



**Environmental
Appeal Board**

**Forest Appeals
Commission**

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DECISION NO. 2010-WIL-020(a)

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

BETWEEN: Larry Hall **APPELLANT**

AND: Director of Wildlife **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Gabriella Lang, Chair

DATE: Conducted by way of written submissions
Concluding on August 26, 2010

APPEARING: For the Appellant: Larry Hall
For the Respondent: Joseph G. McBride, Counsel

APPEAL

[1] Larry Hall appeals the August 6, 2010 decision of Andrew Wilson, Director of Wildlife (the "Director"), Fish and Wildlife Branch, Environmental Stewardship Division, Ministry of the Environment (the "Ministry"), refusing to allow Mr. Hall to hunt before his limited entry hunting authorization season opening date.

[2] The Environmental Appeal Board (the "Board") has the authority to hear this appeal under section 100 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act* (the "Act"). Section 101.1 (5) of the *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.

[3] In his notice of appeal Mr. Hall asks the Board to issue a Disabled Hunting Permit to him to enable him to hunt moose in the Flathead River Valley as he requested.

[4] The appeal was conducted by way of written submissions.

BACKGROUND

[5] Mr. Hall started hunting in 1954 and has hunted every year since then, except for a couple of years because of a medical condition. In 2000 he contracted an illness that now limits him to walking short distances and he still experiences chronic pain in his feet. Because of his physical disability he needs to use a vehicle to access hunting areas. He hunts moose in the Flathead River valley area of the Kootenay region and he intends to keep hunting for years to come.

[6] On June 16, 2010, Mr. Hall submitted an application to the Ministry for a disabled hunter motor vehicle access permit to allow him to use a motor vehicle while hunting in the Kootenay Region on roads that are either closed to all vehicle access or are closed to vehicles for the purpose of hunting. He has a Limited Entry Hunting ("LEH") authorization to hunt moose.

[7] In his letter to the Ministry, Mr. Hall wrote that due to his inability to walk any distance with slopes he asks that the permit allow him to hunt moose with a rifle starting September 10, 2010. He wants to start hunting at the same time bow hunters start hunting in the same area because once it snows in the area he submitted it becomes too hazardous for him to walk off road. Later in his submissions he asked to be allowed to start hunting on September 1, 2010 which is the correct starting date for bow hunting season

[8] On August 6, 2010 the Director responded to Mr. Hall by letter, stating his permit application is being processed. As to Mr. Hall's request that he be allowed to hunt before his LEH authorization season opening date, the Director wrote that he has no statutory authority allowing him to modify LEH season dates, so he is unable to grant this request.

[9] The province regulates hunting of big game through the *Act* and various regulations enacted pursuant to that *Act*, including, regulations defining the areas within a region where hunting is allowed, the dates when hunters can hunt and the method of hunting such as with bows and with rifles. In the area Mr. Hall wants to hunt, the LEH regulation stipulates that during the period September 1 to October 14, 2010 the open season for bull moose is restricted to hunting with a bow only.

THE APPEAL

[10] In his submissions Mr. Hall stated several grounds of appeal which the Panel has summarized as follows:

1. the Director has the authority under the *Act* and its regulations to allow him to hunt moose with a rifle during the restricted bow-only hunting season,
2. the Director and the Minister of Environment (the "Minister") discriminated against him and failed to accommodate him as a disabled hunter by refusing to allow him to hunt moose with a rifle during the same time as the bow hunters hunt, thereby violating section 8 of the B.C. *Human Rights Code* and section 15 of the *Charter of Rights and Freedoms*.

[11] Mr. Hall asks the Board to:

1. issue him a disabled hunting permit to allow him to hunt moose with a rifle during the bow only hunting season starting September 1st and ending October 14, 2010,
2. direct the Director to change the dates he can hunt or to change the weaponry in his case,
3. direct the Minister to change the regulations so that he can start hunting on September 1, 2010, and
4. find that he has been discriminated against and not accommodated as a disabled hunter, under the B.C. *Human Rights Code* and the *Charter of Rights and Freedoms*.

