
DECISION NO. 2006-WIL-019(a)

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

BETWEEN: Brian Chanski **APPELLANT**

AND: Regional Manager **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Cindy Derkaz, Panel Chair

DATE: May 10, 2007 concluding in writing
on June 18, 2007

PLACE: Cranbrook, BC

APPEARING: For the Appellant: Larry Hall
For the Respondent: Audrey G. Lieberman, Counsel

APPEAL

Brian Chanski appeals the October 3, 2006 decision of Wayne L. Stetski, Regional Manager Environmental Stewardship (the "Regional Manager"), Kootenay Region, Ministry of Environment (the "Ministry"), denying Mr. Chanski a permit to exempt him from the provisions of the *Motor Vehicle Prohibition Regulation*, B.C. Reg. 196/99, and to authorize him to discharge a firearm from a motor vehicle. Mr. Chanski's application for the permit was based upon his physical disability.

The Environmental Appeal Board has authority to hear this appeal under Part 8 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act*. Section 101.1(5) of the *Wildlife Act* provides:

- (5) On an appeal, the appeal board may
- (a) send the matter back to the regional manager or director, with directions,
 - (b) confirm, reverse or vary the decision being appealed, or
 - (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

Mr. Chanski seeks an order from the Board reversing the Regional Manager's decision. He also requests that the Board issue a number of directives to the Respondent in respect to issues pertaining to disabled hunters.

BACKGROUND

General

Mr. Chanski began hunting in the East Kootenay Region of British Columbia when he was nine years old. He has continued to hunt in the region for approximately the last 35 years. Mr. Chanski is an avid hunter who views hunting as a life-long recreational activity. In his own words he "loves to hunt" and describes hunting as "awesome recreation".

In 1994, Mr. Chanski was working as a truck driver when he slipped on a truck trailer ladder, grabbed a rung on the ladder with his left hand and severely injured his left shoulder. As a consequence of the injury to his left shoulder, Mr. Chanski developed significant problems with his right shoulder and arm. Over the years, he has had multiple surgeries on both shoulders; however, the symptoms have continued and, in fact, worsened.

Mr. Chanski has not been able to work since the accident and his injuries have been the subject of a Workers' Compensation Board ("WCB") claim. Medical assessments of Mr. Chanski's condition have been carried out in connection with his WCB claim. The assessments, which have been filed in this appeal, state that Mr. Chanski suffers from severe upper extremity disability in both shoulders, neck pain, stiffness, headaches and an impaired range of motion in both arms. He experiences numbness and tingling sensations in his arms and hands and has difficulty lifting weight above his waist. In addition to the other upper extremity problems, an April 19, 2006 medical assessment determined that Mr. Chanski has also developed moderately severe right carpal tunnel syndrome and mild left carpal tunnel syndrome. Mr. Chanski is right-handed.

In a decision issued May 29, 2006, the Workers' Compensation Appeal Tribunal ("WCAT") found that Mr. Chanski's condition is permanent in nature¹. In addition to the WCAT finding of permanent disability, Mr. Chanski has been accepted for disability benefits by the Canada Pension Plan and has been qualified for Disabled Status for travel on BC Ferries.

Hunting is the one recreational activity that Mr. Chanski is able to engage in with his disability. He has continued to pursue his passion for hunting, but finds that he cannot walk as fast or as far as able-bodied hunters.

¹ The Workers' Compensation Appeal Tribunal held that: 1) the preponderance of evidence supports a conclusion that Mr. Chanski's bilateral thoracic outlet syndrome is a compensable consequence of the left shoulder injury and subsequent surgeries; and 2) his bilateral epicondylitis is permanent in nature and forms part of his claim as being a compensable consequence of the injury. See WCAT Appeal No: 995467-B

Mr. Chanski testified that he recently purchased an expensive specially designed light-weight rifle, hoping that he would be able to carry it himself. However, even carrying the light-weight gun in a sling over his shoulder causes him pain and he is forced to rely on a companion hunter, often his son Trevor, to carry his gun. Sometimes he finds walking so painful that he is forced to turn around and discontinue the hunt.

Mr. Chanski stated that he cannot steer an all-terrain vehicle ("ATV") because he does not have sufficient upper body strength. Nor can he ride a horse or bicycle: his hunting is limited to using his pick-up truck. Recently Mr. Chanski is experiencing difficulty getting out of his truck because he lacks strength in his hands due to carpal tunnel syndrome. He stated that he also has trouble balancing when getting out of the truck while carrying anything; sometimes he will use the window sill of his truck as a gun rest or he will put his rifle on a bipod on the hood of the truck for stability. If he were to slip or fall, Mr. Chanski could re-tear the tendons in his arms and shoulders and exacerbate his condition.

Due to his limited physical ability, Mr. Chanski states that he is unable to access hunting areas without the use of a motor vehicle and requires a companion to hunt with him in order to pack out the carcass of any animal he kills, and to track and kill any animal that he wounds.

Restrictions on Vehicle Access

In Kootenay Region, the Ministry uses Access Management Areas ("AMAs") and Vehicle Access Hunting Closures ("VAHCs") to manage the public's use of forest roads. AMAs are areas where no motor vehicle access is allowed. The Ministry uses AMAs to protect the environment by minimizing disturbance to wildlife habitats and fragile areas.

VAHCs are areas where the use of a motor vehicle for hunting is prohibited, but motor vehicles may be used for other purposes. VAHCs are established to protect valuable wildlife areas from over-harvesting by hunters and to provide hunters with non-motorized wilderness hunting opportunities.

Both AMAs and VAHCs are established by regulation enacted pursuant to the *Wildlife Act*; specifically, the *Motor Vehicle Prohibition Regulation*. That *Regulation* also makes it an offence for a person to operate a motor vehicle in an area so designated (see sections 2 and 3 of the *Regulation* under Relevant Legislation, below).

