

DECISION NO. 2009-WIL-001(a)

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

BETWEEN:	Richard F. Horning	APPELLANT
AND:	Deputy Director, Wildlife	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
DATE:	Conducted by way of written submissions concluding on May 21, 2009	
APPEARING:	For the Appellant:	Richard Horning
	For the Respondent	Carol Foott

APPEAL

Richard F. Horning appeals the December 15, 2008 decision of Chris Hamilton, Deputy Director of Wildlife (the "Deputy Director"), Ministry of Environment (the "Ministry"), cancelling Mr. Horning's hunting licence privileges for five years effective December 12, 2008, declaring him ineligible to obtain or renew a hunting licence or a limited entry hunt authorization until December 12, 2013, and requiring him to successfully complete the Conservation and Outdoor Recreation and Education (CORE) program before he is eligible to hunt or apply for a hunting licence again.

The Environmental Appeal Board has the authority to hear this appeal under Part 8 of the *Environmental Management Act* and section 101.1 of the *Wildlife Act* (the "Act"). Section 101.1(5) of the *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. Horning asks the Board to eliminate the period of ineligibility.

BACKGROUND

The circumstances which led to the licensing action against Mr. Horning arose out of activities that occurred in 1998, and Mr. Horning's subsequent convictions for various offences as a result of those activities. The following facts are not in dispute.

The hunting activities

Douglas Albrecht, a resident of Alaska, met Mr. Horning during the summer of 1998 while Mr. Albrecht was firefighting in BC. Mr. Horning told Mr. Albrecht that he was a hunting guide with a quota for cougar, and that he and his assistant guide, Tony Barnes, could take Mr. Albrecht on a guided cougar hunt. Mr. Albrecht expressed an interest in wildlife photography, and Mr. Horning offered to take Mr. Albrecht on a trip to photograph cougars. Mr. Albrecht offered to pay for the trip with wildlife carvings that he carved, which he stated were worth approximately \$500 each. They made plans for a trip in December 1998.

On December 6, 1998, Mr. Albrecht traveled to BC and met up with Mr. Horning. Mr. Albrecht gave Mr. Horning and Mr. Barnes five wildlife carvings to divide among themselves in exchange for taking him on a guided cougar hunt. From December 7 to 10, Mr. Horning and Mr. Barnes took Mr. Albrecht on a guided cougar hunt in the Kamloops area for the purpose of photographing cougars. On December 10, Mr. Horning's and Mr. Barnes' cougar hounds treed a cougar and Mr. Horning handed his gun to Mr. Albrecht. Mr. Horning encouraged Mr. Albrecht to shoot the cougar. Mr. Albrecht fired two shots at the cougar and killed it. Mr. Horning videotaped the shooting. The men also took photographs of themselves with the dead cougar.

At the time of these events, Mr. Albrecht did not possess a hunting licence or a species licence for cougar, and neither Mr. Horning nor Mr. Barnes were licenced guides or assistant guides.

On December 11, 1998, the three men took the cougar that Mr. Albrecht shot, along with another cougar that was previously shot by Mr. Horning, to the Ministry's Kamloops office for a compulsory inspection as required under the *Act*. Mr. Horning signed the inspection sheet for the cougar shot by Mr. Albrecht, and presented the inspection sheet to a Conservation Officer. Mr. Horning falsely stated on the inspection sheet that the cougar was killed on December 7, not December 10. Mr. Horning also provided the hunting licence and cancelled cougar licence of another person, Lanny Schmitke. Mr. Schmitke was not present during the hunt with Mr. Albrecht or during the compulsory inspection. Mr. Horning came into possession of Mr. Schmitke's documentation because a few days earlier, Mr. Schmitke had left a bag with his hunting licence and cougar species licence in Mr. Horning's truck. Without Mr. Schmitke's knowledge, Mr. Horning and Mr. Barnes cancelled his cougar species licence to make it appear that the cougar shot by Mr. Albrecht had been killed by Mr. Schmitke.

At the same time, Mr. Horning also presented the cougar he had previously killed for compulsory inspection. On the inspection sheet for that cougar, he falsely stated that he had killed the cougar on December 10, when in fact he had killed it sometime before that.

