



---

Appeal: 84/18 W'Life

J U D G E M E N T

Appeal against decision of the Director,  
Fish and Wildlife Branch, dated June 15, 1984

APPELLANT: James Hatter

Hearing Details:

The hearing was held in the Hemlock Room, Parliament Buildings, Victoria, B.C. on October 2nd, 1984. The hearing was held before a Panel of the Environmental Appeal Board:

Mr. H.D.C. Hunter, Panel Chairman

Mr. P. D. Myers, Member

Mr. Wm. N. Venables, Member

Mrs. Rita Colwell acted as the recorder of the proceedings.

Participants:

Dr. James Hatter, represented by Mr. D. Hatter,  
Counsel

The Director, Fish and Wildlife Branch, represented  
by Mr. P. G. Jarman, Counsel

Dr. J. Hatter, the Appellant, was the only witness.

EXHIBITS:

- Ex. 1 - The documents produced as Exhibit No. 1 at the hearing before the Director.
- Ex. 2 - Statement of income and expenses, prepared for Dr. Hatter.
- Ex. 3 - Annual summary of guided hunting activity for 1982-1983 of Fish & Wildlife Branch.
- Ex. 4 - Transcript of the hearing before the Director on June 6, 1984.

Dr. Hatter, in evidence, explained the status of Sidney Island and of Tree Farm No. 25 situated on it. He pointed out that it was necessary to reduce and manage the deer population in order to avoid destruction of the regenerative growth. The only way to do this with any degree of safety, considering the location and use of the Island, was to have a guided hunting operation.

The deer involved were of two imported species; fallow deer from Europe and blacktailed deer from elsewhere in British Columbia. The fallow deer was a very small species and the blacktail on the Island was degenerate. The hunting was not trophy hunting, but was really culling the herds. He was not required as a guide to find the deer, but as a warden, to maintain safety. One of his main purposes was to obtain data from the animals killed to allow a proper study of the animals.

The guiding operation was totally unlike any other in the Province and did not make a profit, apart from any royalties paid to the Crown.

His application was to be exempted from the royalty of \$10.00 per deer required by the regulation in respect of his culling the deer. He had no objection to paying a royalty on any trophy animal which was taken. He had paid his royalties for 1983 and he had not sought a refund of these payments. He was asking for exemption for the future.

Under cross-examination, he agreed that he paid 25% of his gross fees to the owners of the tree farm. He also agreed that his evidence was basically the same as he had made in his appeal to the Director. He acknowledged that the payment was a royalty, not a trophy fee.

Counsel for the appellant then argued that under the Financial Management Act, which was referred to by the Regional Manager originally and by the Director, an appeal referred only to refunds of royalties paid and not to exemptions. He further argued that in any event, the appellant was entitled to a refund under the heading of Public Inconvenience. He sought to justify this argument from the evidence.

His main argument was that Regulation 337/82 "Wildlife Act Permit Regulations" allowed a Regional Manager to issue a permit under 1(s) exempting a person from the application of the Act or a regulation. This regulation gave the Regional Manager and the Director a very wide discretion and he should have exercised his discretion in favour of the appellant.

In reply, Mr. Jarman conceded that the Financial Administration Act applied only to remission of payments already made; it did not relate to a possible exemption from the future payment of fees. He also conceded that the exemption referred to in Regulation 337/82 could apply to the royalty payments called for by Regulation 338/82.

He further pointed out that the royalties were imposed by Order in Council and no policy had been indicated with respect to exemption. He also stated that no bias in the exercise of discretion had been alleged by the appellant.

He then referred to case law relating to an Appeal Court's right, or lack of it, to interfere with a discretion exercised by a lower tribunal. Finally, he referred to a decision of another panel of the Environmental Appeal Board with respect to the duty of a public servant to obtain the best possible price for the Province.



In his reply, Mr. Hatter pointed out that the judgements in the cases referred to all related to cases where it was alleged a discretion had been wrongly exercised. In his submission, his point was that the Regional Manager and the Director, by referring to the lack of laid-down policies and to the irrelevant Financial Administration Act, had failed to exercise any discretion at all. He also stated that at least one of the cases pointed out that the hearing in front of the Court was not a hearing de novo, whereas in this case, the hearing was de novo. The decision of the Environmental Appeal Board related to a matter of public tenders and had no bearing on a matter of exempting a royalty.

DECISION:

The Board finds that both the Regional Manager and the Director relied on irrelevant matters in that they relied on the absence of laid-down policy and on the Financial Administration Act. Reliance on irrelevant matters in the purported exercise of a discretionary power is tantamount to a failure to exercise discretion. The Board cannot exercise a discretion where the Regional Manager and the Director have failed to exercise the discretion granted to them, so it is unnecessary to decide whether the Board may substitute its discretion for that appealed from. Accordingly, the appeal is allowed and the application for exemption is referred back to the Director with a direction that, in exercising his discretion whether to grant exemption from royalties under Regulation 337/82, he ignores the Financial Administration Act and the absence of any policy directives from the Cabinet.



H. D. C. Hunter  
Panel Chairman

Victoria, B. C.  
October 30th, 1984