



Environmental Appeal Board

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

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

DECISION NO. 2010-WIL-016(a)

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

BETWEEN: Darlene Clark **APPELLANT**

AND: Director, Fish and Wildlife Branch **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair

DATE: Conducted by way of written submissions
concluding on July 28, 2010

APPEARING: For the Appellant: Darlene Clark
For the Respondent: Tom Ethier

PRELIMINARY ISSUE OF JURISDICTION

[1] Darlene Clark filed an appeal against a letter issued on June 1, 2010, by Tom Ethier, Director (the "Director"), Fish and Wildlife Branch, Environmental Stewardship Division, Ministry of the Environment (the "Ministry"). The letter provides notice that there will not be a season for trappers to harvest black bears in certain regions of BC.

[2] After receiving Ms. Clark's notice of appeal, the Environmental Appeal Board (the "Board") requested submissions from the parties on the question of whether the Director's letter contains an appealable decision under sections 101 and 101.1(1) of the *Wildlife Act* (the "Act").

[3] This preliminary issue of jurisdiction was conducted by way of written submissions.

BACKGROUND

[4] Ms. Clark holds a registered trapline on Vancouver Island.

[5] The Director's letter was addressed to three members of the BC Trapper's Association, including Ms. Clark. The letter states as follows:

After careful consideration, the Fish and Wildlife Branch has made a decision not to implement seasons for trappers to harvest black bears under a trapper's licence in the Vancouver Island, Lower Mainland, and Okanagan regions and those portions of the Thompson Region which currently do not have a season. Current opportunities and bag limits

in the province for trappers to harvest black bears under a trapping or hunting licence will remain status quo. This decision has been made for the 2010/11 and 2011/12 hunting/trapping seasons, and will be revisited for the Southern Region for the 2012/13 season.

I understand that members from your organization may be disappointed with this decision, and may wish to comment on this decision, or seek clarification. If so, please have them contact me at the address below.

[6] On June 11, 2010, Ms. Clark filed a notice of appeal with the Board, indicating that she wanted to appeal the Director's "decision" on the basis that it is discriminatory to trappers.

[7] By a letter dated June 16, 2010, the Board requested submissions from the parties on whether the Board has jurisdiction over the appeal. The Board's letter stated that the subject matter of the appeal "appears to relate to a general policy decision of the Ministry," and the Board provided the text of sections 101(1), 101(2) and 101.1(1) of the *Act* for the parties' reference.

[8] Ms. Clark submits that the Director's letter contains an appealable decision.

[9] The Director submits that he did not make an appealable decision, because the setting of trapping seasons is a legislative action, and not an exercise of statutory discretion by the Director.

ISSUES

[10] The Panel has considered the following issue:

Whether the Director has made an appealable decision under sections 101 and 101.1 of the *Act*.

RELEVANT LEGISLATION

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

Reasons for and notice of decisions

- 101(1)** The regional manager or the director, as applicable, must give written reasons for a decision that affects
- (a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or
 - (b) an application by a person for anything referred to in paragraph (a).
- (2) Notice of a decision referred to in subsection (1) must be given to the affected person.

...

Appeals to Environmental Appeal Board

- 101.1(1)** The affected person referred to in section 101 (2) may appeal the decision to the Environmental Appeal Board continued under the *Environmental Management Act*.

DISCUSSION AND ANALYSIS

Whether the Director has made an appealable decision under sections 101 and 101.1 of the *Act*.

Parties' submissions

[12] Ms. Clark submits that the Director reviews and makes recommendations for legislative action, including implementing regulations. She submits that the request to allow trapping of black bears in all regions of the province was brought forward to the Provincial Hunting, Regulations and Allocations Advisory Committee in 2005, and the Director delayed making a decision until 2010. She submits that the delay has been excessive and unreasonable.

[13] She also submits that black bears are hunted in all regions of the province, and guide outfitters obtain an economic benefit from the commercial harvest of bears. She submits that trappers should have the same opportunity. She notes that trappers are currently entitled to harvest black bears in certain parts of the province. She submits that trappers should have the opportunity to harvest black bears in all regions, and the Ministry's policies support an extension of the regulation.

[14] The Director submits that the *Act* provides neither him nor the Ministry's Fish and Wildlife Branch with the authority to set open seasons for trapping wildlife. Rather, open seasons are set pursuant to the authority to make regulations under section 108(3)(e) of the *Act*. He submits that he has no authority to make a "decision" concerning seasons that would be appealable to the Board under section 101 of the *Act*. Furthermore, he notes that trapping seasons are prescribed in the *Wildlife Act Commercial Activities Regulation*, BC Reg. 338/82 (the "*Regulation*").

[15] The Director acknowledges that his letter states that the Fish and Wildlife Branch "made a decision" concerning trapping seasons, but he did not mean a "decision" under section 101(1) of the *Act*. He submits that his letter was intended to signal to those who may have been anticipating a change in the *Regulation*, to expand the trapping season for black bear, that there would not likely be such a change. There was no legislative action.

Panel's findings

[16] The "decision" that Ms. Clark seeks to appeal is a decision not to change the trapping season for black bears in BC. The seasons for trapping certain species of furbearing animals in each region of the province are prescribed in schedules 3.07 and 3.08 of the *Regulation*. There is currently no open season for the trapping of black bear in Regions 1, 2 or 8.

[17] The *Regulation* is made by the Lieutenant Governor in Council (i.e. Cabinet) under section 108(3)(e) of the *Act*, which states:

Regulations by Lieutenant Governor in Council

108 (3) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

...

- (e) specifying open seasons or closed seasons, or both, for a sex, age or species of wildlife;

[18] The Director, and other staff in the Ministry's Fish and Wildlife Branch, may provide Cabinet with recommendations regarding the open seasons set out in the *Regulation*. However, it is Cabinet, and not the Director, which has the authority under the *Act* to make the *Regulation* and to decide the open seasons for species of wildlife. In this case, the Director's letter simply provided notice that the open seasons for trapping black bear prescribed in the *Regulation* would not be amended.

[19] The Panel finds that sections 101 and 101.1 of the *Act* clearly indicate that only certain decisions of the director or a regional manager may be appealed to the Board. Decisions of Cabinet are not appealable to the Board, and the Board has no authority to direct Cabinet to enact or amend regulations. There is nothing in the *Act* or in any other legislation that provides the Board with the authority to review or direct how Cabinet exercises its legislative functions.

[20] The Panel finds that the matter appealed by Ms. Clark is a matter within Cabinet's regulation-making authority, and is not a "decision" of the Director that may be appealable to the Board under section 101.1 of the *Act*.

[21] Consequently, the Board has no jurisdiction over the matter that Ms. Clark seeks to appeal.

DECISION

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

[23] For the reasons stated above, the Panel finds that this is a matter within Cabinet's regulation-making authority, and is not a "decision" of the Director that may be appealed to the Board under section 101.1 of the *Act*.

[24] Accordingly, the appeal is rejected for lack of jurisdiction.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

September 16, 2010