In 1999 and 2000, Conservation Officers in BC and agents from the US Conservation Service in Alaska conducted an investigation of the events surrounding the cougar hunt. As a result of their investigation, charges were laid against Mr. Horning and Mr. Barnes.

The charges and convictions

Mr. Horning and Mr. Barnes were jointly charged in Provincial Court with six counts of various offences under the *Wildlife Act*, as well as charges under the *Criminal Code* related to improper storage of firearms. Mr. Horning pled guilty to three counts of violating the *Wildlife Act*. The Crown stayed the remaining charges against him; namely, the firearms violations, as well as charges of illegally hunting and possessing the cougar, and making a false statement on a compulsory inspection form.

On December 6, 2000, the following convictions were entered against Mr. Horning:

1. on or about December 10, 1998, acted as a guide for game (cougar) without a guide outfitter licence, assistant guide licence or other licence to guide for game, contrary to section 48(1) of the *Wildlife Act*;
2. on or about December 11, 1998, knowingly made a false statement to a conservation officer engaged in the discharge of his duties, contrary to section 82(1)(d) of the *Wildlife Act*; and
3. on or about December 11, 1998, used another person's hunting licence and cougar species licence, contrary to section 81(b) of the *Wildlife Act*.

The Court imposed a total of \$5,000 in fines, which Mr. Horning paid, and imposed an automatic one year suspension of his hunting licence, as is required by statute.

Licensing action

In April 2003, the Conservation Officer Service requested that the Director of Wildlife consider taking licensing action against Mr. Horning. Specifically, they requested that Mr. Horning's hunting licence be cancelled for ten years.

On April 13, 2005, T.J. Ethier, the then Deputy Director, sent a letter to Mr. Horning notifying him that he was considering taking licensing action against Mr. Horning. The letter stated that Mr. Horning may be ordered ineligible to obtain a hunting licence for up to 30 years. The letter also offered Mr. Horning an opportunity to make submissions. Copies of the documents that had been provided to the Deputy Director by the Conservation Officer Service were also sent to Mr. Horning. However, Mr. Horning did not receive the letter and documents at that time, because he had moved and the Ministry was unable to locate him.

On October 17, 2007, the current Deputy Director sent a letter to Mr. Horning at his new address, notifying him of the original letters and documents, and indicating that licensing action was still being considered. The Deputy Director also acknowledged the delay in proceeding with licensing action, and stated that the delay would be taken into consideration. Mr. Horning was offered an opportunity to respond.

On December 17, 2007, Mr. Horning sent a brief response to the Deputy Director, in which he expressed surprise that licensing action was still being considered seven years after his conviction.

On December 15, 2008, the Deputy Director issued the decision cancelling Mr. Horning's licence and declaring him ineligible to hunt for five years. The Deputy Director's decision indicates that he arrived at the length of the suspension by considering a number of factors. The Deputy Director considered the three convictions, and also found that Mr. Horning had committed the *Wildlife Act* contraventions that were stayed in the Provincial Court. The Deputy Director gave significant weight to the impact of the violations on wildlife resources, and the need for specific and general deterrence. He also considered the number of violations, Mr. Horning's intention to break the law repeatedly, his intention to exploit wildlife resources for personal gain, his lack of remorse, and the fact that Conservation Officers sought a 10-year period of ineligibility to obtain or renew a hunting licence. As a mitigating factor, the Deputy Director considered that Mr. Horning had paid a \$5,000 fine. Based on those factors, the Deputy Director decided that an 8-year period of ineligibility was appropriate. However, the Deputy Director then took into account the delay in imposing licensing action, and reduced the length of the suspension by three years. This resulted in a five year period of ineligibility.

The Appeal

Mr. Horning appeals the decision of the Deputy Director on the basis that the five-year period of ineligibility is unfair and unnecessary.

The Deputy Director submits that the period of ineligibility should be confirmed.

ISSUE

This appeal raises the following issue:

In all the circumstances, whether the period of ineligibility should be reduced or eliminated.