Douglas Martin, Senior Ecosystem Specialist for the Ministry in Kootenay Region, is responsible for identifying areas in the region where access management is necessary to protect ecosystems and preserve a diversity of wildlife habitat. He testified that the trend in the Ministry is to create more AMAs, rather than VAHCs, due to the increase in motorized recreational vehicle use which can have an adverse impact on ecosystems. By eliminating all motor vehicle access to an area, the Ministry can reduce sedimentation and the spread of noxious weeds in

grasslands. Mr. Martin noted that knapweed is a serious problem because it can "wipe out" complete ranges, having a devastating effect on wildlife and livestock.

The Ministry has produced an inventory of motor vehicle closed areas in the Kootenay Region to catalogue the purpose for each closure and the rationale for the restriction. Mr. Martin is responsible for maintaining and updating this inventory. He testified that of the 60,000 to 65,000 kilometres of forest roads in the East Kootenay Region (not including roads that are not "gazetted"), less than three per cent are closed or affected by restrictions.

The Panel notes, from the copy of the Ministry's inventory provided by Mr. Chanski, that there are 66 vehicle-restricted areas in East Kootenay Region: 25 AMAs and 41 VAHCs.

Permit Exemptions and Mr. Chanski's application

Pursuant to section 19 of the *Wildlife Act* and section 3 of the *Permit Regulation*, B.C. Reg. 253/2000, a regional manager may issue a permit exempting a person from certain provisions of the *Wildlife Act* and regulations. Of relevance to this appeal, a permit may be issued to exempt a person from the prohibition in section 27 of the *Act* (making it an offence to discharge a firearm from a motor vehicle), and the prohibitions in sections 2 and 3 of the *Motor Vehicle Prohibition Regulation* regarding AMAs and VAHCs.

The application for a permit exemption that led to this appeal was not Mr. Chanski's first. In the spring of 2005, Mr. Chanski applied to the Ministry for a permit to use a motor vehicle to hunt on closed roads due to his disability. The Regional Manager issued Permit CB05-13726 (the "2005 Permit") to Mr. Chanski on June 17, 2005. The 2005 Permit states that Mr. Chanski is:

Exempted from the prohibition of the *Motor Vehicle Prohibition Regulation*, B.C. Reg. 196/99, against using or operating a motor vehicle for the purpose of game retrieval only in Kootenay Region 4 (as listed in Appendix A), during regular open hunting season.

Appendix "A" states in part:

GENERAL CONDITIONS

1. The permit holder is authorized to discharge a firearm from a motor vehicle in the following VAHCs during the 2005/2006 hunting season as described in the Hunting Regulations for:

[a total of 28 VAHCs are listed: 7 VAHCs in East Kootenay and 14 VAHCs in West Kootenay]

[bold in the original]

The 2005 Permit was valid from September 1, 2005 to March 31, 2006.

Mr. Chanski wrote to the Ministry in July 2005, and again in August 2005, advising that he does not hunt in any of the VAHCs listed in Appendix "A" of the 2005 Permit, and requesting a permit that allowed him access to all areas where motor vehicles have been prohibited. He did not receive any response from the Ministry. At the hearing, Mr. Chanski stated that he did go hunting in the 2005/2006 season but not in any AMAs or VAHCs.

Mr. Chanski applied to renew the 2005 Permit on August 5, 2006. In that application, he stated: "I can walk pretty good if not packing much [weight]." The Regional Manager denied Mr. Chanski's August 5, 2006 application on September 13, 2006 based on his review of the application and "the doctors (sic) letter" on file with the Ministry.

On September 22, 2006, Mr. Chanski completed another General Permit Application for a renewal of the 2005 Permit. This application was for a permit to "hunt and retrieve and shoot from or in road closed areas from my vehicle." Under the heading "Proposed Activity" he listed elk, moose, bear, cougar, sheep, deer, bobcat and lynx as the species he intended to hunt in the East Kootenay Region from September 10, 2006 to March 31, 2007. His application states that he has hunted in road closed areas in the past but that, as his shoulders get worse, it is becoming harder to walk and to carry his gun on his shoulders. He noted that he has "very little or limited strength" in his upper extremities.

Mr. Chanski's September 22, 2006 application provided additional documentation, including medical assessments, for consideration by the Regional Manager.

The Regional Manager's Decision and the Appeal

By a letter dated October 3, 2006, the Regional Manager denied Mr. Chanski's September 22, 2006 application for a renewal of the 2005 Permit. The Regional Manager's decision letter states, in part:

Re: General Permit Application

Thank you for your application requesting a permit to be exempt from the *Motor Vehicle Prohibition Regulation* and the discharging of firearms from a motor vehicle in Kootenay Region 4. Unfortunately, we cannot grant your request for the reasons stated below.

The general permit issued to individuals who wish to be exempt from any provisions of the *Motor Vehicle Prohibition Regulation* and the discharging of firearms from a motor vehicle is issued under section 3(2)(a) and 3(1)(c)(i) respectively of the *Wildlife Act Permit Regulation*. However, section 5(1)(a) of the *Permit Regulation* states that a regional manager must be satisfied that the applicant meets the specific requirements, if any, for the permit as set out in this regulation.

Upon review of your application and the Medical Assessment Form you submitted does not, in our opinion, provide sufficient justification to allow for an exemption to the *Motor Vehicle Prohibition Regulation* or the discharging of firearms from a motor vehicle in Kootenay Region 4. Therefore, we are not able to grant your request.

