Holdings sought party status at the hearing before the Deputy Director of Wildlife. This was refused by the Deputy Director and, on appeal, by the Environmental Appeal Board. The Court disagreed. It concluded that a duty of fairness was owed to Turnagain Holdings and that it should have been given party status at the hearing. In making its decision, the Court considered the relationship between Turnagain Holdings and the person who held the guide outfitter licence and the certificate, Mr. Dalziel. At paragraphs 2 and 3 it states:

[2] In May 1986 the petitioner [Turnagain Holdings] purchased a guide outfitter territory, which is represented by guide outfitting Certificate No. 700478 (the "Certificate"). The territory comprises approximately 10,000 square miles located in northern British Columbia. Under s. 52 of the Act, a guide outfitter's licence can only be issued to a citizen or permanent resident of Canada. A guide outfitter's certificate can only be issued to an individual that holds a guide outfitter's licence. The regional manager under section 59 of the

Act may issue a certificate granting the holder the privilege of acting as a guide in the area described in the certificate.

[3] In May 1986 the petitioner purchased the territory from a Mr. Callison by way of a trust agreement whereby the Certificate was held in the name of Mr. Callison for the benefit of the petitioner. The purchase price was \$720,000 U.S. The Wildlife branch was aware of the purchase by the petitioner. The Branch was also aware of this practice of limited companies, often owned by individuals resident outside of Canada, entering into such agreements with licensed guide outfitters who by way of a trust agreement held a certificate in the name of the guide outfitter for the benefit of the owners.

The Court also found on the question of the duty of fairness as follows at paragraphs 20 and 21:

[20] ... Here, the petitioner was given notice of the s. 62 hearing. The Ministry was aware of the contractual arrangements between Dalziel and the petitioner and Dalziel was holding the Certificate in trust as agent for the petitioner. I am satisfied that the interest of the petitioner was not simply a contingent interest but one that was direct.

[21] I agree with the respondent that the duty of fairness varies with the circumstances of each case. In this case, the relationship between the petitioner and Mr. Dalziel was well-known and so was the significant investment made by the petitioner in the Certificate and the territory. It was also made clear that the consequences of any decision affecting the Certificate could be detrimental to the petitioner. The real party facing punishment [was the petitioner, Turnagain] ....

This finding was not overturned on appeal to the Court of Appeal (*Turnagain Holdings Ltd. v. Environmental Appeal Board et al.*, 2002 BCCA 564).

As is evident from this case, the exclusive right to guide hunters in an area (also referred to as a guide territory) is something capable of being sold. Also evident from this case, this exclusive right to guide in an area can be quite valuable, depending on how desirable that area is to hunters. A guide outfitter territory is granted by the Ministry through a guide outfitter certificate.

Counsel for the Regional Manager described the interest that attaches to a guide outfitter certificate as akin to a "business concession." He described it as similar to an airport authority giving one taxi company the exclusive right to operate from the airport in order to avoid many taxi companies "clamoring for people's business." Like this arrangement, the *Wildlife Act* grants a certificate holder the exclusive privilege to guide hunters in an area. It grants a monopoly in that area as the holder of the certificate is the only person allowed to conduct that business in that area. The certificate holder does not actually own the land, and the certificate does not grant any entitlement to land; it is simply an entitlement to conduct a specific business.

One of the witnesses for the First Nation described the Certificate as a type of tenure which can be bought and sold through transfers approved by the Regional Manager.

The Panel heard a great deal of evidence regarding ownership of the guide territory at issue in this case: the Regional Manager produced numerous documents from the Ministry files, and witnesses for the First Nation, Chief Wilfred Teneese and Lillian Rose, gave oral evidence of the basis for the First Nation's claim of beneficial ownership. From this evidence, the Panel accepts the following:

- The First Nation's reserve, Kootenay Indian Reserve No. 3, is located between Windermere and Fairmont Hot Springs. The First Nation is deemed a Band pursuant to the *Indian Act*. The guide outfitter territory is within the asserted traditional territory of the First Nation and is subject of land claim negotiations being advanced.
- According to Chief Teneese and Ms. Rose, the First Nation has held the area since the early 1970s. Commercial guide outfitting within its traditional territory, referred to on one of the older, undated maps in evidence as "Indian Territory", was grandfathered into the provincial system and it is only because the First Nation is not a person under the Act that it has had to have the territory in the name of a "natural person".
- The first documented outfitter to use the area was Martin Morigeau, a member of the First Nation. In a "Description of Indian Guiding Territory" dated January 12, 1972, signed by a conservation officer and the Chief, the boundaries of the guiding territory held by the First Nation are set out and Mr. Morigeau's utilization of the area is confirmed. These boundaries changed somewhat in the 1980's.
- From 1976 to 2000, the territory was guided by Mr. Joseph, also a First Nation member, first as an assistant guide outfitter and then as a guide outfitter. He also held the guide outfitter certificate for the area again in 2002.
- There are many references in the documents relating to Mr. Joseph that refer to the First Nation being the beneficial owner of the guide outfitter territory.
- In 1983, the boundaries of the guide outfitter territory were amended as part of a provincial government "realignment" initiative. The Province removed two areas. In the same year, the First Nation purchased a neighbouring guiding territory and combined it with the territory. In a letter received by the Ministry on April 22, 1983, the Chief of the Columbia Lake Indian Band writes:

Further to our meeting of February 22, 1983, at which time a Guiding Territory Boundary Change



was discussed, the change being the sale of Fenwick and Cedrus Creek Watersheds to Odd Aasland for \$8,000.00 by the Columbia Lake Indian Band and the purchase of the portion of Chuck Christensen's Guiding Territory that is between Kootenay River on the east and Columbia River on the west, the northern boundary being the Kootenay National Park Boundary, and the southern boundary being the present northerly boundary of the Columbia Lake Indian Band Guiding Territory, ... by the Columbia Lake Indian Band for \$20,000.00.

At that meeting the \$8,000.00 payable by Odd Aasland for Fenwick and Cedrus Creeks was to be paid to Chuck Christensen as part of the total payment for the portion that the Columbia Lake Indian Band would purchase from Chuck Christensen. The Columbia Lake Indian Band was to pay the difference of \$12,000.00.

We have renegotiated with Chuck and have come up with an agreed price of the Band's share to be \$10,000.00, bringing the total price for the area down to 18,000.00 [sic].

We must restate that it is with apprehension that we agree to this but we realize what options we have, as we learned from the previous loss of Nine-Mile Creek from our Territory. We hope that your optimism for this guiding territory will eventually dissipate our apprehension which may be only caused by our short sightedness.

- Following this letter, there are certain relinquishments of the guide outfitter territory to the Crown by Mr. Joseph, and there is also a new description of "Indian Territory" dated September 5, 1983, revised by Mr. Demarchi and Mr. Wolterson of the Ministry, and agreed to by Mr. Joseph as a proper description "of the new territory on behalf of the Columbia Indian Band."
- On August 10, 2000, Mr. Joseph and 605493 B.C. Ltd doing business as "Horn Outfitters" entered into a lease agreement for the territory. There is no evidence that the First Nation knew or consented to this lease.
- On November 21, 2000, Mr. Joseph relinquished his right to guide the territory to Mr. Kebe, also apparently without the knowledge of the First Nation.
- On April 24, 2001, Mr. Kebe relinquished his rights to guide the territory to Mr. Horn, again without having consulted the First Nation. This was ultimately "caught" by a conservation officer

writing the report on Mr. Horn's application for a guide outfitter certificate for the territory. In his report dated April 4, 2002, the Conservation Officer states, "The Guide Territory is owned by the Columbia Lake Indian Band and shows this in our files."; "Must have okay of Columbia Lake Indian Band prior to any transfers of certificate"; and later, "Had conversation with Band Administrator and she as well as Band Council are unaware of this transfer. There needs to be consultation."

- On May 6, 2002, the First Nation agreed that the Ministry could issue the guide outfitter licence and certificate to Mr. Horn. Mr. Horn was issued a ten year guide outfitter's certificate for the territory.
- On January 18, 2005, an Asset Purchase Agreement between Mr. Horn and Horn Outfitters Inc. and Triple H Outfitters Ltd. provided for the purchase of all of the assets and interests of Mr. Horn and Horn Outfitters Inc. in connection with the guide outfitting business in the territory, and the lease agreement between Mr. Horn and Mr. Joseph.
- Also in January of 2005, Mr. Horn provided a payment of \$8,000 to the First Nation for use of the territory for 2005, and requested an extension on the lease.
- On April 26, 2005, Mr. Horn relinquished his guide outfitter licence and certificate for the territory to Mr. Winger. The evidence is that this was also without the First Nation's knowledge and consent.
- A meeting was held between Mr. Winger, Mr. Arnett and the First Nation, which led to the interim agreement in which the First Nation agreed to Mr. Winger holding the licence and the Certificate until January 31, 2006.