RELEVANT LEGISLATION

Section 24(2) of the *Wildlife Act* provides:

- (2) After providing an opportunity for the person to be heard, the director may, for any cause considered sufficient by the director, do any of the following:
 - (a) prohibit, for a period within prescribed limits, the person from hunting, angling or carrying a firearm;
 - (b) cancel or suspend, for a period within prescribed limits, any limited entry hunting authorization or licence that is issued to the person under this Act.

Section 24(5) of the *Wildlife Act* provides:

- (5) If a licence or limited entry hunting authorization is cancelled, the director may order that the person is ineligible to obtain or renew a licence or limited entry hunting authorization for a period, within the prescribed limits, and the director must inform the person of the period of ineligibility.

DISCUSSION AND ANALYSIS

In all the circumstances, whether the period of ineligibility should be reduced or eliminated

Mr. Horning submits that his hunting privileges should not be cancelled because:

- he has already paid a fine for his convictions;
- the offences were committed ten years ago;
- he has hunted since that time without breaking the law; and
- he has learned that it does not pay to hunt illegally.

He argues that cancelling his hunting privileges now will not serve as a deterrent, given the amount of time that has passed, and given his compliance with the law since the contraventions.

The Deputy Director submits that Mr. Horning committed several serious contraventions of the *Act* that deserve a significant penalty. The Deputy Director submits that he adequately considered all of the relevant circumstances in reaching his decision, including the administrative delay. He argues that there is no evidence that the delay has prejudiced Mr. Horning in any way. In addition, the Deputy Director notes that Mr. Horning was subject to a mandatory one-year period of ineligibility as a result of his convictions, but Mr. Horning did not receive notice of that cancellation and suspension, and Ministry records show that he continued to hunt during that time.

Panel's findings

The Board has *de novo* jurisdiction over appeals from decisions of the Deputy Director. As a result, it must determine whether the period of ineligibility is an appropriate one, not whether errors were made by the Deputy Director. However, the reasoning that the Deputy Director used in reaching his decision can be helpful in determining whether the period of ineligibility is an appropriate one.

Mr. Horning has already faced serious consequences for his behaviour. He was convicted in Provincial Court and paid a \$5,000 fine. Given Mr. Horning's clean hunting record since that time, these consequences have been sufficient to deter Mr. Horning from further contraventions. In the Panel's view, further licensing action will have minimal value as a specific deterrent against Mr. Horning. Consequently, specific deterrence need not be given significant weight.

However, the Panel finds that some weight ought to be given to general deterrence. Other hunters who become aware of Mr. Horning's case would likely focus on the fine and the length of Mr. Horning's period of ineligibility from hunting. As a result, it is important that the period of ineligibility reflects the seriousness of Mr. Horning's actions.

Other factors contribute to the need for a penalty. In this case, Mr. Horning's violations were serious. Although not licensed to do so, Mr. Horning guided a non-resident for game. It is noted that for the first three days, the guiding was for the purposes of photography, for which a guiding licence is not required. It was only on the last day that hunting occurred, and at which time a guiding licence became necessary. He also used another person's licenses in an attempt to cover up the illegal hunting and guiding activities, and he lied on two compulsory inspection sheets. Mr. Horning was aware of the law, but chose to disregard it for personal gain. This shows disrespect for the law and the Province's wildlife resources. Consequently, the Panel has given weight to the impact of the violations on wildlife resources, the repeated nature of the violations, and Mr. Horning's intention to break the law and to exploit wildlife resources for personal gain.

However, a period of ineligibility of eight years, before mitigating factors are taken into account, is inconsistent with other licensing actions considered in previous Board decisions which involved persons committing multiple offences including unlawfully acting as a guide.

In *Jeffrey Scouten v. Deputy Director of Wildlife* (Decision No. 2005-WIL-010(a), January 22, 2008)(unreported), Mr. Scouten was convicted of four offences: two counts of illegal possession of wildlife (a cougar and a bighorn mountain sheep); unlawfully acting as a guide for game; and, being a party to the offence of hunting for a cougar without a valid species licence. The Board also found that he had committed other contraventions for which he was not convicted in court, he showed no remorse, and he was unwilling to accept responsibility for his actions. The Board reduced his period of ineligibility from 25 years to 17 years, based primarily on the finding that Mr. Scouten's actions were not in the same category as some of the worst offenders.