Mr. Chanski appealed the Regional Manager's decision by a Notice of Appeal filed with the Board on October 10, 2006. He appealed on the grounds that the Regional Manager ignored the medical opinions and assessments provided to him, and that the denial of the permit significantly impacts Mr. Chanski's ability to participate in hunting in those areas he has hunted since childhood.

In his closing submissions, Mr. Chanski asked the Board to find that the Regional Manager discriminated against him by refusing a permit to hunt on closed roads and shoot from a stationary vehicle. This was the main thrust of his position in his closing argument. Mr. Chanski seeks a permit that allows "two companion trackers that are able to track, dispatch and retrieve downed game and armed with rifles for their protection." Mr. Chanski also asks the Board to make other findings and declarations in respect to the *Human Rights Code*, R.S.B.C. 1996, c. 117, and decisions of the Supreme Court of Canada, as well as requiring the Regional Manager to: create a disabled hunter program in consultation with Mr. Chanski and others; develop new approaches to resolving the issue of disabled hunters' rights; establish a public information program; and direct Ministry staff to participate in a disability workshop.

The Regional Manager requests that the appeal be dismissed and the decision of the Regional Manager be confirmed. In the alternative, the Regional Manager requests that matter be sent back to him, directing Mr. Chanski to make a new application for a permit under the Ministry's newly revised policy and procedures, and directing that the Regional Manager consider the new application in accordance with the revised policy and procedures.²

The Board's jurisdiction in this appeal in respect to the remedies sought by the parties is considered in the Discussion and Analysis section of this decision.

ISSUES

The Panel has considered the questions arising in this appeal under the following issues:

1. Whether Mr. Chanski should be granted a permit exempting him from provisions of the *Motor Vehicle Prohibition Regulation* in respect to hunting in

² On March 15, 2007, the Ministry sent a letter to all existing permit holders advising that revised policy and procedures were in effect for disabled hunting permits. All existing permit holders and new applicants are required to submit the 2007 version of the Permit Application Form and Medical Assessment Form. The policy and procedures relevant to this appeal are those that were in effect on October 3, 2006 when the Regional Manager decided to deny Mr. Chanski's application for a renewal of the 2005 Permit and will be discussed further below.

AMAs and/or VAHCs, and authorizing him to discharge a firearm from a motor vehicle, on the grounds of physical disability.

2. If so, what is the appropriate remedy in this case.

RELEVANT LEGISLATION

The following sections of the *Wildlife Act* are relevant to this appeal:

Permits

- 19** (1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, or

(b) to omit to do anything that the person is required to do by this Act or the regulations,

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

...

- (3) If a regional manager issues a permit respecting the use of firearms, the regional manager may exempt a person from the requirements of section 9 of the Firearm Act and may specify the conveyance or type of conveyance for which the permit is limited.

Use of conveyance

- 27** (1) A person who discharges a firearm or wounds or kills wildlife from a motor vehicle or from a boat that is propelled by a motor commits an offence.

...

Retrieval of wildlife killed

- 35** (1) In this section, "dwelling place" does not include a temporary or seasonal camp.

(2) A person commits an offence if the person hunts wildlife and kills or injures that wildlife and fails to make every reasonable effort to

(a) retrieve the wildlife, and if it is alive to kill it and include it in his or her bag limit, and

(b) remove the edible portions of the carcass of game to the person's normal dwelling place or to a meatcutter or the owner or operator of a cold storage plant,

unless exempted by regulation.

The following provisions of the *Permit Regulation*, B.C. Reg. 253/2000 as amended, enacted pursuant to the *Wildlife Act*, are also relevant to this appeal:

Exemptions by permit

3 (1) A regional manager may issue a permit in accordance with this regulation on the terms and for the period he or she specifies, exempting a person from

...

(c) the prohibitions in section 27 of the Act against

(i) discharging a firearm or killing wildlife from a motor vehicle ...

(e) the requirements in section 35(2)(b) of the Act to make every reasonable effort to remove the edible portions of the carcass of game to the person's normal dwelling place or to a meat cutter or to the owner or operator or a cold storage plant,

...

(2) A regional manager may issue a permit in accordance with this regulation, on the terms and for the period he or she specifies, exempting a person from

(a) any provisions of the Motor Vehicle Prohibition Regulation, B.C. Reg. 196/99, and

(b) any of the following provisions of the Public Access Prohibition Regulation, B.C. Reg. 187/2003: section 2; section 3; section 6; section 7; section 9; section 10.

Restrictions on issuing permits generally

5 (1) Before issuing a permit under section 2, 3 or 4 the regional manager or the director, as applicable, must be satisfied

(a) that the applicant meets the specific requirements, if any, for the permit as set out in this regulation, and

(b) that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia.

The *Motor Vehicle Prohibition Regulation*, B.C. Reg. 196/99 as amended, also enacted pursuant to the *Wildlife Act*, provides in part:

Motor vehicle closed areas

- 2 A person commits an offence if he or she uses or operates a motor vehicle in an area described in Schedule 1 during the period specified in that schedule for each area.

Motor vehicle hunting closed areas

- 3 A person commits an offence if he or she uses or operates a motor vehicle for the purpose of hunting in an area described in Schedule 2 during the period specified in that schedule for each area.

DISCUSSION AND ANALYSIS

1. **Whether Mr. Chanski should be granted a permit exempting him from provisions of the *Motor Vehicle Prohibition Regulation* in respect to hunting in AMAs and/or VAHCs, and authorizing him to discharge a firearm from a motor vehicle, on the grounds of physical disability.**

Mr. Chanski testified that, prior to his injury, he hunted in AMAs and VAHCs using horses but that he no longer has the strength to mount or control a horse. He seeks a permit to hunt in "road closed" areas using a motor vehicle so that he can enjoy some of the wilderness hunting experiences that he had in the past.