Based on the totality of the evidence, the Panel is satisfied that the First Nation is the beneficial owner of the guide outfitter territory in question. The First Nation has historically "nominated" a guide outfitter to hold the certificate for the benefit of the First Nation. While it is apparent that its control over the territory has "gotten away" from the First Nation at times, the Panel accepts that it has retained its interest in the territory. Mr. Winger provided no evidence to the contrary.

Although Mr. Winger acknowledges that the First Nation had "*some*" interest in the territory, he denies that he was aware that it amounted to a beneficial ownership.

It is clear from the interim agreement executed by the First Nation and Triple H Outfitters that the interest asserted by the First Nation was more than just "*some*" interest. After the meeting between the First Nation, Mr. Arnett and Mr. Winger, legal counsel for the First Nation wrote to the Regional Manager advising of the terms of the "interim agreement" reached with Triple H Outfitters regarding the "Columbia Lake Band Guide Territory". He writes:

Based upon that meeting, the Council reached an interim arrangement with Triple H Outfitters as follows:

1. Triple H Outfitters will carry on its guide outfitting business in the Territory pursuant to the Lease Agreement, dated August 10, 2000, between Alfred Joseph and Horn Outfitters Inc., with a one month extension of the lease to January 31, 2006;
2. The application of the Guide Outfitter's Certificate by Mike Winger be issued by the Ministry only until January 31, 2006;
3. The parties will have further discussions regarding the Territory; and
4. This interim compromise is without prejudice to the position of the Akisqnuq First Nation respecting ownership and management of the Territory.

Please confirm that the Ministry is satisfied with this arrangement and will only issue a Guide Outfitter's Certificate to Mike Winger for a period ending January 31, 2006. I look forward to your reply.

[Emphasis added]

This letter was copied to Mr. Arnett, Triple H Outfitters Ltd.

In light of the fact that the Regional Manager advised Mr. Winger and Mr. Arnett to work things out with the First Nation, as well as the clear language in the letter about the First Nation's claim to ownership of the territory, Mr. Winger should have understood the nature of their asserted interest.

In addition, Mr. Winger should have understood the limited nature of his right to the guide outfitter territory. The short term nature of the licence and Certificate was clear – both from the agreement, and from the documents themselves. They were for approximately six months, expiring in January of 2006. The Regional Manager points out that guide outfitter certificates are normally issued for 10 years, and the guide outfitter normally applies for its renewal half way through that term. Mr. Winger was an experienced guide outfitter and would have appreciated that this six month term was unusual.

Further, it is apparent that all of the other individuals involved in this matter recognized that the issuance of the short term licence and Certificate was a "compromise" (as stated in the agreement), a "stop gap" measure so that the guide area would be utilized for the 2005 fall hunting season. The First Nation also saw it as a show of "good will" to Mr. Winger, as Mr. Horn may have misled him into thinking that he could transfer the territory.

While there is some indication in the documents that Mr. Winger and Mr. Arnett were "given the impression" that "long term operations were acceptable to both parties concerned", this is not reflected in the agreement and it is apparent from the evidence that Triple H Outfitters should have realized long before the Certificate expired that this may not occur.

As part of the interim agreement, the parties agreed to have further discussions regarding the territory. According to correspondence from Mr. Arnett, meetings

were scheduled for November of 2005, to allow Triple H Outfitters and the Akisqnuq Chief and Council an opportunity to negotiate. In a letter dated February 13, 2006, Mr. Arnett writes to the Regional Manager that, "Unfortunately numerous attempts by Triple H Outfitters have been made to meet with Chief and Council and currently negotiations have been non-existent..." That is unfortunate because item 3 of the interim arrangement contemplated further discussion.

The licence and Certificate expired on January 30, 2006, and no new agreement with the First Nation had been reached. By the time Mr. Winger applied for a new guide outfitter licence and certificate for the territory in March of 2006, many things had changed, or were in the process of changing, within the organization of the First Nation. For instance, in an email dated February 15, 2006, the Regional Manager was asked by the First Nation not to make any decisions on the guide outfitter territory until after the new chief and council took office on April 1, 2006 and had had an opportunity to consider this matter further. The email states, "It is the intention of the Akisqnuq First Nation to continue to manage the Guide Outfitting Territory in the interest of the Akisqnuq First Nation."