[12] First the Panel will deal with two preliminary matters. In his notice of appeal Mr. Hall wrote that the decision being appealed is the Director's refusal to grant a disabled hunting permit to allow the Appellant to hunt moose with a firearm during the bow hunting season. Mr. Hall asked the Board to issue that permit with certain conditions.

[13] The Panel finds that in the August 6, 2010 letter from the Director to Mr. Hall, the Director did not refuse to grant Mr. Hall the permit he requested. In fact the Director wrote: "we are currently processing this application and will contact you as soon as we make a determination on the requested permit". Therefore, the Panel finds the Director did not refuse to issue a permit; it is still being processed. The Panel finds this Board has no jurisdiction over a decision that has not yet been made.

[14] The only decision the Director made in August, 2010 was to deny Mr. Hall's request that he be allowed to start hunting before his LEH authorization season opening date, and specifically during the bow hunting season. The Director stated he had no authority to modify LEH hunting season dates. The Panel, therefore, finds that the Director's refusal to change hunting season dates for Mr. Hall is the only decision this Board has jurisdiction over under section 101.1 of the *Act*.

[15] Regarding Mr. Hall's intent to rely on section 15 of the *Charter of Rights and Freedom*, this Board sent Mr. Hall a letter dated August 18, 2010 advising Mr. Hall that if he intended to seek a constitutional remedy under the *Charter of Rights and Freedoms*, he has to comply with section 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s.8. In that letter the Board set out the provisions of Section 8 which has explicit requirements for serving notices on the Attorney General of British Columbia and the Attorney General of Canada.

[16] The Panel has no indication that Mr. Hall has satisfied such notice requirements and therefore the Panel finds that it cannot consider this ground of appeal and cannot grant a *Charter* remedy.

[17] As to Mr. Hall's other grounds of appeal the Panel has considered them under the following issues.

ISSUES

[18] In determining this appeal the Panel has considered the following issues:

1. Whether the Director has the authority to change Mr. Hall's hunting season dates, and
2. Whether under the *Human Rights Code*, the Director and the Minister failed to accommodate Mr. Hall in the way he requested; that is, allowing him to hunt moose by rifle during the bow hunting season.

RELEVANT LEGISLATION

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

Limited entry hunting authorization

16 (1) The minister, by regulation, may

- (a) limit hunting for a species of wildlife in an area of British Columbia,
- (b) provide for limited entry hunting authorizations to be issued by means of a lottery or other method of random selection among applicants,
 - (b.1) provide for exceptions that the minister considers appropriate to the random selection among applicants in conducting a lottery or other method of random selection among applicants under paragraph (b), and
- (c) do other things necessary for the purposes of this section.

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 the authority during the term of the permit.

Powers of Director

100 (1) In addition to other powers given under this Act, the director may do an act or thing that a regional manager is empowered to do.

DISCUSSION AND ANALYSIS

1. Whether the Director has the authority to change Mr. Hall's hunting season dates.

[20] Mr. Hall submits that the Director has the authority to allow him to hunt with a rifle during bow hunting season. Mr. Hall also submits that the Director has the ability to change the LEH regulation and further that the Minister should change the regulations to grant him an exemption.

[21] Mr. Hall wants to start hunting moose with a rifle on September 1, 2010 and he submits that the Director has the authority to put the following condition in his permit, that: "as a disabled hunter with a moose LEH Permit the Disabled Hunter can hunt moose with a rifle during the same period of time that a bow hunter is entitled to hunt moose outside of the normal rifle season." Mr. Hall submitted that this was a change in the hunting start date for him, and also submitted that this request was for a change in weaponry.

[22] The Respondent notes that Mr. Hall has an LEH authorization issued under the *LEH Regulation*, BC Reg. 134/93 that permits him to hunt bull moose in MU 4-01, Zone B in the Kootenay Region. MU or management unit is a geographic area defined by the Ministry to manage hunts. In the areas for which Mr. Hall has an LEH authorization, the regular moose hunt begins on October 15, 2010.