Mr. Chanski also seeks a permit to use a motor vehicle in closed areas so that he can comply with section 35 of the *Wildlife Act*, which obliges a hunter to make every reasonable effort to retrieve wildlife and, if it is alive, to kill it and remove the edible portions of the carcass.

Mr. Chanski points out that he is seeking permission to drive his truck on existing roads and, as such, would not harm the road surface, destroy rare or valuable plants or spread noxious weeds any more than any other vehicle not involved in hunting.

When applying for a permit in each of 2005 and 2006, Mr. Chanski did not specify which closed roads he wished to use for hunting. He believed that an unrestricted permit was available for disabled hunters. Mr. Chanski testified that his friend, Vaughn Krueger, held a permit in 2003 or 2004 for vehicular access on all closed roads in Kootenay Region. Mr. Krueger did not testify at the hearing, and a copy of his permit was not provided to the Panel.

In the course of this appeal, Mr. Chanski identified 36 areas within the East Kootenay Region where he wants to use a motor vehicle on closed roads.

Mr. Chanski submits that the opinions of the medical professionals provided to the Regional Manager (and to the Panel), as well as his testimony, support a finding that he cannot walk without pain or carry heavy loads. He argues that, given his physical disability, the Regional Manager had a duty to accommodate him by issuing a permit that attempts to put him on an equal footing with able-bodied hunters. He states that the Ministry did not contact him to discuss his disability, or to determine how he might be accommodated. Further, neither the Regional Manager, nor anyone in the Ministry, made any effort to avoid discriminating against him. He submits that the Regional Manager simply refused to renew the 2005 Permit without providing any *bona fide* or reasonable justification.

The Regional Manager submits that his decision with respect to Mr. Chanski's permit application was a proper exercise of his discretion under the *Permit Regulation*, and was made after due consideration of all the facts and relevant legislation, including the *Human Rights Code*. He further submits that his decision is consistent with the Ministry's policy and procedures for disabled hunting permits in effect at the time of the application.

The Regional Manager referred the Panel to the Ministry's Policy #4-7-01.09 titled: Disabled Hunting – to discharge a firearm from a vehicle and/or access areas closed to motor vehicles (the "Policy"). The following excerpts from the Policy are relevant to this appeal:

POLICY STATEMENT:

It is the Policy of the Ministry:

To encourage regional managers who are considering issuing permits under sections 3(1)(c)(i) and 3(2) of the Permit Regulation to persons who assert physical disability, to consider their human rights: discretion must be exercised in a way that complies with human rights law.

...

Reason for Policy:

To facilitate a consistent, province-wide approach to accommodating hunters with physical disabilities who are affected by motor vehicle use restrictions.

...

Duty to Accommodate

One of the central concepts in human rights law is the duty to accommodate. Accommodation means providing an opportunity to participate in employment or access a service for a person who has special requirements due to a protected ground [as set out in the

Human Rights Code]. A duty to accommodate commonly arises in situations concerning disability.

In the context of these permits, the Province's duty to accommodate individuals with disabilities can be met by ensuring everyone has the opportunity to participate in the regulated activities. The Province is required to accommodate to a point of "undue hardship" – a strict standard that is only reached when a value, such as protection of the environment, outweighs the goal of equal participation.

In making the assessment on accommodation, it is essential that the particular circumstances of each applicant are considered and documented.

Physical Disability

It is the policy of the Ministry for the director of wildlife (or deputy) to exercise the powers of a regional manager to determine whether an applicant has a physical disability within the meaning of the Code. ...

It is the policy of the Ministry to consider the opinion of a qualified medical professional on the nature of the applicant's asserted physical disability.

There are two distinct questions to be answered depending on the permit(s) requested:

Does the applicant have a physical disability that requires accommodation by the issuance of a s. 3(1)(c)(i) permit to shoot from a motor vehicle?

Does the applicant have a physical disability that requires accommodation by the issuance of a s. 3(2) permit to access an area with a motor vehicle?

Permit to Shoot from a Motor Vehicle

It is the policy of the Ministry for the director of wildlife (or deputy) to exercise the powers of a regional manager for all applications to shoot from a motor vehicle by persons asserting physical disability.

Physical Disability

The director should consider the disability threshold as being met if an applicant's physical disability makes him/her unable without assistance to safely exit a motor vehicle, position himself/herself on uneven terrain, and load, hold, aim, and discharge a firearm. But a permit should not be issued if it would create undue hardship – see below.

Balance Values

When considering whether to issue a permit to shoot from a motor vehicle, the director must balance competing values: the value that prohibiting shooting from a vehicle addresses and the value of equal participation for all. If issuing the permit would be an "undue hardship" under the circumstances, the decision maker may legally exercise discretion to deny the permit. But if issuing the permit would not be an undue hardship, it would normally be discriminatory to refuse the permit.

The prohibition against shooting from a vehicle is grounded in the value of public safety. The decision maker, before issuing a permit, should be satisfied not only that the applicant has the requisite disability, but also that the risk of harm resulting from the applicant being given the permission is not undue. For example, it may be that an applicant is not able to safely load, hold, aim, or discharge the firearm while in the motor vehicle. The risk of harm resulting from that inability may outweigh the value of equal participation.

Permit to use a Motor Vehicle in a Closed Area

It is the policy of the Ministry for the regional manager of the relevant region to consider all applications for permits to use a motor vehicle in a closed area, once the director has determined that the person has a physical disability that could require accommodation by the issuance of that kind of permit.

...

Physical Disability

The director should consider the disability threshold as being met if an applicant's physical disability makes him/her unable to walk 100 metres while carrying a firearm. Recognize that this threshold is not absolute, but is rather a guideline. Even if an applicant demonstrated the described disability, a permit should not be issued if it would create undue hardship – see below. On the other hand, the director has discretion to issue a permit even if the disability threshold is not met.