In *Erwin Klapper v. Deputy Director of Wildlife* (Decision No. 2006-WIL-003(a), June 11, 2007)(unreported), Mr. Klapper was convicted of five offences under the *Act* and one offence under the *Firearm Act*. The convictions included: unlawfully acting as a guide for game; two counts of hunting from a vehicle; hunting moose without a limited entry hunting authorization; and, allowing his hunting licence to be used by another person. The Board found that an appropriate period of ineligibility was 12 years, before mitigating factors were considered. The Board then reduced that period by four years based on Mr. Klapper's remorse, his age, and the lengthy delay in the proceedings before the Deputy Director. The Board also reduced the period by a further two years due to the one-year mandatory suspension that was imposed following his convictions, and due to the extreme personal and financial consequences he had suffered.

In *Rod Parkin v. Assistant Director* (Decision No. 2006-WIL-017(a), October 11, 2007)(unreported), Mr. Parkin was convicted of two offences: unlawfully acting as a guide for game; and, illegal possession of a number of dead wildlife. Mr. Parkin had been charged with 13 offences, but as a result of a plea bargain was only convicted of two offences including the illegal possession of six different species of wildlife. The convictions arose from an undercover operation in which officers paid Mr. Parkin to lead them on a guided hunt. The Board confirmed that Mr. Parkin's hunting privileges should be cancelled for six years. However, the Board credited

Mr. Parkin with six months, effectively reducing the period of ineligibility to 5 ½ years, because he was under a mandatory hunting suspension for six months following his conviction.

The Panel finds that Mr. Horning's illegal guiding activities were similar to those of Mr. Parkin, but Mr. Horning's actions were less serious in that Mr. Horning was charged with fewer offences; six as opposed to 13, and those offences only involved one illegally harvested animal as opposed to at least six animals that were in Mr. Parkin's possession. Further, Mr. Horning's activities were not as serious as those committed by Mr. Scouten or Mr. Klapper. After considering the above cases, and given the Panel's finding that the Deputy Director gave more weight to specific deterrence than is necessary in the circumstances, the Panel finds that an appropriate period of ineligibility for Mr. Horning is five years, not eight. A five-year period of ineligibility properly reflects the seriousness of the offences, the effect of Mr. Horning's actions on wildlife resources, and an appropriate level of deterrence, before mitigating factors are considered.

In terms of mitigating factors, although Mr. Horning did not express remorse in the proceedings before the Deputy Director, he has indicated to the Board that he has "smartened up" and realized that it "does not pay to be illegal". On this basis, the Panel finds that it is appropriate to reduce the period of ineligibility by six months.

Regarding the issue of delay, the Panel finds that the delay has been significant. The Deputy Director's decision was issued ten years after the contraventions occurred, and eight years after Mr. Horning was convicted. Although Mr. Horning has not claimed that he was prejudiced by the delay, the Deputy Director did reduce the period of ineligibility by three years based on the delay. This implies that the Deputy Director recognized that the delay was unacceptable, and he accounted for this by reducing the period of ineligibility. In these circumstances, the Panel agrees with the Director that a 3-year reduction in the period of ineligibility is appropriate.

In addition, the Panel notes that Mr. Horning did not receive notice of the mandatory 1-year period of ineligibility to hold a hunting licence following his convictions, and there is clear evidence that Mr. Horning continued to enjoy his hunting privileges when he should have been subject to a mandatory suspension. Therefore, he is not entitled to a reduction for a mandatory suspension.

Consequently, the Panel finds that Mr. Horning should be ineligible to obtain a hunting licence for a period of one year and six months, commencing on December 15, 2008 (the date of the Deputy Director's decision). This recognizes the five-year period of ineligibility minus three and one-half years for mitigating factors.

DECISION

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

The Deputy Director's decision is varied as follows.

For the reasons given above, the period of ineligibility is reduced from five years to one year and six months, commencing on December 15, 2008. Thus, Mr. Horning will be ineligible to obtain a hunting licence until June 15, 2010. Mr. Horning is also required to successfully complete the Conservation and Outdoor Recreation and Education (CORE) program before he is eligible to hunt or apply for a hunting licence again.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

June 11, 2009