[23] The Respondent also submits that LEH authorizations are constrained by other parts of the *LEH Regulation*, such as section 26(3) which states that "during the period September 1 to October 14 the open season for bull moose in Zones A and B of M.U. 4-01, ... is restricted to hunting with bow only." Mr. Hall wants to shoot moose with a rifle during the period the regulation says is limited to bow hunting.

[24] The Respondent submits that in this instance, when considering Mr. Hall's request, the Director was exercising regional manager powers pursuant to section 100(1) of the *Act*, and in that capacity denied Mr. Hall's request under section 19 of the *Act*. Mr. Hall does not dispute the Director's exercise of such authority under section 19.

[25] The Respondent submits that section 19 of the *Act* grants the Director the authority to issue permits, but that authority is limited by regulations, such as the *LEH Regulation*. The Respondent's position is that the Director's August 2010 letter responded to the narrow question of whether the Director could modify Mr. Hall's hunting season dates. The Respondent submits that the answer is strictly no. Only the Minister responsible for the administration of the *Act* has the authority to change hunting dates by having regulations enacted under s. 16 of the *Act*.

[26] Mr. Hall agrees that section 19 of the *Act* is the permit granting authority, but also submits that the Director, with his authority under section 19, can make changes to the hunting regulations by way of a permit. However, Mr. Hall also acknowledges that regulations are enacted by the Minister through order-in-council. He, therefore, also asserted that the Director should prepare an amendment to the hunting season regulations for the Minister to enact.

[27] The Panel finds that the Director's permitting authority is derived from section 19 of the *Act*. However, the Panel also finds that the words: "to the extent authorized by and in accordance with regulations made" restrict such authority. The Director can only do what the *Act* and the regulations specifically allow him to do. In this case the regulations limiting the Director are those which have set the moose hunting seasons, areas and methods of hunting in the Kootenay region, as well as the *Permit Regulation*.

[28] Mr. Hall also cites several sections of the *Permit Regulation* in support of his position. He submits that section 2(c)(iii) allows the regional manager to issue Mr. Hall a permit to hunt moose during the bow hunt season. Section 2(c)(iii) states:

A regional manager may issue a permit in accordance with this regulation on the terms and for the period he or she specifies ...

(c) authorizing a person to hunt, trap or kill wildlife during the open or closed season for the following purposes:

(iii) if the regional manager considers it necessary for the proper management of the wildlife resource.

[29] The Respondent submits that he does not consider granting Mr. Hall's request as being necessary for the proper management of the wildlife resource; rather the appellant's request is about his personal circumstances.

[30] The Panel agrees with the Respondent. Mr. Hall's appeal is about his hunting season and he has provided no evidence or submissions to demonstrate that allowing him to hunt when he wants to is necessary for the province's proper management of the wildlife resource.

[31] Mr. Hall further submits that section 2(k)(ii), which authorizes a person to possess and dispose of dead wildlife or parts of wildlife for a ceremonial or societal purpose, and also section 2(v) authorizing a person in need of sustenance to possess game meat for the purpose of providing sustenance for him or herself and his or her dependants, would give the Director the authority to change his hunting season dates.

[32] The Panel finds that neither of these regulatory provisions allows the Director to change hunting season dates or allow the use of other weapons to hunt moose during bow hunting season. These sections of the *Permit Regulation* apply to possession of and disposition of wildlife and game meat for specific purposes, not to hunting seasons or the use of weapons.

[33] Mr. Hall also referred to section 4(a)(i) of the *Permit Regulation* which states that the Director may issue a permit to hunt game, in accordance with the regulation, to non-residents or non-resident aliens. The Respondent points out that Mr. Hall is neither a non-resident nor a non-resident alien.

[34] The Panel agrees and finds that section 4(a)(i) does not apply to Mr. Hall's circumstances and does not give the Director the authority to authorize Mr. Hall to hunt from September 1, 2010.