Balance Values

When considering whether to issue a permit to use a motor vehicle in a closed area, a regional manager must balance competing values: the value that motivated the closure and the value of equal participation for all. If issuing the permit would be an undue hardship under the circumstances, the decision maker may legally exercise discretion to

deny the permit. But if issuing the permit would not be an undue hardship, it would normally be discriminatory to refuse the permit.

This process involves identifying the value that motivated the closure.

...

Some closures are motivated by a goal of reducing hunting pressure. If access is made more difficult by banning the use of motor vehicles, the number of animals killed tends to drop. Unfortunately this kind of management strategy can systematically discriminate against persons with physical disability who cannot practically access the area without a motor vehicle. Generally speaking, if the value of the closure is to reduce hunting pressure, it is very unlikely that giving permission to access would be an undue hardship. This is for two reasons: (1) the ministry has the option of managing hunting pressure in ways that do not result in systematic discrimination and (2) the number of persons holding these permits tends to be quite low and therefore the effectiveness of the closure may not be significantly reduced by giving permission.

On the other hand, some closures are motivated by a goal of protecting the environment. It may be that the friction from the tires of motor vehicles results in significant harm to rare or valuable plants. This is a value that may well result in undue hardship if compromised.

...

[bold in the original; underlining added for emphasis]

David Dunbar, R.P.Bio., the Ministry's Fish and Wildlife Section Head in Kootenay Region, reviews and makes recommendations to the Regional Manager with respect to applications for disabled hunting permits in the region. He was involved in the review and issuance of the 2005 Permit, as well as Mr. Chanski's 2006 renewal application.

Mr. Dunbar testified that, in 2005, Mr. Chanski applied for a permit to be exempted from the *Motor Vehicle Prohibition Regulation* for the purpose of "game retrieval." Mr. Dunbar noted that the 2005 Permit also authorized Mr. Chanski to shoot from his vehicle in 28 vehicle closed areas. Mr. Dunbar stated that this was a Ministry error which he did not notice until Mr. Chanski applied to renew the 2005 Permit: Mr. Chanski had not applied for permission to shoot from a motor vehicle in 2005. However, he did not take any steps to advise Mr. Chanski of the error.

In 2006, Mr. Dunbar assessed Mr. Chanski's renewal application. He took into account Mr. Chanski's statements that he "can walk pretty good" and "walks a lot", and the medical information provided by Mr. Chanski. Mr. Dunbar concluded that Mr. Chanski's disability is limited to his upper extremities. He found that Mr. Chanski did not meet the "disability threshold" in the Policy because his physical

disability did not “make him unable to walk 100 metres”. He recommended that the renewal application be denied by the Regional Manager.

In answer to Mr. Chanski’s assertion that Mr. Krueger was issued a permit for unrestricted motor vehicle access to hunt in all AMAs and VAHCs, Mr. Dunbar testified that Mr. Krueger’s 2004 permit authorized him to discharge a firearm from his vehicle, and gave him motor vehicle access to the same 28 VAHCs that were authorized in Mr. Chanski’s 2005 Permit. He stated that Mr. Krueger’s condition differs significantly from Mr. Chanski’s: Mr. Krueger is a double amputee who walks with metal braces and has very limited lower body mobility.

Mr. Dunbar stated that the Ministry had previously reviewed the AMAs and VAHCs in the Kootenay Region and identified 28 VAHCs that were “pre-approved” for the issuance of permits for motor vehicle access for disabled hunters. In 2006, the Ministry issued approximately 30 permits for disabled hunters in Kootenay Region.

The Panel’s Findings

In the decision under appeal, the only reason given by the Regional Manager for refusing the permit was that Mr. Chanski’s application and Medical Assessment Form did not “provide sufficient justification to allow for an exemption to the *Motor Vehicle Prohibition Regulation* or the discharging of firearms from a motor vehicle in Kootenay Region 4.” This certainly did not provide Mr. Chanski with any indication of the underlying deficiency in either his application or the medical documents that he provided. Nor did it give him any indication of the Ministry’s real concerns. This dearth of information is also problematic given the Ministry’s past actions.

Mr. Chanski was issued the 2005 Permit, which both exempted Mr. Chanski from the *Motor Vehicle Prohibition Regulation* for “the purpose of game retrieval only” and authorized him to shoot from a motor vehicle in 28 VAHCs, although this later exemption was in error.

In 2006, Mr. Chanski applied to renew the 2005 Permit with modifications. He requested a permit to “hunt and retrieve and shoot” from a motor vehicle in closed areas. He did not specify the closed areas he wished to hunt in because he thought that the Ministry issued permits to disabled persons for all closed areas – “like the one [his] buddy Vaughn Krueger had”. The Panel accepts Mr. Dunbar’s evidence that Mr. Krueger’s permit authorized motor vehicle access in the same 28 VAHCs listed in Mr. Chanski’s 2005 Permit.

The Panel finds that, in 2006, Mr. Chanski could have reasonably expected to receive at least the same authorization as in the 2005 Permit. He had not been advised by the Ministry that the authorization to shoot from a vehicle in the 2005 Permit was a mistake, and he was not advised of the disability thresholds to be met for each type of disabled hunter permit.

Given that a permit had been issued to Mr. Chanski in 2005, it was particularly important, in the interest of fairness, to give Mr. Chanski full reasons for refusing the same permit just one year later. Although it was not argued, the Panel is of the

view that the Regional Manager's reasons for decision do not satisfy the duty to give reasons as set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

At the hearing, the Regional Manager had an opportunity to fully explain the rationale for his decision. He maintained that his decision was a proper exercise of his discretion under the *Permit Regulation*, which states in section 5 as follows:

Restrictions on issuing permits generally

- 5** (1) Before issuing a permit under section 2, 3 or 4 the regional manager or the director, as applicable, must be satisfied
- (a) that the applicant meets the specific requirements, if any, for the permit as set out in this regulation, and
 - (b) that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia.