In addition, the authority and jurisdiction over the guide outfitter territory was transferred from the First Nation's Chief and Council to the Akisqnuqnik Development Corporation (the "ADC"). According to the evidence of Ms. Rose, the ADC decided on a new process for choosing a guide outfitter to hold the certificate, which did not include any contact with Mr. Winger, contrary to the interim arrangement. It ultimately entered into a contract with a guide outfitter, other than Mr. Winger, to manage the territory on behalf of the First Nation. The Chief and Council of the First Nation supported the decision of the ADC, and advised the Regional Manager of their choice in a letter dated May 2, 2006.

Although a review of the documents in evidence leads to the conclusion that at least by June 5, 2006, if not sooner, the Regional Manager had determined that "Mike Winger's Certificate expired in January of 2006 and will not be renewed," for some reason, this was not communicated to Mr. Winger until late July, 2006. At that time, it was communicated verbally by Mr. Dunbar, the head of the Fish and Wildlife Section in the Kootenay Region.

The Regional Manager testified that he followed-up by telephoning Mr. Winger and leaving a message that his licence and the Certificate had expired in January of 2006, with no successor rights. He then provided Mr. Winger with the written decision which is now under appeal; the decision dated August 18, 2006.

The Regional Manager acknowledged that, prior to making his decision, he did not provide Mr. Winger with a formal hearing or opportunity to be heard. The question is; should he have done so?

Normally, the application process itself is considered the applicant's opportunity to make his or her case for a guide outfitter licence or certificate. The Regional Manager argues that Mr. Winger was clearly aware that the guide territory was granted to him for a short period of time, and he knew, or should have known as a result of the process leading up to the short term agreement, that the First Nation had beneficial ownership of the territory. In these circumstances, the Regional Manager argues that Mr. Winger was aware of the case to meet, and that if he had

come to the Regional Manager with evidence to rebut the First Nation's beneficial ownership of the area, he could have done so when he applied for the new guide outfitter licence and certificate for the area.

In the alternative, if the Panel is of the view that the Regional Manager fell short of the standard expected for administrative fairness, the Regional Manager submits that the hearing of this appeal has cured those deficiencies. He notes that Mr. Winger received all of the Ministry's file documents in December of 2006, which show the First Nation's interests. Further, he had a full opportunity to be heard on these matters at the appeal hearing.

The Panel is of the view that, in the circumstances of this case, there was no legal requirement for a formal hearing. Mr. Winger was not facing the loss of an existing right or privilege; any right or privilege he had in the guide territory had already expired. In the event that the Panel is wrong on this point, it finds that the appeal hearing cured that defect. Mr. Winger had an opportunity to present evidence, cross-examine the witnesses of the other parties, and to provide a closing submission. Despite these opportunities to provide some basis for his appeal, the Panel finds that he did not do so.

In making his decision to refuse Mr. Winger's application, the Regional Manager testified that, in exercising his discretion, he took into consideration his finding that the First Nation was the beneficial owner of the territory and the fact that the First Nation expressed a desire to have direct involvement in the decision-making process. In light of these two factors, as well as the Court's decision in *Turnagain* and the Government's general duty to consult with first nations who may be affected by a decision, the Regional Manager decided to follow the First Nation's recommendation. Provided that the proposed guide meets the legal requirements, the Regional Manager is of the view that he will accept that nominee and issue the licence and certificate. In this case, the First Nation was not nominating Mr. Winger.

After carefully considering all of the evidence, the Panel finds as follows:

- the Regional Manager can and should consider the interests and wishes of a beneficial owner (*Turnagain*);
- the beneficial owner of the guide outfitter territory at issue in this case is the First Nation;
- the guide outfitter licence and the Certificate issued to Mr. Winger was known to be an interim arrangement that he knew expired on January 30, 2006;
- the First Nation chose a new process for managing its guide outfitter territory and chose a new person to hold the guide outfitter certificate on its behalf – the person was not Mr. Winger;
- the Regional Manager can and did consider the First Nation's wishes in this case, and properly refused Mr. Winger's applications;

- while Mr. Winger was not given a formal opportunity to be heard prior to this decision, there was no requirement to do so and, in any event, any defect in the process has been cured by this appeal hearing.

Accordingly, the Panel confirms the Regional Manager's decision to refuse Mr. Winger's applications.

It is difficult not to feel sympathetic to Mr. Winger and the situation in which he finds himself, particularly as he appeared without counsel. However, this administrative tribunal cannot grant him the remedy he seeks for the above reasons.

### **DECISION**

In making this decision, this Panel of the Board has considered all of the evidence and arguments provided, whether or not they have been specifically reiterated here.

For the reasons provided above, the appeal is dismissed.

"David H. Searle"

David H. Searle, C.M., Q.C., Panel Chair  
Environmental Appeal Board

April 12, 2007