[35] The Panel finds that there are no exemptions in the Act or in the regulations which would allow the Director to give Mr. Hall the moose hunting season he requested. The Panel notes that section 3 of the *Permit Regulation* does provide the Director with the authority to exempt a person from certain prohibitions in the Act and regulations specifically listed in section 3. For example, section 3(1)(c) provides an exemption to section 27 of the Act, which prohibits discharging a firearm or killing wildlife from a motor vehicle. Also, section 3(2) authorizes the issuance of a permit exempting a person from provisions of the *Motor Vehicle Prohibition Regulation*, B.C. Reg. 196/99 and certain provisions of the *Public Access Prohibition Regulation*, B.C. Reg. 187/2003. However, none of the exemptions set out in section 3 of the *Permit Regulation* would allow the hunting of moose out of season with a prohibited weapon.

[36] The Panel also finds, because section 19 explicitly states that the Director may issue permits subject to regulations, any changes or exemptions to such hunting seasons must be explicitly set out in regulations. Therefore, a change to current regulations is needed to allow Mr. Hall to start hunting on September 1, 2010.

[37] The Respondent submits that regulations, such as the *LEH Regulation*, are solely within the authority of the Minister to enact by order-in-council and that authority comes from Section 16 of the Act. The Director has no such authority. The Respondent also submits that decisions of the Minister are not appealable to this Board, nor are decisions of a legislative nature such as the enactment of a regulation.

[38] The Panel finds that section 16 of the Act is clear. It is only the Minister, by order-in-council, who has the authority to enact hunting regulations; not the Director and certainly not with a permit. As the Panel noted above, Mr. Hall does acknowledge that it is the Minister who has the authority to enact regulations by order-in-council.

[39] The Panel finds that the Board has no authority to direct the Minister to enact or amend regulations. Section 101.1 of the Act sets out the Board's jurisdiction; there is nothing there or in any other legislation that says the Board has authority to review or direct how the Minister exercises his regulatory functions.

[40] The Panel finds that the decision appealed by Mr. Hall was a decision made by the Director and that is the only decision this Board has jurisdiction over. The Panel also finds that this Board does not have the jurisdiction to direct the Director to do what he has no authority to do. The Director's permitting authority comes from statute and regulations; he has no authority to act outside of them. The Panel also finds that it cannot make a decision that the Director could not have made because he lacked the required authority.

2. Whether under the *Human Rights Code*, the Director and the Minister failed to accommodate Mr. Hall in the way he requested; that is, allowing him to hunt moose by rifle during the bow hunting season.

[41] Mr. Hall submits that he is a disabled hunter and both the Director and the Minister discriminated against him and failed to accommodate him by not allowing him to hunt with a rifle starting on September 1, 2010 when bow hunting season

starts. Mr. Hall makes a number of assertions in support of his position. The Panel has considered all of them even if not specifically cited below.

[42] In support of his position Mr. Hall cites section 8 of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"). Section 8(1) of the *Code* states:

- 8** (1) A person must not, without a bona fide and reasonable justification,
- (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
 - (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

[43] The duty to accommodate arises from human rights legislation, such as the *Code*, and case law. The Panel notes that the Supreme Court of Canada has 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 to apply the whole law, including human rights legislation, to a matter properly before them (*Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513). Therefore, this Board has the jurisdiction to consider and make findings under the *Code* when deciding appeals under the *Act*.

[44] In addition, the Panel notes that section 46.3 of the *Administrative Tribunals Act*, S.B.C. 2004, c.45, which prohibits certain administrative tribunals from considering issues arising under the *Code*, does not apply to this Board. The Panel also notes that this Board, in other decisions, has considered the application of the *Code* and the duty to accommodate in cases of disabled hunters. (see for example, *Chanski v. Regional Manager*, [2007] B.C.E.A. No. 14).

[45] The Panel acknowledges that Mr. Hall is physically disabled. Mr. Hall has chronic foot pain and lacks strength in his legs. He has difficulty with slopes over 15%. He submitted that it will be very difficult for him to hunt the Flathead River Valley when the snows come as these obstacles will prevent him from hunting anywhere but on the roads. He also submitted that even at the start of bow hunting season he will have difficulty hunting for a moose, so his odds of harvesting a moose are very low, and during regular moose hunting season they will be much lower. Mr. Hall states he just wants to increase his chances of making a kill ever so slightly.