The only "requirements" relevant to Mr. Chanski's application are that he have a disability that necessitates an exemption, and that the balancing test set out in the Ministry's Policy weigh in favour of Mr. Chanski. The Regional Manager submits that he made his decision after due consideration of all relevant facts and legislation, including the *Human Rights Code*, and that it was consistent with the Ministry's Policy. The Panel disagrees. The Panel finds that the Regional Manager, and Ministry staff, failed to follow the Policy when they reviewed Mr. Chanski's application to renew the 2005 Permit. From the beginning, the Ministry's analysis of Mr. Chanski's application has been inconsistent with the Policy and lacking in fairness.

In some cases, the errors in the decision-making process below would result in the Board sending the matter back to be re-determined. However, this Panel has heard the matter afresh, with both parties presenting evidence and full argument on all matters relevant to deciding Mr. Chanski's permit application. In these circumstances, the Panel may exercise its power under section 101.1(5) of the *Wildlife Act* to make "any decision that the person whose decision is appealed could have made". Accordingly, the Panel has considered the evidence with respect to each of the permits that Mr. Chanski seeks.

The Ministry's Policy, although not binding, sets out guidelines for exercising discretion under the *Permit Regulation* with respect to disabled hunters, and incorporates relevant human rights considerations. Accordingly, the Panel finds it appropriate to apply the Policy to Mr. Chanski's case.

The Policy is clear that two distinct permits that may be issued to accommodate disabled hunters: 1) a permit to use a motor vehicle in a closed area and 2) a permit to shoot from a motor vehicle. There are also two distinct "disability thresholds" to be considered depending on the type of permit requested.

Presumably, a disabled hunter applying for a permit to shoot from a motor vehicle requires that permit for all areas open for hunting, not only for AMAs or VAHCs.

i) Permit to use a motor vehicle in a closed area

The Panel has reviewed the medical information that Mr. Chanski provided to the Ministry in support of his application to renew the 2005 Permit, including:

- A June 9, 2005 letter from Dr. D. Lenz of Cranbrook, BC (Mr. Chanski's physician for the last 20 years), which states in part:

Brian Chanski has had five major shoulder surgeries in the past eight years, which has now left him with a severe upper extremity disability to both of his shoulders.

He can not lift or carry any kind of weight without pain or a chance of re-injuring his shoulder worst (sic) than they already are. Brian is now very limited in his everyday and recreational activities.

- An undated Ministry "Hunters with Disabilities Medical Assessment Form" signed by Dr. Lenz in which he answers "yes" to a number of questions confirming Mr. Chanski's mobility-related problems including: an inability to walk in varied terrain conditions, and while lifting and carrying items; chronic or intermittent but significant pain, especially in the arms, legs, chest or back, that affects Mr. Chanski's ability to walk, lift or carry; and chronic or intermittent joint stiffness that affects his ability to walk, lift or carry.
- A WCAT appeal submission prepared by H.A.W.C. (Human Resources and Worker's Compensation Consulting) dated July 16, 2006 which summarizes the opinions of various medical professionals who have attended Mr. Chanski.

The Policy states that the disability threshold for a permit to use a motor vehicle in a closed area is met if the applicant is "unable to walk 100 metres while carrying a firearm" [emphasis added].

In his application dated August 5, 2006, Mr. Chanski states that he "can walk pretty good if not packing much..." He elaborates in his September 22, 2006 application stating that, over the past few years, his shoulders have been getting worse and it is becoming harder to hunt or walk in road closed areas. He states that even the weight of his gun on his shoulders now hurts.

At the hearing, Mr. Chanski stated that he walks a lot for exercise to try to keep in shape. However he finds that even the natural swinging motion of his arms causes bilateral shoulder pain and he has a great deal of difficulty walking if he is carrying any weight.

The Panel notes that the Ministry's Medical Assessment form did not ask about the threshold distance of 100 metres. Further, neither Mr. Dunbar, nor anyone else from the Ministry, asked Mr. Chanski or his physicians about the distance that he is able to walk while carrying a firearm.

In any event, the Panel finds that the guideline of 100 metres is not determinative of whether a disabled hunter should be accommodated by issuing a permit to use a motor vehicle in closed areas. As set out in the Policy, when making an assessment on accommodation, it is essential that the particular circumstances of each applicant are considered and documented.

The Panel finds that the medical information that Mr. Chanski provided to the Ministry supports a finding that he suffers from a severe upper extremity disability to both of his shoulders which impedes his ability to walk any distance while lifting or carrying items including a firearm. The Panel finds that Mr. Dunbar's conclusion that Mr. Chanski's disability is limited to his upper body and not related to mobility or propulsion issues, was unreasonable in the circumstances.

The Panel has had the advantage of Mr. Chanski's testimony and has reviewed the medical assessments. Based on the evidence before it, the Panel finds that Mr. Chanski's physical disability is such that he should be accommodated by the issuance of a permit to hunt using a motor vehicle in closed areas.

Having found that Mr. Chanski should be issued a permit to hunt using a motor vehicle in closed areas, the question is which closed areas should be included in the permit? Mr. Chanski has identified 36 closed roads within 10 management units in East Kootenay Region on which he wishes to use a motor vehicle, including 13 AMAs.

The Panel notes that four of the areas identified by Mr. Chanski in this appeal were included in the 2005 Permit, namely: Craven Creek, Jake Creek, Yahk River and Grave Creek. In his August 5, 2005 correspondence to the Ministry, Mr. Chanski stated:

I received a road closure permit last month for permission to retrieve game I have taken on certain roads only. The problem is that I do not hunt on any of those roads that you have given me permission to hunt on in the itemized list. [emphasis added]

As stated in the Policy, the competing interests of protecting wildlife and the environment must be balanced against a disabled hunter's right to be accommodated so that he/she can enjoy a "wilderness hunt" with reduced hunting competition. A permit should not be issued if it would have the effect of unreasonably harming the environment.

The Policy contemplates that where closures are motivated by a goal of reducing hunting pressure, "it is very unlikely that giving permission to access would be an undue hardship." On the other hand, where closures are motivated by a goal of protecting the environment, the value being protected must be identified and an

attempt made to accommodate a disabled person up to the point of undue hardship (i.e. unreasonable adverse affect on the environment).

In the Kootenay Region, the Ministry has identified 28 VAHCs that are "pre-approved" for disabled hunting permits. The Panel finds that a disabled hunter's request for motorized access should be considered based on the circumstances of each case. It is not appropriate accommodation of a disabled hunter to authorize him/her to use a motor vehicle in the same 28 pre-approved VAHCs assigned to every other disabled hunter.

Mr. Chanski applied for a permit for the East Kootenay Region. He wants to hunt in the areas he knows, having hunted in them since childhood. The Panel finds that Mr. Chanski would not be accommodated by authorizing him to hunt in 28 pre-approved areas in the Kootenay Region, 14 of which are in the West Kootenay Region.

In Mr. Chanski's case, he is seeking to use his truck on existing forest roads. He is not asking for a permit to use a motor vehicle, such as an ATV or motor bike, off-road. The Ministry, and now this Panel, must therefore consider the environmental impact of allowing Mr. Chanski motor vehicle access on existing roads in closed areas. If it would adversely affect the wildlife or fragile habitats, such that it would result in undue hardship, a permit should not be issued. However, if driving on an existing road in a closed area would not compromise the environmental or wildlife values, the permit may be issued.

The Panel also finds that there is also a duty on a disabled person to assist the Ministry in securing appropriate accommodation to meet his/her specific disability: *Central Okanagan School District No. 23 v. Renaud* (1992), 16 CHRR D/425 (SCC). Mr. Chanski did not provide specific evidence about the areas that he has hunted in the past, the game that he has killed in those areas and the timing and duration of the hunting he proposed to do in the 2006/2007 hunting season. This would have been valuable information for determining which closed areas he could reasonably be expected to be accommodated in.

The Panel notes that the Regional Manager is concerned that granting disabled hunting permits for motor vehicle use will have a deleterious effect on the use and enjoyment of a wilderness area by other hunters and recreational users. The Panel finds that this concern may be addressed, in part, by limiting motor vehicle access by disabled hunters to areas they have reasonably identified as their intended hunting grounds in a particular year.

The Regional Manager also submits that a disabled hunter should not be entitled to an advantage over able-bodied hunters in accessing closed areas. The Panel finds that the Regional Manager has the discretion to attach conditions to permits in order to put a disabled hunter "on an equal footing" with able-bodied hunters. For example, the speed and distance travelled in the motor vehicle may be restricted, the weight of gear and harvested game may be restricted and the occupants of the vehicle may be restricted to the disabled hunter and non-hunting companions (trackers/packers). The Regional Manager can craft a permit to provide

accommodation to a disabled hunter's specific circumstances. It is a process involving dialogue between the Ministry and the disabled hunter to determine how he or she might be accommodated without resulting in undue hardship.

In summary, the Panel finds that Mr. Chanski has provided sufficient justification to allow for an exemption to the *Motor Vehicle Prohibition Regulation*, and a permit should be granted to use a motor vehicle in a closed area. However, the Panel finds that it does not have sufficient evidence before it to determine how Mr. Chanski could be accommodated (which roads he should be able to use) up to the point of undue hardship and, further, the hunting season applied for has now expired. Both of these matters affect the remedy that may be granted by the Board. The Panel will address the appropriate remedy under issue #2, below.

ii) Permit to shoot from a motor vehicle

The Panel finds the evidence provided by Mr. Chanski with respect to obtaining a permit to shoot from a motor vehicle is ambiguous. As noted above, Mr. Chanski did not apply for permission to shoot from a motor vehicle in 2005. In 2006, he applied to renew the 2005 Permit, including the provision that had erroneously authorized him to shoot from a motor vehicle in 28 closed areas. He did not seek a permit to shoot from his motor vehicle in other closed areas.

The Ministry's "Hunters with Disabilities Medical Assessment Form" asks whether the applicant has an inability to exit a motor vehicle and position himself on uneven ground while aiming and discharging a loaded firearm, and/or an inability to balance while handling a firearm and while lifting and carrying items. Dr. Lenz answered "No" to both questions.

Mr. Chanski's evidence at the hearing was that, as a result of the carpal tunnel syndrome, he now lacks the strength to pull himself in and out of a vehicle, and he has trouble balancing. He stated that he sometimes uses the window sill of his truck as a gun rest or he will put his rifle on a bipod on the hood of the truck for stability.

The Panel notes that an assessment done by Viewpoint Medical Assessment Services Inc., dated April 15, 2005, found that Mr. Chanski's balance was unchanged since before his injury.

Based on the evidence before it, the Panel is not satisfied that Mr. Chanski has demonstrated a physical disability that requires accommodation by authorizing him to shoot from a motor vehicle. The Panel notes that this may change if Mr. Chanski's condition deteriorates, or if further medical information becomes available.