[46] Mr. Hall submits that he cannot hunt with a bow because bow hunters are able to climb a tree stand, stand for lengthy periods, crawl through obstacles and sneak about in the woods, and he cannot do these things. Mr. Hall also submits that bow hunters require a great deal of practice to become proficient at shooting a bow and that is not possible for him because of his chronic foot pain and lack of leg strength.

[47] The Panel will first address Mr. Hall's discrimination assertions.

[48] Mr. Hall submits that his permit application was rejected and the Director rejected it on the basis of his disability. He states that the Director discriminated against him because he cannot hunt with archery equipment. Mr. Hall also stated that the Director discriminated against him by not constructing a regulatory amendment to allow Mr. Hall's request.

[49] First the Panel finds that Mr. Hall's permit application has not been rejected; as noted above it is still being processed. The Panel further finds that Mr. Hall has provided no evidence to support his assertions of discrimination. In particular, there is no evidence that the Director denied Mr. Hall's request on the basis of his disability or of his inability to use archery equipment. The Director only stated he had no authority to grant the request; that is not evidence of discrimination and it is not a discriminatory statement.

[50] Mr. Hall submits that the Director could grant him an exemption and could accommodate him in the way he requested. Mr. Hall submits that various sections of the *Permit Regulation* should have been used by the Director to accommodate him.

[51] The Respondent submits that the Board cannot dictate a remedy that is outside the authority of the Director, and that if a remedy is required in this case the type of remedy should be left to the Director, but only acting within his statutory authority. To support his position the Respondent cites *British Columbia (Minister of Health Planning) v. British Columbia (Human Rights Tribunal)* [2003] B.C.J. No. 1755, at para.27.

[52] The Panel agrees with the Respondent. The Board cannot order the Director to act outside of his authority, and in this case his permitting authority comes from the *Act* and the regulations cited above. The Panel has discussed why it found that there are no provisions in the *Act* or the *Permit Regulation* that would authorize the Director to grant Mr. Hall his request and therefore, the Director has no authority to accommodate Mr. Hall in the specific way he wants to be accommodated.

[53] Mr. Hall asks to be accommodated by being allowed to hunt with a rifle during the bow hunting season which starts on September 1, 2010. The Panel has already found that hunting seasons, areas and methods are set by regulations, and there is nothing in the current regulations that would allow the Director to grant Mr. Hall's request. As the Panel discussed above, to authorize Mr. Hall's request requires a regulatory change. Therefore, the Panel finds accommodating Mr. Hall in the way he wants, requires a regulatory change.

[54] Mr. Hall acknowledges that it is the Minister who has the authority to amend hunting regulations through order-in-council pursuant to section 16 of the *Act*. He submits that as a disabled hunter he needs special consideration and therefore to accommodate him, the Minister could have constructed an amendment to the *Permit Regulation* or *LEH Regulation*. Mr. Hall further asserts that the *Permit Regulation* and the *LEH Regulation* were set arbitrarily without any due consideration for his special needs or that of other disabled hunters, and therefore the Minister has failed to accommodate him.

[55] This Panel finds that the Board has no jurisdiction over the Minister's regulatory authority, and therefore it has no jurisdiction to decide whether the

Minister failed to accommodate Mr. Hall. The Panel also finds that Mr. Hall has provided no evidence or legal arguments supporting his assertion that the regulations were set arbitrarily.

[56] In summary, the Panel finds that Mr. Hall wants to be accommodated by being allowed to hunt moose with a rifle from September 1, 2010 to October 14, 2010, which under Ministry regulations is reserved for bow hunting. Such accommodation requires a change in the regulations enacted pursuant to the *Act*. Regulatory changes are not within the Director's authority; regulatory changes are solely within the Minister's authority. Mr. Hall will need to seek any remedies from the Minister in another forum.

DECISION

[57] 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.

[58] For the reasons stated above, the Panel finds that it is not appropriate in the circumstances to send the matter back to the Director, nor is it appropriate for the Panel to issue its own permit decision.

[59] The appeal is dismissed.

"Gabriella Lang"

Gabriella Lang, Panel Chair
Environmental Appeal Board

August 30, 2010