Accordingly, the Panel finds that the evidence, in particular the medical evidence, does not support the issuance of a permit authorizing Mr. Chanski to discharge a firearm from a motor vehicle.

Human Rights Code Argument

Although the Panel has decided this appeal on the evidence before it, Mr. Chanski's main focus during closing argument was in relation to discrimination and the *Human Rights Code*. In particular, Mr. Chanski submits that by denying him the permit, the Regional Manager failed to accommodate him as a disabled person. In other words, the Regional Manager discriminated against Mr. Chanski on the basis of physical disability.

Neither Mr. Chanski nor the Regional Manager addressed the issue of the Board's jurisdiction to consider and make findings according to the *Human Rights Code* when deciding appeals under the *Wildlife Act*. However, the Panel notes that in a 2006 decision, the Supreme Court of Canada held that statutory tribunals empowered to decide questions of law (such as this Board) are presumed to have the power to look beyond their enabling statutes in order to apply the whole law, including human rights legislation, to a matter properly before them (see: *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] S.C.J. No.14).

Both Mr. Chanski and the Regional Manager cited the Supreme Court of Canada decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (hereinafter *Meiorin*), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 858 (hereinafter *Grismer*), as establishing the legal framework for considering claims of discrimination under the *Human Rights Code*.

The *Meiorin* case arose in an employment context. McLachlin J. (as she was then) set out the following three-step test for determining whether an employer has established that a prima facie discriminatory standard is a bona fide occupational requirement:

54. ... An employer may justify the impugned standard by establishing on the balance of probabilities:
 - that the employer adopted the standard for a purpose rationally connected to the performance of the job;
 - that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
 - that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

The *Grismer* case extended the "*Meiorin* test" to all claims of discrimination under the *Human Rights Code*.

Although Mr. Chanski vigorously pursued his claim of discrimination, and provided the Panel with copies of a number of legal authorities, he did not provide cogent legal argument based upon the *Meiorin* test. Nor did he clearly identify which provisions of the *Wildlife Act*, the regulations and/or the Policy that he believes are discriminatory standard(s).

The Panel notes that the Policy provides a "disability threshold" for issuing a permit to use a motor vehicle in a closed area. It states that the decision-maker is to consider the threshold to be met "if an applicant's physical disability makes him/her unable to walk 100 metres while carrying a gun." The Policy also provides that the threshold is not absolute but rather is a guideline. It specifically states that the decision-maker has the discretion to issue a permit even if the threshold is not met. Neither Mr. Chanski nor the Regional Manager provided any argument about whether this threshold is a *prima facie* discriminatory standard as contemplated by the *Meiorin* test.

The Policy also provides a disability threshold for issuing a permit to shoot from a motor vehicle. The decision-maker is to consider the threshold to be met "if an applicant's physical disability makes him/her unable without assistance to safely exit a motor vehicle, position himself/herself on uneven terrain, and load, hold, aim, and discharge a firearm." The Regional Manager addressed this threshold in closing submissions.

On reviewing the evidence and the parties' written submissions, the Panel finds that there is not sufficient analytical legal argument before it upon which to base a decision in this appeal on human rights law and the *Human Rights Code*.

With respect to Mr. Chanski's argument that the Regional Manager failed to accommodate him as a disabled person, the Panel notes that the flaw in the Regional Manager's decision goes deeper than a failure to accommodate. As the Panel has found above, the Regional Manager did not believe that Mr. Chanski even met the first hurdle of having a relevant disability – he did not meet the disability threshold relevant to the requested exemptions. As a result, an accommodation analysis was not considered when making his decision.

2. What is the appropriate remedy in this case?

In his closing submission, Mr. Chanski asks the Board to make a number of declarations and orders in respect to human rights law and the *Human Rights Code*. However, the Panel received insufficient argument to properly consider these issues, or the Board's authority to make these declarations or orders. In addition, this appeal has not been decided under human rights law and the *Human Rights Code*. For all of these reasons, the Panel does not make any declarations or orders in that regard.

The Panel has found that Mr. Chanski should be granted a permit to use a motor vehicle in closed areas. The Panel has also found that there is not sufficient evidence before it to determine in which closed areas Mr. Chanski could be reasonably accommodated up to the point of undue hardship. The Panel notes that the permit period at issue in this appeal expired on March 31, 2007.

Under section 101.1(5)(a) of the *Wildlife Act* the Panel may send the matter back to the Regional Manager with directions. In this appeal, if the permit period had not already expired, the Panel would have sent the matter back to the Regional Manager and directed him to issue a permit allowing Mr. Chanski to use a motor vehicle in those closed areas that Mr. Chanski identifies as the areas he will be hunting in during the season, provided that such accommodation of Mr. Chanski's disability would not result in undue hardship.

However because the permit period has expired, the Panel has decided to allow the appeal without further remedy.

The Ministry requires all existing holders of disabled hunting permits and new applicants to submit the 2007 version of the application form and medical assessment for permits for the 2007/2008 hunting season. The Panel expects that its decision in this appeal will provide the Regional Manager with guidance in assessing and deciding Mr. Chanski's 2007 application.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

For the reasons stated above, the Panel finds that Mr. Chanski's physical disability justified the issuance of a permit exempting him the *Motor Vehicle Prohibition Regulation*. However, as Mr. Chanski sought a permit for a time frame which has now expired, and the Board has no jurisdiction to order a permit for next year's hunting season, the Panel has allowed this ground for appeal without further remedy.

The Panel further finds that there was insufficient evidence before it, and before the Regional Manager, to support the issuance of a permit authorizing Mr. Chanski to discharge a firearm from a motor vehicle.

The appeal is allowed, in part.

"Cindy Derkaz"

Cindy Derkaz, Panel Chair
Environmental Appeal Board

August 29, 2007